This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 053 471 645

10/14/33

HARVARD LAW LIBRARY

Received

THE MICHIGAN DIGEST ANNOTATED

EMBODYING ALL REPORTED DECISIONS FROM THE EARLIEST PERIOD DOWN TO VOLUME 208 MICHIGAN, INCLUSIVE.

Being a
NEW EDITION OF JACOBS & CHANEY
By
GEORGE F. LONGSDORF
Editor New York Cyclopedic Digest, Illinois Cyclopedic Digest, Ohio Notes, etc.

VOLUME V
INFANTS TO MATURITY

CHICAGO
CALLAGHAN & COMPANY
1921

Allowance has been made by the West Publishing Co. against the purchase of a new set. To be retained by the Harvard Law Library.

Copyright 1921
By
Callaghan & Company

OCT 15 1921
LRR

A DIGEST

OF

ALL THE REPORTED DECISIONS OF THE COURTS OF MICHIGAN

VOLUME V

INFANTS.

TREATS of the general law of infants as distinguished from that depending on the relation of the infant to others (see Parent and Child; Adoption). It also excludes matters relating to juvenile delinquents (see Incompetents) and pauper children (see Poor Persons) and the determination of the right to custody and support on divorce of parents (see Divorce, IX) and on habeas corpus (see Habeas Corpus). For rights of children as such without special regard to their infant or adult status, see Descent; Wills; and other specific topics treating of the right in question.

Analysis.

I. Status and disabilities.

§ 1. In general; right to assert infancy.
§ 2. Capacity to appoint agents or attorneys or ratify their acts.
§ 3. Capacity to be estopped.

II. Custody, protection and support.

§ 4. In general.
§ 5. Allowance for support out of infant's estate.

III. Property and conveyances.

A. In General.

§ 6. Capacity in general.
§ 7. ——Transfers of personalty.
§ 8. Ratification and avoidance of conveyances.
§ 9. ——Of mortgages.
§ 10. ——Restitution or reimbursement of grantee for improvements.
§ 11. Persons entitled to affirm or avoid.
§ 12. Mode and sufficiency of ratification or disaffirmance.

§ 13. Ratification of guardian's purchase or redemption.
§ 14. Estoppel to ratify or disaffirm.
§ 15. Burden of proof, presumptions and evidence.

B. Judicial Supervision and Sale.

§ 16. In general.

IV. Contracts.

§ 17. In general; validity and effect.
§ 18. Contracts for necessaries, support or medical attendance.
§ 19. Contracts for infant's services.
§ 20. ——Implication of promise.
§ 21. Contracts of guardian, parent or relative for infant.
§ 22. Contracts and settlements with guardians or parents.
§ 23. Compromise and releases.
§ 24. Partnership and agency agreements.
§ 25. Promises of marriage.
§ 26. Right to ratify or avoid.
§ 27. ——Before attaining majority.
§ 28. ——Restitution of consideration.
§ 29. What constitutes ratification or avoidance.
§ 30. ——Acquiescence or delay in asserting or denying.
§ 31. ——New promise or contract.
§ 32. ——Acts of third persons.
§ 33. Effect of affirmance or avoidance.
§ 34. Liability for breach of contract.
§ 35. Enforcement or repudiation by courts during minority.
§ 36. Burden of proof, presumptions and evidence.
§ 37. Questions of law and fact.

V. Torts.

§ 38. In general.
§ 39. Waiver, bar or loss of infant's rights.

VI. Crimes.

§ 40. In general.

VII. Actions by and against.

§ 41. In general; capacity for suing and defending.
§ 42. Supervisory jurisdiction and protection by courts.
§ 43. Person in whose name to sue or defend.
§ 44. Joinder or intervention in actions by others.
§ 45. Laches and limitations.
§ 46. Burden of proof and presumptions.
§ 47. Evidence, issues and jury questions.
§ 48. Judgments and decrees.
§ 49. ——On consent, confession, stipulation or admission.

I. STATUS AND DISABILITIES.

§ 1. In general; right to assert infancy.

Capacity to appoint agents or attorneys or ratify their acts, see post § 2.
Capacity to be estopped, see post § 3.
Custody, protection and support in general, see post II.
Police power to protect and conserve welfare, see Constitutional Law § 105.
Effect on citizenship of father's renunciation of allegiance, see Aliens ¶ 11.

Domicile of infant as that of parent or custodian, see Domicile § 5; Guardianship.
Dismissal of infant member of defendant firm as affecting garnishee of the firm, see Garnishment ¶ 301.

¶ 1. Infancy is a personal privilege of which none but the infant can take advantage while he lives.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 58 Mich. 238.

¶ 2. The infancy of the vendee in a land contract may be a reason for refusing specific performance sought by his assignee against the vendor.—Carrell v. Potter, 23 Mich. 377.

¶ 3. An infant's voidable contract is valid as to third parties who do not claim under either party, and wrongdoers cannot set up the infant's incapacity as a defense.—Holmes v. Rice, 45 Mich. 142.

¶ 4. An infant's license to remove timber is void and is no defense to an action of trespass for doing it.—Richey v. Brown, 58 Mich. 435.

§ 2. Capacity to appoint agents or attorneys or ratify their acts.

Agency agreements, see post § 24.
Power of parent to engage attorney for infant son, see also post ¶ 55.

¶ 5. An infant cannot appoint an agent or attorney, or empower either to act for him.—Armitage v. Widoe, 36 Mich. 124.

¶ 6. An infant cannot affirm what another has assumed to do in his name as an agent or attorney; he cannot ratify what he could not authorize.—Armitage v. Widoe, 36 Mich. 124.

§ 3. Capacity to be estopped.

Estoppel to ratify or disaffirm, see post § 14.

¶ 7. Estoppels do not apply to infants.—Ryder v. Flanders, 30 Mich. 336; Hayes v. Livingston, 34 Mich. 384; Rundle v. Spencer, 67 Mich. 189.

II. CUSTODY, PROTECTION AND SUPPORT.

§ 4. In general.

Parent's custody aand control of infant, see Parent and Child, I.
Adoption of children, see Adoption.
Obligation of parent to furnish infant with support and necessaries, see Parent and Child, II.
Emancipation of male minor by marriage, see Parent and Child, I.
Statutory provisions for cancellation of tax-sale of lands of minors under and not under guardianship, see Taxes, XI.
Compulsory education of infants, see Comp. L. 1915, §§ 5979-5985.
Parent as natural guardian, see Guardianship § 9.
Powers, duties and liabilities of guardians respecting infant ward's person, education and support, see Guardianship, III, B.
Authority of guardian ad litem to make waiver or relinquishment of infant's rights, see Guardian ad Litem § 11.
Right to custody as between foreign and domestic guardians, see also Conflict of Laws ¶ 99.
Res adjudicata effect of decision as to custody of infant, see Habeas Corpus; Former Adjudicata § 11.
Homeless, destitute or abandoned children, see Incompetents § 4.
Support of illegitimate children, see Bastards.
Adjudication of status, custody and support in divorce, see Divorce, IX.
Habeas corpus for custody of child, see Habeas Corpus § 4.
Authority of representative to bind estate for support of infant devisees, see Estates of Decedents ¶ 179.
Measure of damages for breach of agreement to furnish support and schooling, see Damages § 85.
Statutory provision for support and custody of infant children on separation of parents, see Comp. L. 1915, §§ 11483, 11484.
Care and custody of infant children on annulment of marriage of their parents, see Comp. L. 1915, § 11426.
Care and custody of infant children upon divorce of their parents, see Comp. L. 1915, §§ 11407, 11414.
Care and custody of infant under guardianship, see Jud. Act, chap. LVIII, §§ 6-8; Comp. L. 1915, §§ 13955-13957.
Care and custody of infant children during pendency of suit for divorce of parents, see Comp. L. 1915, § 11426.

¶ 8. The protection of infancy is a substantial one and is not to be overcome by indirection.—Armitage v. Widoe, 36 Mich. 124.

¶ 9. Courts of equity always view with special favor, and guard with jealous care, the rights of infants.—Langdon v. Clayson, 75 Mich. 204.

¶ 10. An infant will not be taken from the custody of persons with whom it was placed by a county agent upon being abandoned by its mother, and given into the custody of its guardian on his petition, where, notwithstanding the fact that the mother of the child had been declared an unfit person to have its custody, the guardian has left in her control an infant brother of the child, over whom he has the same rights of guardianship, and where there are other indications that he does not make the petition in good faith, but for the purpose of securing to himself the exclusive care, control, and education of the child.—In re Clancy, 108 Mich. 427.

¶ 11. A resident of Washington, D. C., in compliance with his wife's dying wish, placed their child, a girl seventeen months old, in the custody of his wife's parents, who lived in Michigan, and who kept the child some years, except during a few months when she was in Washington with her father. Fearing the child's health would suffer in Washington, the maternal grandmother to regain custody of the girl agreed in writing to return her when the father desired. Such return being refused, the father instituted habeas corpus proceedings wherein the court divided, leaving the question unsettled, the child, however, remaining with its mother's parents. The father died, leaving a will appointing his parents guardians of the child, then about six years old, and they qualified as such in Washington, soon after the maternal grandparents qualified as guardians in Michigan. Upon habeas corpus brought by the father's parents it appeared that the Michigan guardians were proper persons and well able to care for the child, who was now nine years old, and who desired to remain with them, while there was some evidence against the fitness of the petitioners, whose claim was, therefore, denied.—In re Stockman, 71 Mich. 180.

§ 5. Allowance for support out of infant's estate.

¶ 12. Chancery has power on a proper original application to allow advancements from an accumulating fund when needed for the support of infant beneficiaries.—Knorr v. Millard, 52 Mich. 542; Knorr v. Millard, 57 Mich. 265.

III. PROPERTY AND CONVEYANCES.

A. IN GENERAL.

§ 6. Capacity in general.

Transfers of personalty, see post § 7.
Ratification and avoidance of conveyances, see post §§ 9, 10.
Judicial supervision and sale, see post III, B.
Property rights between parent and child, see Parent and Child, IV.
Rights of minor children in homesteads, see Homesteads, VII.
Powers, duties and liabilities of guardians respecting infant ward's property, see Guardianship, III, A.
Jurisdiction of probate court to require representative to support infant distributees from trust funds, see Estates of Decedents ¶ 47.

¶ 13. A mortgage given by an infant feme covert, to secure the debt of her husband, is absolutely void, and not merely voidable.—Chandler v. McKinney, 6 Mich. 217.

¶ 14. A mortgage on a homestead, executed by both husband and wife, is void where the wife is a minor.—Blanchard v. Mott, How. N. P. 126.

§ 7. ——Transfers of personalty.

¶ 15. An infant cannot be bound by a transfer of his property which cannot possibly be for his benefit—e. g., where he joined in a bill of sale executed by his father, conveying to defendant property owned by his father and himself to prevent seizure by the father's creditors—and an action may be brought at once by his next friend to recover the property from the unauthorized holder.—Bloomingdale v. Chittenden, 74 Mich. 698.

§ 8. Ratification and avoidance of conveyances.

See also post ¶ 22.
Persons entitled to affirm or avoid, see post § 11.
Ratification of guardian's purchase or redemption, see post § 13.
What constitutes ratification or avoidance of contracts, see post §§ 29-31.
Effect of avoidance of deed to extinguish relation between infant grantor and grantee, see also Estoppel ¶ 47.

¶ 16. A minor's deed must be held affirmed by him unless he makes some claim to the conveyed premises within the period of forty years after he comes of age.—King v. Merritt, 67 Mich. 194.

¶ 17. A minor's deed is disaffirmed by his conveyance after majority to a third person.—Corbett v. Spencer, 63 Mich. 731.

¶ 18. A minor's deed is disaffirmed by his conveyance after majority to a third person, and entry by the grantee thereunder.—Prout v. Wiley, 28 Mich. 164.

¶ 19. Where one who had conveyed land during infancy deeded it to another on reaching majority, the later grantee can maintain ejectment against an occupant deriving title from the former grantee; the execution and record of the later deed are sufficient without making re-entry.—Haynes v. Bennett, 53 Mich. 15.

§ 9. ——Of mortgages.

¶ 20. Infant's purchase-money mortgage may be ratified by silence and acquiescence for more than one year after reaching her majority.—Langdon v. Clayson, 75 Mich. 204.

¶ 21. Where land is conveyed and a mortgage taken back for the purchase money, the deed and mortgage together constitute but one transaction, and the title only passes by the deed subject to the mortgage. And where the grantee in such case is an infant, he may disaffirm the deed on coming of age, but by retaining the land he affirms the mortgage.—Young v. McKee, 13 Mich. 552.

¶ 22. An infant cannot ratify the purchase of land, after arriving at full age, by dealing with the title thus acquired as owner, without ratifying a mortgage given during his minority to secure a loan with which to pay off liens on the land which he had agreed to pay as a part of the purchase-price.—Langdon v. Clayson, 75 Mich. 204.

§ 10. ——Restitution or reimbursement of grantee for improvements.

Restitution of consideration as condition precedent to ratification of contract, see post § 28.

Conditions upon rescission generally, see Rescission, III.

¶ 23. The improvers of land by building on it after taking a deed from an infant's grantee are equitably entitled, on disaffirmance by the infant, to the cost of all improvements made by themselves and their grantors, and also of those made by their immediate grantees of the infant, if he should also disaffirm a purchase-money mortgage made by him covering such previous improvements.—Rundle v. Spencer, 67 Mich. 189.

§ 11. Persons entitled to affirm or avoid.

See also ante ¶¶ 1, 3.

Ratification of contract of infant by his assignee, see also post ¶ 85.

¶ 24. A deed to a homestead by an administrator of a deceased husband passed no right to disaffirm mortgages given severally by the husband and his minor wife, as such right of disaffirmance rested in such minor.—Shreeves v. Caldwell, 135 Mich. 323.

§ 12. Mode and sufficiency of ratification or disaffirmance.

What constitutes ratification or avoidance of contracts, see post § 29.

¶ 25. A quit claim deed executed after the arrival of a minor at majority was not of itself an assertion of an intention to disaffirm mortgages executed by such infant during her minority; the deed having contained neither mention of the mortgages nor any express disaffirmance.—Shreeves v. Caldwell, 135 Mich. 323.

¶ 26. A conveyance by the guardian of a minor during her minority did not amount to a disaffirmance of the minor's mortgages in question, as such disaffirmance must have taken place after the attainment of majority.—Shreeves v. Caldwell, 135 Mich. 323.

¶ 26a. The recording law supplies the place of feoffment with livery of seizin, so that the making and recording of a deed by one who has come of age revokes a deed made during infancy, and renders unnecessary an entry before giving deed of avoidance (How. St., ch. 216, §§ 5652, 5657).—Haynes v. Bennett, 53 Mich. 15.

§ 13. Ratification of guardian's purchase or redemption.

¶ 27. A minor seeking to take the benefit of the act of a guardian whose appointment was fraudulently secured, and who had redeemed the minor's lands from mortgage foreclosure, does not thereby ratify his appointment and acts as guardian.—Tong v. Marvin, 26 Mich. 35.

§ 14. Estoppel to ratify or disaffirm.

Capacity of infant to be estopped, see ante § 3.

Laches and limitation on actions to avoid conveyances, see post § 45.

Delay or acquiescence not amounting to estoppel, see also post ¶¶ 80, 81.

Acquiescence or delay constituting ratification or avoidance of contracts, see also post § 30.

Notice of facts preventing estoppel to avoid conveyance on ground of infancy, see also Estoppel ¶ 109.

Operation of minor's quit claim deed to estop grantee to get in tax titles, see Estoppel ¶ 20.

¶ 28. Plaintiffs, infant heirs, having, in 1883, joined with other heirs in a quitclaim, the purchaser under a foreclosure of the grantee's subsequent mortgage held possession nearly eight years, but no improvements were made, and plaintiffs, who reached their majority in 1884 and 1885, did nothing to affirm their deed. Held, that they were not estopped from bringing ejectment in 1893.—Donovan v. Ward, 100 Mich. 601.

¶ 29. An infant who had conveyed certain premises, and who knew or might have known that subsequent grantees were making improvements thereon, was not estopped from disaffirming his deed within six months after his majority though they had made them relying on his assurance that he was of age when he conveyed.—Rundle v. Spencer, 67 Mich. 189.

¶ 30. Where the title of certain plaintiffs in ejectment as heirs was sold at guardian's sale during their minority, they were held, in an action of ejectment, not estopped from setting it up against the purchaser by having accepted the proceeds of the sale, after coming of age, and with full knowledge of all the facts.—Ryder v. Flanders, 30 Mich. 336.

¶ 31. A ward on reaching his majority cannot ask to have a deed reformed when he has repudiated the transaction wherein his guardian took the deed in his behalf.—Rowley v. Towsley, 53 Mich. 329.

§ 15. Burden of proof, presumptions and evidence.

See also post ¶ 98.

Evidence in actions by and against infants, generally, see post § 47.

General law of evidence, see Evidence.

Evidence and presumptions as to election and waiver, see Election and Waiver § 18.

¶ 32. In an action for the recovery of lands sold by a guardian, the burden of proof is on the plaintiff to show that he has commenced his action within the time allowed him by the statute after attaining his majority.—Stewart v. Ashley, 34 Mich. 188.

¶ 33. Where an infant had assigned a land contract made to him during minority his retention of the consideration for the assignment, and his quiescence for five months after coming of age, would not raise an inference of ratification, especially if he had been out of the state during most of the five months.—Carrell v. Potter, 23 Mich. 377.

B. JUDICIAL SUPERVISION AND SALE.

§ 16. In general.

Rights of minor heirs in proceedings for the assignment of dower, see Dower § 40, ¶¶ 106, 107.
Representative's accounts involving rights of infants, see Estates of Decedents § 338.
Chancery proceedings for sale and conveyance of infants' lands, see Jud. Act, chap. XIX, § 39 et seq; Comp. L. 1915, § 12693 et seq.
Proceedings relating to conveyance of lands of infants, see Jud. Act, chap. XIX, §§ 39-54; Comp. L. 1915, §§ 12693-12708.
Conveyance of lands held by way of mortgage or in trust, see Jud. Act, chap. XIX, §§ 39, 40; Comp. L. 1915, §§ 12693, 12694.
Proceedings for sale of infant's land, see Jud. Act, chap. XIX, §§ 41-54; Comp. L. 1915, §§ 12695-12708.
Accumulation of rents and profits for benefit of infants, see Comp. L. 1915, § 11557.
Partition proceedings on behalf of infants, see Jud. Act, chap. XXXI, §§ 13-15; Comp. L. 1915, §§ 13270-13272.

¶ 34. If a court of chancery has acquired jurisdiction to sell an infant's land it will retain it to protect the infant's rights until the matter is finally disposed of, and may compel the purchaser to pay the amount agreed in cash, except so far as the court may have ordered otherwise.—In re Axtell Petition, 95 Mich. 244.

IV. CONTRACTS.

§ 17. In general; validity and effect.

Contracts for necessities, support or medical attendance, see post § 18.
Contracts for infant's services, see post §§ 19, 20.
Contracts of guardian, parent or relative for infant, see post § 21.
Contracts and settlements with guardians or parents, see post § 22.
Compromise and releases, see post § 23.
Partnership and agency agreements, see post § 24.
Promises of marriage, see post § 25.
Right to ratify or avoid, see post §§ 26-28.
What constitutes ratification or avoidance, see post §§ 29-32.
Effect of affirmance or avoidance, see post § 33.
Liability for breach of contract, see post § 34.
Enforcement or repudiation by courts during minority, see post § 35.
Burden of proof, presumptions and evidence, see post § 36.
Invalidity of decree based on infant's unauthorized contract, see post ¶ 138.
Contract rights between parent and child, see Parent and Child, IV.
Apprenticeship of infants, see Apprentices.
Father of infant son as real party to contract, see Contracts § 11.
Invalidity of mortgage given by infant feme covert, see Husband and Wife ¶ 458.
Validity of contract by infant for life, health or accident insurance, see Pub. Acts 1917, No. 256, Part III, chap. II, § 27.

¶ 35. Adults who contract with infants do so at their own risk, as they are bound by their contracts while infants are not.—Widrig v. Taggart, 51 Mich. 108.

¶ 36. The contract of a minor is voidable merely and not void.—Barr v. Packard Motor Car Co., 182 Mich. 612.

¶ 37. Only such agreements as cannot possibly be regarded as beneficial to the infant are null from the beginning.—Dunton v. Brown, 31 Mich. 182.

¶ 38. A contract to secure another's debt is not beneficial to an infant and is absolutely void.—Chandler v. McKinney, 6 Mich. 217.

¶ 39. The mercantile paper of a minor is voidable at his election; not absolutely void.—Minock v. Shortridge, 21 Mich. 304.

¶ 40. An infant's assignment for the benefit of creditors is not void but only voidable, and that only by the infant or some one in his right.—Soper v. Fry, 37 Mich. 236.

¶ 41. Minor heirs cannot become jointly liable with the administrator in an action of assumpsit for services rendered the estate by an attorney.—Rogers v. Heath, 48 Mich. 588.

¶ 42. A contract with and for the benefit of an infant, such as a contract for insurance, is not void but only voidable, and that at the infant's election.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 288.

§ 18. Contracts for necessaries, support or medical attendance.

Jury question as to what are "necessaries," see post ¶ 101.

¶ 43. A minor may bind himself by contract for necessaries, and such a contract, if

reasonable, cannot when executed be repudiated by him.—Squier v. Hydliff, 9 Mich. 274.

¶ 44. An agreement with a minor to give him board, clothing and schooling in payment for his labor, if reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage, cannot be repudiated by the minor after it has been executed.—Squier v. Hydliff, 9 Mich. 274.

¶ 45. A father owes a child the duty of providing medical attendance and care, but where he refuses or is unable to furnish it, a child may be liable for necessaries furnished it.—Harris v. Crawley, 161 Mich. 383.

¶ 46. An infant who was sued for the price of a horse sold to him showed that his sole business was to carry on his mother-in-law's farm for one-third of the produce, and that she was to furnish all the teams, tools and implements. Held, that this showed that the horse was not a "necessary" for which he was liable. And it was error to give the jury to understand that it was the necessity of the horse to the farming business, instead of to his part in it, that fixed his liability.—Wood v. Losey, 50 Mich. 475.

¶ 47. Whether a watch and chain is a necessity to an infant of the age of eighteen years, so as to bind him by an executed contract for their purchase at the price of $20, was submitted to the jury in this case, who found in the negative.—Welch v. Olmstead, 90 Mich. 492.

§ 19. Contracts for infant's services.

Implication of promise, see post § 20.
Contracts for infant's services at place distant from home, see Comp. L. 1915, §§ 5580-5582.
Statutory provisions regulating hours and conditions of infant's employment, see Comp. L. 1915, §§ 5330-5332, 5592-5599.

¶ 48. When a minor has rendered services on an agreement or understanding that they are to be paid for, the person for whom they are done is under legal obligation to pay for them.—Sword v. Keith, 31 Mich. 247.

¶ 49. An infant cannot repudiate an executed contract for his services, even though not exclusively for necessaries, if it was apparently fair and reasonable and the other party did not know of his infancy. But he can abandon the service when he pleases, or ask for new terms, and he is bound only so far as he executes the contract without dissent.—Spicer v. Earl, 41 Mich. 191.

¶ 50. A minor's written agreement to work another's land on shares does not make him a tenant of the land owner, but constitutes both tenants in common of the crops.—Loomis v. O'Neal, 73 Mich. 582.

§ 20. ——Implication of promise.

General law of implied contract, see Implied Contracts.
Implication from services rendered by child for parent, see Implied Contracts § 11.

¶ 51. An infant adopted into a family can claim no compensation for services except by express agreement.—Sword v. Keith, 31 Mich. 247.

¶ 52. Where an infant is taken into a family it is presumed that neither his support nor his services are to be paid for, except as the one recompenses the other.—Thorp v. Bateman, 37 Mich. 68.

§ 21. Contracts of guardian, parent or relative for infant.

Contract rights between parent and child, see Parent and Child, IV.
General law of guardianship, see Guardianship.
Contract powers of guardian in dealing for infant ward's estate, see Guardianship § 32.
Contract powers of guardian for infant ward, see Guardianship § 32.
Power or authority of next friend to bind infant by accord and satisfaction pursuant to which slander suit is dismissed, see Guardian ad Litem ¶ 39.

¶ 53. An infant cannot be personally liable on a mortgage bond made by another as guardian.—Wood v. Truax, 39 Mich. 628.

¶ 54. A contract made by a father in his infant son's name, and without the knowledge of the son, is of no binding force upon the son until he has in some way assented to it, and does not therefore of itself confer upon him any rights.—Armitage v. Widoe, 36 Mich. 124.

¶ 55. Without express authority legal counsel cannot be engaged by a father for his son lately a minor.—Carrell v. Potter, 23 Mich. 377.

¶ 56. An infant is not bound by a contract for necessaries made for him by his brother, unless he acts under it.—Squier v. Hydliff, 9 Mich. 274.

§ 22. Contracts and settlements with guardians, or parents.

Contract and property rights between parent and child, see Parent and Child, IV.
Rights and dealing between guardian and infant ward, see Guardianship, VI.

¶ 57. A settlement with a ward of 20, she being old enough to give evidence, may be given weight as evidence, though it is not binding as a contract upon her.—Alexander v. Hillebrand, 140 Mich. 490.

§ 23. Compromise and releases.
Waiver of infant's rights in tort, see post § 39.
General law of releases, see Releases.

¶ 58. An infant cannot disaffirm a voidable compromise and settlement of a claim for personal injuries during his infancy.—Lansing v. Michigan Cent. R. Co., 126 Mich. 663.

¶ 59. A compromise and settlement of a claim for personal injuries made between an infant and a railroad company is not void but voidable on behalf of the infant.—Lansing v. Michigan Cent. R. Co., 126 Mich. 663.

§ 24. Partnership and agency agreements.
Capacity to appoint agents or attorneys or ratify their acts, see ante § 2.
General law of agency, see Agency.
General law of partnership, see Partnership.

¶ 60. An infant's partnership agreement is not void but only voidable.—Dunton v. Brown, 31 Mich. 182; Osburn v. Farr, 42 Mich. 134.

¶ 61. Articles of partnership purporting to be between the complainant on one part and defendant and a minor brother on the other, which were executed only by the two, held, not to have made the minor brother a partner.—McGunn v. Hanlin, 29 Mich. 476.

¶ 62. Whether an infant's partnership that has terminated before his majority does not come within the rule that protects executed contracts, quære.—Dunton v. Brown, 31 Mich. 182.

§ 25. Promises of marriage.
Capacity for marriage, see Marriage, § 7.
Promise of marriage by minor, see Breach of Promise to Marry § 1.

¶ 63. An infant, though of the age competent to contract marriage, cannot make a valid executory contract of marriage, for breach of which action may be brought.—Frost v. Vought, 37 Mich. 65.

§ 26. Right to ratify or avoid.
Before attaining majority, see post § 27.
Restitution of consideration, see post § 28.
What constitutes ratification or avoidance, see post §§ 29-32.

¶ 64. One who purchases an automobile while a minor may, at majority, rescind the contract, return the vehicle and recover the purchase money.—Reynolds v. Garber-Buick Co., 183 Mich. 157.

¶ 65. The fact that a guardian furnished a minor with money to purchase an automobile does not prevent the latter, at majority, from rescinding the contract, returning the vehicle and recovering the money paid.—Reynolds v. Garber-Buick Co., 183 Mich. 157.

§ 27. ——Before attaining majority.

¶ 66. An infant cannot, during his minority, disaffirm a voidable contract of purchase.—Armitage v. Widoe, 36 Mich. 124.

¶ 67. Neither an infant nor his guardian has authority, while the infancy continues, to determine whether a voidable contract of the infant shall be affirmed or annulled. This is for the infant to decide when he reaches maturity.—Dunton v. Brown, 31 Mich. 182.

¶ 68. An infant may rescind a sale for breach of warranty before attaining his majority.—Stoll v. Hawks, 179 Mich. 571.

¶ 69. An infant may during minority rescind a contract of purchase because of fraudulent representations, and recover the consideration paid by him.—Patterson v. Kasper, 182 Mich. 281.

¶ 70. An infant cannot, while an infant, repudiate his partnership agreement and recover on an implied assumpsit for his labor done in pursuance of its provisions.—Dunton v. Brown, 31 Mich. 182.

§ 28. ——Restitution of consideration.
Restitution or reimbursement of grantee for improvements on avoidance of conveyance, see ante § 10.
Conditions upon rescission generally, see Rescission, III.

¶ 71. If on coming to the age of discretion the settlement of a personal injury claim is repudiated by a minor, it will be set aside without requiring a return of consideration if the minor has parted with the money and cannot make restitution.—Barr v. Packard Motor Car Co., 172 Mich. 299.

¶ 72. Where an infant brought replevin to recover possession of chattels taken from her by virtue of a chattel mortgage that she had given to secure a loan to her, a ruling that she could not disaffirm the contract made by the mortgage, without first restoring the consideration, was erroneous. It treated the mortgage as an executed contract.—Corey v. Burton, 32 Mich. 30.

§ 29. What constitutes ratification or avoidance.
Acquiescence or delay in asserting or denying, see post § 30.
New promise or contract, see post § 31.
Acts of third persons, see post § 32.
Ratification or avoidance of conveyances, see ante §§ 8-10.
Mode and sufficiency of ratification or disaffirmance of infant's conveyance, see ante § 12.

¶ 73. The voidable contract of an infant is ratified where, on coming of age, he makes

a distinct acknowledgment of it, and indicates an intention to be bound by it; but mere silence is not enough, where the doctrine of estoppel is not applicable.—Lynch v. Johnson, 109 Mich. 640.

¶ 74. A suit, after reaching majority, to enforce an agreement made by complainant during his minority, affirms such agreement. —Carrell v. Potter, 23 Mich. 377.

¶ 75. To confirm an infant's executed contract all that is necessary is to show any distinct acknowledgment or act indicating an intention to be bound by the contract; and if the infant continues after full age to occupy a position which is only explicable upon the supposition that he intends to stand by his contract, it will be considered a ratification. —Durfee v. Abbott, 61 Mich. 471.

¶ 76. Where a promissory note was given by a firm, one of the members of which was at the time a minor, a ratification of the liability of the firm after the majority of the minor will not be inferred from incidental and collateral circumstances, in the face of the explicit declaration of the party that he did not intend to become bound.—Minock v. Shortridge, 21 Mich. 304.

¶ 77. An infant who, by means of a voidable contract, obtains possession of property and spends it, and after becoming of age does not return the value of it, and otherwise retains the benefit of his contract, thereby affirms it; it is his conduct after reaching the age of discretion that precludes his relying on the infant's privilege; what he may have done previously can bind him neither by way of contract nor estoppel.—Corey v. Burton, 32 Mich. 30.

¶ 78. If an infant continues under a contract of service after he becomes of age without demanding increased wages, it is evidence of his affirmance of the contract.— Spicer v. Earl, 41 Mich. 191.

¶ 79. An infant legatee's acceptance of the executor's note will not extend the time for payment of the legacy unless the act is somehow ratified after becoming of age; and if by that time the note is past due its mere retention will not extend the time or give it the character of payment.—Durfee v. Abbott, 50 Mich. 479.

§ 30. ——Acquiescence or delay in asserting or denying.

Estoppel to ratify or disaffirm conveyance, see ante § 14.

Loss of right to disaffirm deed by delay in asserting, see ante ¶ 16.

¶ 80. Delay, or acquiescence, without any act either indicating an intention to affirm or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as quietly seeing improvements made, or money expended, or the sale of the property to another, or failure to assert one's claim, etc., will not operate as an affirmance or confirmation of a deed executed during minority, nor prevent a minor from disaffirming it and reclaiming the lands at any time within the period allowed by the statute of limitations for bringing an action. —Prout v. Wiley, 28 Mich. 164.

¶ 81. Where no express ratification is shown, and no act done in reliance upon or in affirmance of an infant's contract, mere delay in proceeding to enforce his claim against the sureties cannot be construed into a ratification where there are no elements of estoppel that intervene; especially where the infant has not received any new consideration or retained any consideration arising out of the original transaction.—Durfee v. Abbott, 61 Mich. 471.

¶ 82. Where an infant has a right to repudiate a transaction in which he has not been defrauded, and where he has received and obtained the benefit thereof, he must act with reasonable promptness after reaching his majority or he will be deemed to have ratified the act by acquiescence.—Langdon v. Clayson, 75 Mich. 204.

§ 31. ——New promise or contract.

¶ 83. An express or implied agreement of a party to terms which may create a conditional or restricted liability for or on account of a contract made during the minority of such party is not a ratification of such contract. It may, if the condition be performed, become a new contract, and as such become binding from its date.—Minock v. Shortridge, 21 Mich. 304.

§ 32. ——Acts of third persons.

¶ 84. Where an infant assignor of an agreement made by him had been made party defendant by the assignee to a suit for specific performance, and an answer purporting to be on his behalf had been filed, admitting all the material facts of the bill, disclaiming all interest, and solemnly declaring his ratification of the original agreement, and of the assignment, said answer not being signed by him personally but by a solicitor in his name, therein acting without authority from him, it was held that the answer could not be made the basis for decreeing that he had ratified the original agreement.—Carrell v. Potter, 23 Mich. 377.

¶ 85. A suit by a party claiming to be an assignee of an infant's contract under an assignment, made during minority, does not affirm the infant's agreement.—Carrell v. Potter, 23 Mich. 377.

§ 33. Effect of affirmance or avoidance.

¶ 86. The ratification of a minor's contract after the disability ceases relates back and renders the original contract binding from

the time it was made.—Minock v. Shortridge, 21 Mich. 304.

¶ 87. A mercantile firm, of which one of the members was a minor, having purchased goods during such minority, will be liable for the value, not exceeding the contract price of the goods on hand at the time the minor becomes of age, and afterwards sold by the former.—Minock v. Shortridge, 21 Mich. 304.

§ 34. Liability for breach of contract.

Breach of contract in general, see Contracts, VII.

¶ 88. An infant is not liable to recoupment for breach of contract.—Widrig v. Taggart, 51 Mich. 108.

§ 35. Enforcement or repudiation by courts during minority.

See also ante ¶ 2.

Supervisory jurisdiction and protection by courts in actions concerning infants, see also post § 42.

Infancy of vendee in land contract as reason for refusing specific performance sought by his assignee against vendor, see ante ¶ 2.

¶ 89. A court of equity will enforce or repudiate an infant's contract upon equitable grounds.—Barr v. Packard Motor Car Co., 182 Mich. 612.

¶ 90. An infant's chattel mortgage, whether void or voidable, cannot be enforced against him during his minority.—Barney v. Rutledge, 104 Mich. 289.

¶ 91. One who has lent money to an infant and has taken a chattel mortgage as security cannot enforce the mortgage by seizing the property covered by it while the mortgagor is still under age. Otherwise the privilege of infancy, making the executory contracts of infants voidable when they come of age, would not avail them.—Corey v. Burton, 32 Mich. 30.

¶ 92. One who declares a land contract with a minor purchaser void for nonpayment is liable for the amount paid in by the minor less the value of the use of the land, in an action by the minor before becoming of age. —Vanatter v. Marquardt, 134 Mich. 99.

§ 36. Burden of proof, presumptions and evidence.

See also ante ¶ 57.

¶ 93. In an action for the purchase price of goods within the class known as "necessaries," furnished to defendant while an infant, and while he was living apart from his parents, the burden of proof is upon him to show that they were not in fact necessaries, and that he was supplied with all such necessaries by his parents.—Lynch v. Johnson, 109 Mich. 640.

¶ 94. In an action upon a note executed by a minor, plaintiff has the burden of showing a ratification after majority, and this cannot be presumed from the mere silence of the maker for two years after he became of age.—Tyler v. Gallop's Estate, 68 Mich. 185.

¶ 95. In an action by an emancipated minor against a husband and wife for damages for breach of a contract to furnish plaintiff shelter, food, clothing and education in consideration of the performance of personal services, evidence held sufficient to sustain a verdict for plaintiff for $225.—Fox v. Schumann, 191 Mich. 331.

¶ 96. In an action by a minor to recover the part payment made upon a motorcycle, in which plaintiff claimed that upon returning the motorcycle for repairs, the seller did not make such repairs, and refused to give the motorcycle back, or the money, upon demand, and in which defendant sought to recover under a counterclaim for depreciation in the value of the motorcycle during the period that it was in possession of plaintiff, evidence held sufficient to sustain a verdict for the plaintiff.—Jackson v. Haverford Cycle Co., 194 Mich. 286.

¶ 97. There can be no presumption that a gift to an infant of a contract for the purchase of land at the price of $13,000, and upon which only $400 has been paid, is for the benefit of the infant; even if he were an adult, it could not be presumed that he had accepted a contract binding him to the payment of a large sum of money without express evidence to establish it.—Armitage v. Widoe, 36 Mich. 124.

¶ 98. It seems that more solemn and decisive acts are requisite to prove ratification of a conveyance than of a purchase.—Carrell v. Potter, 28 Mich. 377.

¶ 99. In an action upon a note given during infancy the question whether the maker was or was not emancipated by his father at the time of the note's execution cannot affect his liability, and it is irrelevant.—Tyler v. Gallop's Estate, 68 Mich. 185.

¶ 100. A minor sued to recover compensation for labor. The defendant offered to prove that the labor was performed under and with knowledge of an agreement between defendant and an older brother of the minor (whose parents were dead), in pursuance of which and in payment for the labor the minor had been sent to school, clothed, his washing and mending done, etc. Held, that the proposed evidence was competent, as the jury might have found from it that the minor had given his assent to the agreement, and was therefore bound by it when executed.—Squier v. Hydliff, 9 Mich. 274.

§ 37. Questions of law and fact.
See also ante ¶ 47.

¶ 101. Clothes furnished to an infant are within the class known as "necessaries"; but whether they were in fact necessary in the particular case is a question for the jury.—Lynch v. Johnson, 109 Mich. 640.

¶ 102. Where an infant seeks to repudiate an executed contract for services, the question for the jury is whether an unfair advantage was taken of him rather than the question of his subsequent affirmance.—Spicer v. Earl, 41 Mich. 191.

¶ 102a. The question as to what acts amount to a ratification of an infant's contract is one of intention, and is proper to be submitted to the jury under proper instructions.—Durfee v. Abbott, 61 Mich. 471.

¶ 103. Where, in an action for the purchase price of goods sold to defendant while an infant, it appears that, after attaining his majority, he recognized the debt, and promised to pay it in full if he could get an extension of time, and that he did not plead infancy when the account was presented to him, or on the return day of the summons by which the suit was commenced, the question whether the contract was ratified by him is for the jury.—Lynch v. Johnson, 109 Mich. 640.

V. TORTS.

§ 38. In general.
Validity of judgment for tort, see also post ¶ 140.
Compromises and releases, see ante § 28.
Right of infant to compromise claim for personal injuries, see ante § 28.
Right of parent to release infant's right of action for tort, see Parent and Child, I.
Torts of child, see also Parent and Child, V.
Liability for neglect of duty in supplying dangerous substance to infant, see Negligence, II, B.
Imputation of negligence to infant, see Negligence, IV.
Actions by parents or representatives for death of infant, see Death by Wrongful Act.
Liability of city for injuries to children from defective highways, see Highways § 240.
Duty of persons using road to exercise care towards children in street, see Highways § 373.
Suspension of limitations on actions concerning infants, see Limitation of Actions, III, B.
Limitation of time within which to present claim or demand against municipal corporations, see Municipal Corporations, XIV.

¶ 104. The defendant's infancy is no defense in an action in tort for seduction under promise of marriage.—Becker v. Mason, 98 Mich. 336.

¶ 105. The infancy of an employee does not of itself give him a cause of action against an employer for setting him at dangerous work.—McGinnis v. Canada Southern Bridge Co., 49 Mich. 466.

Liability for personal injuries caused by toy pistol, gun or cannon, see note, 8 N. C. C. A. 149-151.
Liability of carrier for injuries to child passengers, see note, 7 N. C. C. A. 1029-1039.
Liability of school district, school board or other school authority for personal injuries, see note, 2 N. C. C. A. 215-228.
Liability of street railroad company for injuries to children while crossing or near track, see note, 9 N. C. C. A. 407-451.
Liability of owner of automobile for injury to children in streets, see note, 8 N. C. C. A. 369-385.
Injury to child using roller skates on sidewalk, see note, 2 N. C. C. A. 513-517.
Causing trespassing minor to jump or fall from moving wagon, see note, 1 N. C. C. A. 792-797.
Injury to trespassing child by the making of flying switches or the kicking of cars, see note, 4 N. C. C. A. 662, 663.
Liability of railroad company for injury to child stealing ride, see note, 6 N. C. C. A. 1077-1084.
Injuries to children from explosives, see note, 12 N. C. C. A. 864-880.
Injuries to children en ventre sa mere, see note, 4 N. C. C. A. 129-138; 13 N. C. C. A. 1113.
Ponds, wells, or reservoirs, and pools or water holes, as attractive nuisances, see note, 12 N. C. C. A. 966-983.
Liability of one, illegally selling gun or pistol to infant, for injuries to third person caused by infant's use of same, see note, 7 N. C. C. A. 447-453.
Liability of street railroad company for injuries to children struck by starting cars, see note, 9 N. C. C. A. 514-517.
Liability of street railroad company for injuries to children caused by their running against car, see note, 9 N. C. C. A. 571-578.
Liability of street railroad company for injuries to children playing in street, see note, 9 N. C. C. A. 614-646.
Liability of street railroad company for injuries to children near school, see note, 9 N. C. C. A. 718-729.
Liability of municipality for injury to children playing in public places other than on streets and sidewalks, see note, 8 N. C. C. A. 624-628.

§ 39. Waiver, bar or loss of infant's rights.
Judgments and decrees on consent, confession stipulation or admission, see post § 49.

¶ 106. A mother's admission that her child was warned to avoid the danger does not release the child's right of action for an in-

jury caused by defendant's negligence.—Power v. Harlow, 57 Mich. 107.

¶ 107. An infant's license to remove timber is no defense to an action of trespass for doing it.—Richey v. Brown, 58 Mich. 485.

VI. CRIMES.

§ 40. In general.

General law of crimes and prosecution therefor, see Crimes; Indictment.
Capacity of infants for crime, see Crimes § 12.
Proceedings against juvenile delinquents, see Incompetents, §§ 6, 7.
Crime of abduction or enticement of girls, see Crimes § 39.
Crime of abandonment or neglect, see Crimes § 38.
Crime of cruelty to children, see Crimes § 61.
Delinquent children, see Incompetents § 5.
Emancipation as predicate of responsibility of infant for nonsupport of wife, see Crimes ¶ 256.
Proceedings against juvenile delinquents, see Incompetents and Delinquents.

¶ 108. A minor who is not shown to have been emancipated or to have any property cannot be held criminally liable for failure to support his wife.—People v. Todd, 61 Mich. 234.

VII. ACTIONS BY AND AGAINST.

§ 41. In general; capacity for suing and defending.

Supervisory jurisdiction and protection by court, see post § 42.
Person in whose name to sue or defend, see post § 43.
Joinder or intervention in actions by others, see post § 44.
Laches and limitations, see post § 45.
Burden of proof and presumptions, see post § 46.
Evidence, issues and jury questions, see post § 47.
Judgments and decrees, see post § 48.
Judgments on consent, confession, stipulation or admission, see post § 49.
Bringing suit to enforce contract after attaining majority as affirmance of contract, see ante ¶ 74.
General law of actions, see Actions.
Actions and suits by guardians, see Guardianship, IV.
Necessity and occasion for guardian ad litem, see Guardian ad Litem, I.
Service of process on infant defendant, see Process.
Suspension of limitations on actions involving rights of infants, see Limitation of Actions, III, B.
Infants as strangers to parents' divorce decree, see also Judgment, VI.
Fraud and unclean hands as defense to infant's petition for leave to file bill of review, see Equity ¶ 966.
Right of parent to recover for loss of infant's baggage, see Carriers § 255.
Necessity of making infant mortgagees whose guardian has assigned mortgage parties to bill for foreclosure filed by assignee, see Foreclosure ¶ 236.
Consideration of errors affecting infants on appeal without complaint by them, see Appeal § 224.
Measure of damages recoverable by infant, see Damages § 156.
Suits by and against infants in justice courts, see Jud. Act, chap. LXVII, §§ 22-26; Comp. L. 1915, §§ 14199-14208.
Statutory provisions covering suits by and against infants, see Jud. Act, chap. XIX, §§ 28-30; Comp. L. 1915, §§ 12379-12381.

¶ 109. The proper practice in our courts, where an infant sues by prochein ami, indicated.—Haines v. Oatman, 2 D. 430.

¶ 110. Where the principal defendant is a firm, a verdict discharging one of the partners because he is an infant does not release a garnishee; the infant could not, individually, sue him for firm property.—Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 111. Instructions which make one's right to recover from the estate of a deceased person for services rendered during minority depend on his right to sustain a suit for them on coming of age are erroneous where such services have been merged in an agreement to pay at the death of the person for whom they were performed, for in that case there could be no recovery until such person died, when the estate would be liable.—Sword v. Keith, 31 Mich. 247.

§ 42. Supervisory jurisdiction and protection by courts.

Enforcement or repudiation by courts of infant's contracts during minority, see ante § 35.
General supervision by chancery, see also Equity ¶ 88.

¶ 112. Chancery has general jurisdiction over the persons and estates of infants; and when any part of an infant's estate is in litigation in chancery it is under the immediate guardianship and protection of the court; and neither the general guardian nor the guardian ad litem has any right to receive it.—Westbrook v. Comstock, W. 314.

¶ 113. A court is bound to guard the interests of infant litigants whether protected by their guardian or not; as to control of funds of such litigants, see Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

§ 43. Person in whose name to sue or defend.

Necessity for appointment of next friend or guardian ad litem for infant parties, see Guardian ad Litem § 2.

¶ 114. The usual and proper course is to entitle a cause in which an infant is the real plaintiff in the name of the infant by his next friend, naming him, but it does not necessarily follow that a strict compliance with this rule is indispensable to the validity of the proceeding.—Kees v. Maxim, 99 Mich. 493.

¶ 115. An action of replevin brought by a father in his own name cannot proceed on the theory that he is suing in his child's behalf as guardian or next friend.—Ash v. Mathes, 52 Mich. 615.

¶ 116. In a suit on a joint contract made by an infant and an adult as joint parties, and under which money has been earned, the infant's father cannot sue with the other contractor in his own name as the infant's substitute.—Osburn v. Farr, 42 Mich. 134.

¶ 117. In a suit under an infant's partnership contract upon a completed cause of action for his benefit, the infant should be a plaintiff in his own name and not through another.—Osburn v. Farr, 42 Mich. 134.

¶ 118. Where infants are joined as plaintiffs with an adult there must be some one to represent their interests on the record, unless in the case of joint executors some of whom are under age, in which case, as their authority is joint, the adult represents all. But if the suit is against the executors, the infants must appear by guardian.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

¶ 119. An infant partner cannot individually sue to recover a debt or property due the firm.—Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 120. An infant may authorize an agent to enforce his log labor lien under Comp. L. 1897, § 10762, without violating Comp. L. 1897, § 756, since "no process has been issued, suit brought, or issue joined" in the name of the infant.—Craig v. Brown, 171 Mich. 256.

§ 44. Joinder or intervention in actions by others.

¶ 121. Minor children are not necessary parties to an action of ejectment brought by a widow, their mother, to recover the homestead, though it is proper to join them.—Showers v. Robinson, 43 Mich. 502.

¶ 122. In a suit by an assignee of a land contract against the vendor for specific performance, the assignor and vendee, who was an infant when he bought and assigned, is a necessary party.—Carrell v. Potter, 23 Mich. 377.

§ 45. Laches and limitations.

Capacity to be estopped, see ante § 3.

Estoppel to disaffirm conveyance based on delay and laches, see ante § 14, ¶ 28.

Loss of right to disaffirm deed by delay in asserting, see ante ¶ 16.

Application to infants of limitation of time within which to present claim or demand against municipal corporations, see Municipal Corporations, XIV.

Limitation of actions, see Limitation of Actions, III, B.

Immunity from laches in general, see Equity § 53.

¶ 123. Laches is not imputable to a minor. Chandler v. McKinney, 6 Mich. 217; Dragoo v. Dragoo, 50 Mich. 573; Putnam v. Tinkler, 83 Mich. 628.

¶ 124. A minor is guilty of laches in delaying nearly seven years after his maturity in moving to set aside a judgment obtained against him during his minority.—Schimpf v. Wayne Circuit Judge, 129 Mich. 103.

¶ 125. The decree sought to be set aside was obtained some seven months before complainant arrived at majority. He was aware of the decree and its effect, and of all the material facts in the case, when he attained his majority, but delayed for six years and a half before filing his bill. In the meantime the principal party charged with the fraud, and the guardian charged with collusion, as well as the principal witness, who, from the nature of the case, must have been best acquainted with the facts, had all died. The bill was dismissed as not brought in a reasonable time.—Campau v. Van Dyke, 15 Mich. 371.

¶ 126. An infant gave a mortgage which was foreclosed sometime after she became of age, and, though personally served, she allowed the bill to be taken as confessed, apparently without any disposition to contest it. Held, that she had no equity entitling her to set up the defense of infancy to defeat a subsequent bill brought by an assignee of the foreclosure decree to enforce it against her.—Terry v. McClintock, 41 Mich. 492.

¶ 127. An infant's failure to file a bill to enforce the specific performance of a parol contract for the conveyance of land to her father fully performed by him in his lifetime does not prevent her doing so after coming of age.—Putnam v. Tinkler, 83 Mich. 628.

§ 46. Burden of proof and presumptions.

Burden of proving infancy in breach of promise to marry, see Breach of Promise to Marry § 3.

¶ 128. One who relies upon infancy as a defense has the burden of proving the fact.—Lynch v. Johnson, 109 Mich. 640.

¶ 129. The burden of proving the continuance of infancy where the right to bring suit depends thereon rests with plaintiff.—Stewart v. Ashley, 34 Mich. 183.

¶ 130. Infancy is a substantive defense, requiring affirmative proof.—Simmons v. Simmons, 8 Mich. 318.

¶ 131. One who sues soon after coming of age for an injury inflicted upon him when twelve years old cannot be treated as at fault for the delay, since he could not have sued earlier himself; nor is such delay a circumstance tending to show that no serious injury was ever done to him; but he has the burden of proof, and must take it with all the additional weight that the passage of time throws upon him.—Thurstin v. Luce, 61 Mich. 292.

¶ 132. An infant sued for the price of goods does not have the burden of showing that they were not necessaries, and the plaintiff cannot make out his case without showing that they were, whether defendant assumes such burden or not.—Wood v. Losey, 50 Mich. 475.

§ 47. Evidence, issues and jury questions.

Questions of law and fact as to contracts, see also ante § 37.
Burden of proof, presumptions and evidence as to contracts, see also ante § 36.
Burden of proof, presumptions and evidence respecting property and conveyances, see ante § 15.
General law of evidence, see Evidence.
Admissibility of foreign judgment record as evidence of infancy, see Foreign Judgments ¶ 2.

¶ 133. An Indian child six years of age at the date of a treaty claimed land under it. A witness was called to prove that for seven years after the treaty he heard no claim made by the band to which the child belonged that any reservations were made for Indians of full blood. Held, that the evidence was not competent, since neither the neglect of others to make the claim nor of the child herself, at that age, could affect her claim.—Campau v. Dewey, 9 Mich. 381.

¶ 134. Where the contract sued on was made while the plaintiff was a minor, and he never sought to repudiate it, but did seek to enforce it both before and after coming of age, the inquiry by defendant whether he ever attempted to vitiate the contract on the ground of infancy was irrelevant.—Austin v. Burroughs, 62 Mich. 181.

¶ 135. In partition involving infant's interests facts must be inquired into and proof given whether the infant is a complainant or a defendant.—Claxton v. Claxton, 56 Mich. 557.

¶ 136. Evidence suffices to show that grantor was of age when a deed was made; where his parents, witnesses to it, stated at the time of execution in 1882 that he was 22 years old, corroborated by an aunt's testimony that he was living when another died (in 1858), against which is the baptismal certificate of one by the same surname in 1862, but of a different Christian name and not certainly proved to have been the same person, and though the witnesses to his age are so illiterate and ignorant that their testimony is much weakened thereby.—Moran v. Lebot, 97 Mich. 472.

¶ 137. In an action for personal injuries a finding of the jury that plaintiff was under 21 years of age held to be against the overwhelming weight of evidence, she having herself contradicted it, and her parents not being called.—Lansing v. Michigan Cent. R. Co., 143 Mich. 48.

§ 48. Judgments and decrees.

On consent, confession, stipulation or admission, see post § 49.
Judgments in general, see Judgments.
Immunity from costs, see Costs § 11.
Exoneration from costs on appeal, see Costs § 133.
Youthfulness of parties as mitigating or enhancing damages for seduction, see Damages § 177.

§ 138. A decree made during infancy upon the basis of an infant defendant's unauthorized contract is void.—Chandler v. McKinney, 6 Mich. 217.

¶ 139. A decree of foreclosure and sale rendered during the infancy of the mortgagor, a feme covert, who did not come of age until the time for appeal had expired, was held absolutely void.—Chandler v. McKinney, 6 Mich. 217.

¶ 140. Equity will not at the instance of a minor plaintiff set aside a judgment of a court of law rendered in an action for personal injuries, where the amount awarded was adequate, and the defendant was not guilty of any fraud or misrepresentation.—Barr v. Packard Motor Car Co., 182 Mich. 612.

§ 49. ——On consent, confession, stipulation or admission.

¶ 141. No decree will be entered against an infant on a bill taken against him as confessed, or without full proof; his guardian's admissions do not conclude his rights.—Thayer v. Lane, W. 200; Chandler v. McKinney, 6 Mich. 217; Ballentine v. Clark, 38 Mich. 395; Cooper v. Mayhew, 40 Mich. 528; and see Smith v. Smith, 13 Mich. 258.

¶ 142. Where the interests of infants are involved nothing can be established by admissions or stipulations; proof is necessary.—Wood v. Truax, 39 Mich. 628; Claxton v. Claxton, 56 Mich. 557.

¶ 143. The guardian or solicitor of an infant defendant in foreclosure has no implied power to stipulate for the introduction of evi-

dence of facts occurring since the filing of the bill.—Wood v. Truax, 39 Mich. 628.

¶ 144. A chancery order made on an infant's admissions is invalid.—Smith v. Smith, 13 Mich. 258.

¶ 145. An infant cannot in his own name confess judgment, nor can an infant's partner confess judgment for him.—Soper v. Fry, 37 Mich. 236.

INFECTIOUS DISEASE to INITIATIVE.

Cross-References.

Infectious Disease—
- General sanitary control, regulation and treatment, see Health.

Inferences—
- In the sense of presumptions of law or fact, see Evidence, II; Indictment, VIII, A; and see specific topics for presumptions pertaining to their subject-matter.
- Circumstantial or inferential proofs, see Evidence, X; Indictment, VIII, C; and see also specific topics for circumstantial proofs of the specific facts or causes of action.

Inferior Courts—
- See Courts; Municipal Courts; Justices of the Peace.
- Legislative power to create or change, see Constitutional Law § 51 et seq.

Infidelity—
- To marital obligations, see Divorce; Crimes, II (adultery, abandonment and nonsupport); Husband and Wife, V, B, VII.

Infirmaries—
- See Health, § 8.

Infirmity—
- Affecting competency of person, see Incompetents; Wills, II.
- As element in undue influence on person, see Fraud, II; Wills, III.
- As element in negligence or contributory neglect, see Negligence; Carriers § 150; Highways, XII, XIII; Railroads, VIII; Street Railways, IV.

Inflammatory Arguments and Instructions—
- See Argument of Counsel; Indictment, IX, C; Instructions, II, B; Indictment, IX, E.

Information—
- Mode of prosecuting and accusing of crime, see Indictment, I, A.
- Accusation or complaint of crime to magistrate for warrant of arrest, see Arrest, III.
- Information or bill in equity as better practice, see Equity § 72.
- Bills of information for injunction, mandamus, prohibition, or quo warranto, see Injunction § 107 et seq.; Mandamus, V; Prohibition; Quo Warranto.
- Furnishing information as consideration for promise, see Contracts, V.

Information and Belief—
- Pleading and verifications of pleadings, see Pleading; Equity, VII, A.
- Averments in accusations of crime, see Arrest, III; Indictment, I, B.
- Affidavits on information and belief, see specific topics treating of the relief, remedy or process to obtain which the affidavit is offered, e. g., Civil Arrest (capias); Attachment § 31; Garnishment § 45; Injunctions § 121.

Infringement—
- Of names, see Corporations § 18; Trade Marks, III;
- Of literary property or copyright, see Literary Property.
- Of patents and inventions, see Patents.
- Conflicting and exclusive franchises, see Franchises; Electricity § 2; Street Railways, I; Waters, VI.

In Full—
- Construction and effect of payment, satisfaction and releases "in full," see Accord § 10 et seq.; Releases, II; Payment, II.
- Indorsement in full, see Negotiable Instruments, V, VII.

Ingress and Egress—
- See Highways, X, XI; Easements; Landlord and Tenant, IV.

In Gross—
- Easements in gross, see Easements § 4.
- Sales in gross or in parcels, see Executions § 64; Estates of Decedents, § 287; Judicial Sales, II; Taxes, XI, A.
- Assessments in parcels or in gross, see Local Improvements, VI; Taxes, V.

Inhabitancy—
- See Domicile.

Inherent Power of Courts—
- See Contempt § 20; Courts §§ 11, 38 et seq.

Inherent Risks and Dangers—
- Rule as to assumption of risk by servant, see Master and Servant, III, F.
- Disability of person to cast duty on independent contractor, see Independent Contractors § 5.
- Liability of carrier for loss due to inherent nature of undertaking or of goods, see Carriers §§ 44, 97, 101.
- Hazards covered by insurance, see Insurance, VII.

Inheritance—
- See Descent; Aliens § 2; Bastards § 2.
- By will, see Wills.
- Words of inheritance, see Deeds § 37; Wills, VI.
- Tax on inheritance, see Taxes, XIII.

Initial and Connecting Carriers—
- See Carriers, II, G, III, IV, F, V.

Initials—
- As abbreviation or symbol of name, see Names; Corporations § 16.

Initiative—
- Of proposed statute by electors, see Statutes, VIII.

INJUNCTIONS.

TREATS of the equitable remedy of injunction and the practice in injunction suits.

Analysis.

I. General nature of and grounds and occasions for the remedy.

§ 1. Nature, office and propriety of injunctions.
§ 2. ——As preventive remedy.
§ 3. Mandatory injunctions.
§ 4. Ancillary injunctions.
§ 5. Protection of title or rights pending litigation.
§ 6. ——In aid of other equitable relief.
§ 7. ——Pending review of proceedings.
§ 8. Existence of legal or other remedy.
§ 9. ——Adequacy and completeness of legal remedy.
§ 10. Election of other remedies.
§ 11. Existence of clear right or title in complainant.
§ 12. ——Necessity of establishing right or title at law.
§ 13. Unsubstantial injuries or abstract rights.
§ 14. ——Apprehended or threatened injury.
§ 15. ——Acts working benefit to plaintiff.
§ 16. Prevention of multiplicity of suits.
§ 17. Enjoining exercise of lawful rights.
§ 18. Injunction ineffectual or impracticable.
§ 19. Injunction inequitable to defendant.
§ 20. Persons entitled to invoke remedy.
§ 21. ——Taxpayers' suits.
§ 22. ——Wrongdoers.
§ 23. Acquiescence, laches and estoppel.
§ 24. Offer of equity or performance of duty by complainant.

II. Particular occasions; who and what enjoinable.

A. In General; Breach of Contract, Trust or Assumed Duty.

§ 25. Executory contracts in general.
§ 26. Performance secured by mortgage.
§ 27. Contracts in restraint of trade or competition.
§ 28. ——Agreements not to use trade name or trade mark.
§ 29. Disclosure or use of trade secrets.
§ 30. Violation of leases.
§ 31. Breach of conditions and restrictions in deeds.
§ 32. Dissipation of estate by personal representative.

B. Actions and Proceedings in Court.

§ 33. Restraining proceedings at law in general.
§ 34. ——Grounds and defenses available at law.
§ 35. To prevent multiplicity of suits.
§ 36. Action brought without leave of court.
§ 37. Proceedings of other courts.
§ 38. ——Courts of sister state or Federal courts.
§ 39. Proceedings pending in other counties.
§ 40. Restraining assertion of defense.
§ 41. Enjoining intervention or interference in proceedings.
§ 42. Actions on contracts and debts.
§ 43. ——On bonds, bills and notes.

§ 44. ——On covenants.
§ 45. Garnishment and attachment proceedings.
§ 46. Ejectment suits.
§ 47. Trespass actions.
§ 48. Replevin suits.
§ 49. ——Foreclosure and deficiency proceedings.
§ 50. ——Condemnation proceedings.
§ 51. Criminal prosecutions.
§ 52. Enjoining appeal or review proceedings.

C. Acts of Private Corporations, Associations and Officers or Members.

§ 53. In general.

D. Acts of Municipalities and Public Officers.

§ 54. In general.
§ 55. Acts illegal or contrary to public policy.
§ 56. Trespass by public officers.
§ 57. Illegal use of public funds.
§ 58. Use or misuse of public property.
§ 59. Usurpation or destruction of franchises.
§ 60. Public improvements and contracts.
§ 61. Issuance and negotiation of bonds.

E. Transfers, Conveyances and Assignments.

§ 62. In general.
§ 63. Conveyances, transfers or incumbrances in breach of contract.
§ 64. Disposal of trust or estate property.
§ 65. Disposal of property by husband or wife.
§ 66. Collection or disposition of property by assumed agent.
§ 67. Sale on execution or process.
§ 68. Transfer of negotiable instruments.

F. Interference with or Disturbance of Personal Property Rights or Business.

§ 69. Interference with possession and use of premises.
§ 70. Trespasses in general.
§ 71. ——Irreparable or permanent injury.
§ 72. ——Continuing and recurring trespasses.
§ 73. Waste and nuisance.
§ 74. Removal of buildings, fences or other structures.
§ 75. Removal of fixtures.
§ 76. Cutting and removal of timber.
§ 77. Removal of mortgaged property and impairment of security.
§ 78. Maintenance or interference with easements and ways.
§ 79. Erection or use of overlooking or obstructing structures.
§ 80. Highways and streets; laying out or improving.
§ 81. ——Closing, obstructing or encroaching upon.
§ 82. ——Preventing use for railways.
§ 83. ——Preventing interference with railway rights of use.
§ 84. Injury to public parks.
§ 85. Construction, maintenance and obstruction of drains and sewers.

§ 86. Injunction to protect riparian and water rights.
§ 87. Obstructing or misusing navigable waters.
§ 88. Infringement on pictorial, literary or artistic property rights.
§ 89. Interference with business; unfair competition.
§ 90. Boycotts and strikes.
§ 91. Interference with civil rights.
§ 92. Invasion of right of privacy.

G. Commission of Torts and Public Offenses.

§ 93. In general.
§ 94. Publication of libel.

H. Execution of Invalid Laws and Ordinances.

§ 95. Enforcement of criminal laws.
§ 96. Enjoining official acts under penal statute.
§ 97. Enforcement of ordinances.

I. Assertion of Forfeitures.

§ 98. In general; forfeiting conditions in conveyances and land contracts.
§ 99. Forfeiture of franchises.

III. Suits for injunction.

§ 100. Jurisdiction and venue.
§ 101. Parties complainant.
§ 102. ——Suits on behalf of the public.
§ 103. ——Taxpayers as plaintiffs against officers and municipalities.
§ 104. ——Defendants.
§ 105. ——Necessary and indispensable parties.
§ 106. ——Joinder, misjoinder and withdrawal of parties.
§ 107. Pleading.
§ 108. ——In taxpayers' and other representative suits.
§ 109. ——Demurrer, answer or other defensive pleading.
§ 110. ——Issues, proof and variance.
§ 111. Presumptions, burden of proof and evidence.
§ 112. Weight and sufficiency of evidence.
§ 113. Hearing on questions of damages or alternative relief.
§ 114. Reference or issues to jury.

IV. Preliminary or temporary injunction.

A. In General; Condition of Case; Bond, Notice and Hearing.

§ 115. Nature, purpose and grounds.
§ 116. Discretion of court.
§ 117. Time to issue.
§ 118. Sufficiency of bill and parties thereto.
§ 119. ——Verification or oath to bill.
§ 120. Notice of application.
§ 121. Affidavits or showing in support of pleading.
§ 122. Hearing and order.
§ 123. ——Scope and extent of relief.
§ 124. Bonds or other security.

B. DISSOLUTION, MODIFICATION, CONTINUANCE OR REINSTATEMENT.

§ 125. Grounds for dissolving.
§ 126. ——Invalidity of preliminary injunction.
§ 127. ——Want of equity.
§ 128. Discretion of court.
§ 129. Application or motion.
§ 130. ——Issues and questions on motion.
§ 131. ——Supporting affidavits.
§ 132. Dissolution upon answer.
§ 133. Dissolution upon failure to appear and oppose motion.
§ 134. Dismissal of bill as dissolution.
§ 135. Order for dissolution.
§ 136. Modification of injunction.
§ 137. Continuance of temporary injunction.
§ 138. Continuance, dissolution or revival on appeal.
§ 139. Dissolution of injunction granted by supreme court.

V. Decree or order, and terms of restraint or command.

§ 140. In general.
§ 141. Restriction of relief to parties and issues involved.
§ 142. Provisions as to time, duration and operation of restraint.
§ 143. Alternative and complementary relief.
§ 144. ——Damages.
§ 145. Dismissal with terms or relief.
§ 146. Dismissal without prejudice.
§ 147. Bond on issuance of permanent injunction.
§ 148. Relief to defendant.
§ 149. Modification of decree.
§ 150. Operation, construction and effect.
§ 151. ——Parties and persons affected.

VI. Compliance or violation and punishment.

§ 152. In general; what constitutes violation.
§ 153. Excuses or discharge from compliance.
§ 154. Enforcement and punishment for violation.

VII. Liability and damages for suing out.

§ 155. In general; liability on bond.

I. GENERAL NATURE OF AND GROUNDS AND OCCASION FOR THE REMEDY.

§ 1. Nature, office and propriety of injunctions.

Injunction in aid of other suits or proceedings, see post §§ 4-7.
Existence and sufficiency of other remedies, see post §§ 8-10.
Necessity that complainant have clear right or title, see post §§ 11, 12.
Necessity that injury complained of be a substantial one, see post § 18.
To prevent multiplicity of suits, see post §§ 16, 85.
Not to restrain defendant in performance of lawful acts, see post § 17.
Injunction impossible of execution or ineffectual, see post § 18.
Refusal of injunctive relief where it would work disproportionate injury to defendant, see post § 19.
To whom remedy available, see post § 20.
Conditions precedent to relief, see post § 24.
As discretionary writ, see post § 116.
Refusal of remedy on ground of laches or estoppel, see post § 23.
Nature and purpose of preliminary injunction, see post § 115.
Discretion of court in issuing preliminary injunction, see post § 116.
Equitable rights and remedies generally, see Equity.

Mandamus to compel issuance or dissolution of injunction, see Mandamus.
Prohibition to restrain action by court of bill for injunction and other relief, see Prohibition.
Clean hands maxim as bar to relief, see also Equity § 6.
Disability to relieve against nuisance in another jurisdiction, see Equity § 32.

¶ 1. The summary remedy by injunction is granted only on strictly equitable grounds. —B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

¶ 2. The writ of injunction is not one of right, but of grace. It should not issue out of hand, but should issue in cases where the right to such relief is clearly established. —Saier v. Joy, 198 Mich. 295.

¶ 3. Injunctions are to prevent irreparable mischief and stay consequences that could not be adequately compensated; their allowance is discretionary and not of right, call for good faith in the petitioner, and may be withheld if likely to inflict greater injury than the grievance complained of.—Edwards v. Allouez Min. Co., 38 Mich. 46.

¶ 4. The writ of injunction is not a writ of right, but its issuance rests in sound discretion, and such discretion should not be moved where the party applying does not bring his case with equitable principles, does not show superior equities that are entitled to protection at the hands of a court of equity, and does not make such a case as moves the conscience of the court to grant the relief.—Howard v. Lovett, 198 Mich. 710.

¶ 5. Upon a bill for an injunction, the court will take into consideration not only complainant's bare legal rights, but the damage which will result to a defendant from the enforcement of such legal rights as well as the question of delay in bringing the proceedings. So, a court will not restrain a city from adding to its water plant, although the addition is an infringement of complainant's legal rights, where it appears that he had known for a number of years of defendant's use of the water, that the extension of the plant was simply a furtherance of the city's original policy, and that before filing his bill he had allowed the city to spend a considerable amount of money and incur large obligations without more than a protest.—Stock v. City of Hillsdale, 155 Mich. 375.

§ 2. ——As preventive remedy.

Injunctions mandatory in character, see post § 3.
Removal of obstruction in alley by plaintiff as precluding injunction to prevent closing of alley, see post ¶ 280.
Scope and terms of decree or order, see post V.

¶ 6. Preventive injunctions necessarily operate upon unperformed and unexecuted acts.—Bates v. City of Hastings, 145 Mich. 574.

¶ 7. Injunction will not lie where the wrong sought to be enjoined is already perpetrated.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

¶ 8. A hearing upon an injunction bill cannot be had after the act has been done which it is the sole purpose of the bill to restrain; the remedy for any consequent injury is to be had, if at all, at law.—East Saginaw St. R. Co. v. Wildman, 58 Mich. 286.

§ 3. Mandatory injunctions.

Mandatory preliminary injunction to compel delivery of cars by carrier, see post ¶ 407.

¶ 9. Courts look with disfavor upon mandatory injunctions, and will only grant them when it is necessary to preserve the status quo. Usually an order restraining action will accomplish this result, but the status quo is not always "a condition of rest, but of action." Whenever courts have found a mandatory injunction essential to the preservation of the status quo, and a serious inconvenience and loss would result if not preserved, they have not hesitated to grant it.—Gates v. Detroit & M. R. Co., 151 Mich. 548.

§ 4. Ancillary injunctions.

As remedy to preserve status quo pending litigation, see post §§ 5-7.
Injunction to stay proceedings in court, see post II, B.
Injunction in aid of recission or cancellation, see Recission and Cancellation.
Ancillary to creditors' bill, see Creditors' Suits § 33.
Injunction as ancillary to interpleader, see Interpleader § 12.

¶ 10. An injunction bill, strictly speaking, is one seeking no other relief. When the bill prays other relief, the injunction is regarded as ancillary to such relief and falls with it. —Blackwood v. Van Vleet, 11 Mich. 252; Widner v. Olmstead, 14 Mich. 124.

¶ 11. Equity may stay proceedings at law until an answer to a bill for discovery has been obtained.—Wright v. King, H. 12.

§ 5. Protection of title or rights pending litigation.

Injunction to protect property rights of spouse intending to sue for divorce, see post § 65.
Restraining enforcement of gas regulating ordinance pendente lite, see post ¶ 332.
Sufficiency of bill for injunction, see post § 107.
Decree restraining waste pending ejectment, see post ¶ 480.
To restrain proceedings in courts, see post II, B.

Injunction to restrain waste by tenant pending possessory proceedings, see Landlord and Tenant.
Provisions as to injunctions pending divorce suits, see Comp. L. 1915, §§ 11405, 11480.
Retention of divorce bill for injunction to protect property rights, see also Divorce ¶ 415.

¶ 12. An injunction will generally issue to preserve the status quo of property until the final hearing upon the merits.—State Road Bridge Co. v. Saginaw Circuit Judge, 143 Mich. 337.

¶ 13. The ground and the only ground on which injunctions are granted against third persons in possession of personal property, and ostensibly its rightful owners, upon an ex parte application, is the protection of the fund or property, when it is shown that without such interposition of the court there is danger that it may be lost to the complainant if he succeeds in establishing his title.—Thayer v. Swift, H. 430.

¶ 14. A bill was filed to cancel a lease as obtained by fraudulent representations. The fraud was denied and the injury alleged was not irreparable, as the lease provided for its termination by notice, so that the lessor had a remedy at law for damages. Held, that an ex parte injunction restoring possession to the lessor pending suit was improvidently granted.—Arnold v. Bright, 41 Mich. 207.

¶ 15. Since an attachment cannot be levied on corporate stock previously assigned by the defendant to his wife, a bill cannot lie to protect the lien of such an attachment by enjoining the payment of dividends to the holder.—Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

¶ 16. Pending suit against a corporation for the cancellation, on the ground of false representations, of subscriptions to stock and for the return to complainant of money paid for such stock, it is proper to restrain by injunction any disposition of the corporate property and of the money paid.—Sherman v. American Stove Co., 85 Mich. 169.

¶ 17. Equity has jurisdiction to restrain the cutting of timber from the lands by a grantee in a deed claimed to be a mortgage, pending the determination of the question whether the debt had been fully paid or not.—Bigelow v. Thompson, 133 Mich. 334.

¶ 18. An injunction restraining a bridge company from collecting tolls until the further order of the court is improperly granted on a complaint in a court of chancery in the nature of an information in quo warranto to test the right of the company to maintain its franchise and privilege of collecting tolls; the result of such restraining order being to deprive the parties of the possession of their property, and their right and control over it and the income from it without a hearing upon the merits.—State Road Bridge Co. v. Saginaw Circuit Judge, 143 Mich. 337.

§ 6. ——In aid of other equitable relief.

See also ante ¶ 16.
Injunction against violation of contract and for specific performance, see also post ¶ 116.
Bill to enjoin action on insurance policy and to cancel same, see post ¶ 140.
Bill to restrain action upon covenant of title and reform the deed, see post ¶ 171.
Bill to enjoin ejectment and for specific performance, see post ¶ 183.
Bill to enjoin action for purchase price of land and to cancel the deed, see post ¶ 163.
Bill to restrain enforcement of securities and to cancel same, see post § 43.
Bill to enjoin trespass by public officers and to quiet title, see post § 56.
In aid of suit to quiet title to boundary strip, see post § 74.
Parties to suit to enjoin foreclosure of mortgage and cancel it of record, see post ¶ 373.
Demurrer to bill to enjoin breach of contract and specifically enforce it, see post ¶ 391.
Answer in suit to enjoin ejectment and quiet title, see post ¶ 390.
Retention of injunction suit to dispose of entire controversy, see post § 143.
Modification of injunction issued in aid of creditors' bill, see post ¶ 474.
Injunction to prevent interference with possession pending suit for specific performance, see Specific Performance.
Injunctions in aid of judgment creditors' bills, see Jud. Act, chap. XXXIV, § 5, Comp. L. 1915, § 13382.

¶ 19. A bill will not lie merely for an injunction and receivership, pending another suit in the same court covering all rights in the disputed property. Interference with such rights can be restrained in the other suit.—Beekman v. Fletcher, 48 Mich. 156.

§ 7. Pending review of proceedings.

Right to injunction on reversal against defendant who changed status pending appeal, see Appeal § 562.
Injunction in supreme court ancillary to appeal, see Appeal § 142.

¶ 20. The supreme court may, pending an appeal of a bill to establish a trust, restrain defendant from removing the fund in question from the jurisdiction.—Patek v. Patek, 166 Mich. 443.

¶ 21. The petitioner in condemnation proceedings that are admittedly illegal may be enjoined from entering upon the land condemned pending review of the proceedings by a court of equity.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

§ 8. Existence of legal or other remedy.

[Note. The doctrine that injunction will not ordinarily issue when there is a complete and adequate legal remedy pervades the whole law of injunctions in so far as concerns the propriety of the remedy. Concrete applications of the general principles here illustrated may therefore be found throughout division II of this topic. This section and the one following are restricted to the decisions which express or enunciate the rule in general terms.]

See also post ¶ 44.

Establishing right or title at law prior to relief by injunction, see post § 12.

Equity entitling complainant to restrain proceedings at law, see post § 33.

Allegations in bill as to existence or adequacy of legal remedy, see post § 107.

Award of damages upon refusal of injunction, see post § 144.

General law as to equitable relief where legal remedy exists, see Equity § 26.

¶ 22. A drain commissioner may be enjoined from emptying water on complainant's land without providing a proper outlet therefrom, notwithstanding the complainant will have a legal remedy for damages when they occur.—Bruggink v. Thomas, 125 Mich. 9.

¶ 23. A court of equity will not entertain a claim, and application for relief, when the subject-matter is in the nature of a set-off and therefore entertainable by a court of law.—Dewey v. Billings, 76 Mich. 89.

¶ 24. Complainant alleged in his bill that as mortgagee he obtained title to premises, through foreclosure; that the children of the deceased mortgagor denied the right of the latter to make the mortgage and were suing complainant in ejectment; that the estate of the mortgagor was being settled, and if the children succeeded in their ejectment suit complainant would have no remedy for the mortgagor's breach of warranty of title. Held, that complainant's proper remedy was to file a claim in the probate court against the estate of the deceased mortgagor for the breach of warranty, and that equity would not aid him.—Rogers v. Schram, 161 Mich. 278.

¶ 25. The State Game Warden will not be enjoined from interfering with the use of fish nets having a two-inch mesh, where the only question involved is whether the statute permits the use of such nets, since the legality of their use is available to the complainant as a defense to a criminal prosecution.—Kleinke v. Oates, 187 Mich. 548.

¶ 26. Upon a bill filed to restrain village authorities from interfering with a fence which complainant had been notified to remove as an encroachment upon a public street, the proofs showed an encroachment commenced upon an established street within the period required for adverse possession, and relief was denied without considering whether the summary method prescribed in How. St. § 1371 et seq. (Comp. L. 1897, § 4121), for settling such a controversy should not have been followed.—Wyman v. St. Johns, 100 Mich. 571.

§ 9. ——Adequacy and completeness of legal remedy.

Multiplicity of suits as ground for injunction, see post § 16.

Uncertainty of damages as ground for injunction, see post § 25.

Refusal of injunction to remove house where ejectment appropriate, see post ¶ 258.

Injunction to prevent interference with possession of church where ejectment inadequate, see post § 69.

Equitable relief by injunction against trespasses where legal remedy inadequate, see post § 70.

General rule to decline jurisdiction where legal remedy is adequate, see Equity § 39.

Adequacy of legal remedies to try question of disputed boundary, see Boundaries § 24.

¶ 27. In the case of a deed of property subsequently found to be incumbered the grantee's remedy at law upon his grantor's warranty of title is complete, and the fact that the grantor has absconded leaving no property to be assessed, gives no ground for equitable relief against the estate.—Crow v. Conant, 90 Mich. 247.

¶ 28. An injunction will not be awarded where an award of damages will afford adequate relief; as where lands had been inundated because of releasing water to float logs down a river where the defendant had been engaged in such business for many years and had a considerable investment which would be rendered valueless if an injunction were granted, none will be granted where the defendant can and will compensate complainant for pecuniary loss.—Howard v. Bellows, 148 Mich. 410.

¶ 29. Where in a dispute between two railway companies over the ownership of rights of way an adequate remedy exists at law, a bill for injunction is properly dismissed.—Grand Rapids Elec. Ry. Co. v. Battle Creek, C. & S. Ry. Co., 161 Mich. 248.

¶ 30. The remedy at law is not adequate where the bill charges a deliberate violation of contract obligations, shows confusion and misunderstanding concerning the use of complainant's name in a business and an attempt to avoid an agreement with complainant not to use a certain name for a corporation by organizing another corporation of the same name which agreement complainant is entitled to specifically enforce.—George v. Rollins, 176 Mich. 144.

¶ 31. A bill will not lie in equity to require an accounting, to restrain the defendant from

proceeding with a replevin suit begun by the complainant, to declare such action to have been settled by the parties, and to cancel the replevin bond; since there was an adequate legal remedy for determining such questions in the replevin suit on an issue framed under § 10402 et seq., Comp. L. 1897, § 13116 et seq., How. St., 2nd Ed.—Huebel Co. v. MacKinnon, 186 Mich. 617.

§ 10. Election of other remedies.

General law as to election of remedies, see Election.

¶ 32. An action at law for damages growing out of the erection of a dam is not an election of remedy that will preclude a bill to secure a mandatory injunction compelling the removal of the dam.—Feldkamp v. Ernst, 177 Mich. 550.

§ 11. Existence of clear right or title in complainant.

Enjoining collection of tolls pending litigation, see ante ¶ 18.

¶ 33. A bill for an injunction will not be sustained unless the right it aims to secure can be determined in advance with certainty.—Bennett v. Seligman, 32 Mich. 500; Bradfield v. Dewell, 48 Mich. 9.

¶ 34. A court of equity will not restrain a person from asserting a title to real estate in the course of judicial proceedings, or decree a release from one to another, unless in a case entirely free from doubt.—Stockton v. Williams, 1 D. 546.

¶ 35. Chancery has no jurisdiction to restrain a trespass upon land the title to which is in dispute, and to establish as the true boundary of such land the line claimed by complainant.—Andries v. Detroit, G. H. & M. R. Co., 105 Mich. 557.

¶ 36. Where a bill for injunction alleges possession and this is denied by the answer, a question of fact as to possession is presented and if the evidence should disclose that complainant was out of possession, quære whether a suit in equity could be maintained.—F. H. Wolf Brick Co., v. Lonyo, 132 Mich. 162.

¶ 37. An injunction against the obstruction of a public way will not be denied for the reason that the title to the land may be said to be in dispute because of a claim by complainant of a private right of way secured by deed and by user.—Detroit Mineral Bath Co. v. Stroh Brewery Co., 151 Mich. 555.

¶ 38. Complainant and defendant owned adjoining tracts of land. Complainant charged defendant with cutting and carrying away timber from his land, and in his bill prayed an injunction to restrain defendant from cutting timber thereon and for a decree determining the ownership of the timber, and fixing the compensation to be paid for the injury suffered. The answer claimed title to the land upon which the timber was growing. Held, that title to the land was not incidentally, but directly, involved, and that the bill should be dismissed.—Simmons v. Day, 151 Mich. 1.

¶ 39. In an action to enjoin repeated trespasses on the waters of an inland lake, a court of equity will not determine the title to the submerged lands, where the contending parties have each had intermittent partial possession for many years.—Beach v. Rice, 186 Mich. 95.

§ 12. ——Necessity of establishing right or title at law.

Necessity that complainant seeking bill of peace first establish his right at law, see post § 35.

Necessity that complainant seeking to enjoin ejectment have clear title, see post § 46.

¶ 40. Bill against one in possession of lands claiming them under tax titles, to have these titles declared void, and complainant's right to the lands quieted, and for an injunction to restrain the commission of waste by defendant. Complainant had not established his right at law, and had brought no suit for that purpose. Held, that the bill could not be sustained.—Blackwood v. Van Vleet, 11 Mich. 252.

¶ 41. Equity will not restrain interference with complainant's possession where defendant claims the property as a riparian owner. The remedy is at law.—Peters v. Hansen, 55 Mich. 276.

¶ 42. A lumberman obtained the right to cut a lot of timber and run it to a mill, and at the same time he contracted to deliver it to a certain lumber company. The owner of the timber, however, was to retain his title until it was paid for. The lumberman afterward surrendered his interest in his contract to the owner. The lumber company had overpaid the former, and on its refusing to advance the necessary sum to finish the job, the latter abandoned it and sold the logs to a third person. The river-drivers also claimed liens on the logs for their labor, and several attachments were levied. The lumber company then filed a bill to enjoin any interference with their possession. Held, that the case did not fall within the jurisdiction of equity. The questions raised by the conflicting claims of title were purely legal, and so with the labor liens, which did not depend upon the rights of the original owner nor on any equities that might exist between him and the company. Held, also, that the owner of the logs was entitled to have his claim for stumpage paid by the company, and if the company had overpaid the original contractor, its loss cannot be charged to the owner, whose conduct in ordering payments

by the company to be made to the lumberman did not make him a principal in the latter's contract.—Southern Michigan Cedar Lumber Co. v. McDonald, 57 Mich. 292.

¶ 43. Ejectment and not an action to enjoin repeated trespasses is the proper proceeding for the determination of title to land covered by the waters of an inland lake, where for many years the contending claimants have each had partial intermittent possession.—Beach v. Rice, 186 Mich. 95.

§ 13. Unsubstantial injuries or abstract rights.

Necessity that injunctive relief be effectual or practicable, see post § 18.
Disproportionate injury to defendant from injunction, see post § 19.
Interest of taxpayer entitling him to relief by injunction against city, see post § 21.
Equity entitling plaintiff to enjoin proceedings at law, see post § 33.
Enjoining acts of public officers where injury slight or doubtful, see post ¶ 205.
Refusal to enjoin opening of highway where injury slight, see post ¶ 274.
Injury entitling landowner to restrain widening of drain, see post ¶ 302.
Amount in controversy in taxpayer's suit, see Equity § 16.

¶ 44. Injunction will not lie for the purpose of passing on abstract rights or wrongs apart from such threatened injury to the person seeking relief, nor when such injury is remediable at law.—East Saginaw St. R. Co. v. Wildman, 58 Mich. 286.

¶ 45. A court of equity will not lend injunctive aid to enforce mere abstract rights unaccompanied by any injury or damage to the person seeking relief.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 46. Injunctive relief will not be granted for a mere injury to the feelings.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 47. Injunction will not issue simply because no material injury would accrue to defendants thereby; but on the contrary, the court requires in all cases a sufficient showing to be made of threatened injury entitling the complainant to equitable relief.—Bates v. City of Hastings, 145 Mich. 574.

¶ 48. An increase in telephone rates will not be restrained at the suit of a city where there is no substantial injury, though there may be some annoyance to the sensibilities of the patrons by the manner in which notice of it is given by the company.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 49. A bill by a taxpayer and coal dealer to restrain the city from unlawfully injuring him in his business and from subjecting his property to the burden of an unlawful assessment for taxes because the city was engaging in selling coal at a loss will be dismissed where the proofs show that a few days after filing the suit the city discontinued the business, and that by the city's action no loss had occurred, and no increased burden could be imposed on complainant's property by reason of the city's action, and where he has failed to show any present or prospective injury.—Baker v. City of Grand Rapids, 142 Mich. 687.

¶ 50. The right to hunt wild fowl upon the navigable waters of the state is not a mere bare legal right, interference with which causes no substantial injury, and which therefore will not be prevented by injunction.—Ainsworth v. Munoskong Hunting & Fishing Club, 153 Mich. 185.

¶ 51. Where a city has vacated certain streets for the purpose of enabling a railway company to erect a much-needed depot, a nursery and seed company cannot enjoin the railway from proceeding with the erection of said depot where it appears that the only inconvenience to said seed company is to compel its customers to approach its plant by a somewhat circuitous route.—Detroit & M. Ry. Co. v. Sioux City Seed & Nursery Co., 168 Mich. 668.

¶ 52. An injunction should not be granted to restrain the recording of a land contract where the only ground alleged is that certain matter set out therein is not usually set out in land contracts and is private to the parties and of no interest to the public and complainant dislikes to have it recorded.—Ranney v. Stoll, 174 Mich. 440.

§ 14. ——Apprehended or threatened injury.

Apprehended injury from electric railway in streets, see post § 82.

¶ 53. Injunctions will not issue to allay mere apprehensions of injury.—Bates v. City of Hastings, 145 Mich. 574.

¶ 54. Whether injunction to restrain threatened injury is matter of right, quære; but it will not be granted where such relief is disproportionate to the injury.—Hall v. Rood, 40 Mich. 46.

§ 15. ——Acts working benefit to plaintiff.

Benefit rather than resultant injury to complainant as reason for denying injunction against alley vacation, see Highways ¶ 489.

¶ 55. Where, by contract and deed between adjoining landowners, one landowner is entitled to have an area way of specified dimensions left open, an injunction against the obstruction of such area way will not be refused upon the ground that defendant is leaving open an area way more advantageous to complainants than that for which they had contracted.—Tolsma v. James E. Scripps Corporation, 153 Mich. 14.

§ 16. Prevention of multiplicity of suits.

See also post § 35.

Injunction where legal remedy inadequate or incomplete, see ante § 9.

Multiplicity of suits as ground for enjoining trespasses, see post § 72.

As ground for enjoining ejectment suits, see post § 46.

Joinder of taxpayers in suit to restrain collection of tax, see post § 106.

Avoidance of multiplicity as ground for bill to restrain acts which may become prescriptive, see also Equity ¶ 142.

Avoidance of multiplied litigation as ground to entertain suit by taxpayers, see also Equity § 44.

¶ 56. Injunction will issue to remedy a wrong for which redress might be secured by an action of trespass, where it would be necessary to resort to a multiplicity of suits to secure such redress.—Ainsworth v. Munoskong Hunting & Fishing Club, 153 Mich. 185.

§ 17. Enjoining exercise of lawful rights.

¶ 57. An injunction will not generally be granted against the continuance of action or possession which, though originally wrongful, can be made lawful for the future by taking the necessary legal measures.—Mercer v. Williams, W. 85; Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 63 Mich. 645.

¶ 58. Equity will not interfere to protect one from an injury that defendants can make lawful at any time, if they choose, proof of a subsisting right of flowage for saw-mill or grist-mill purposes will prevent the abatement of a mill-dam erected to supply a paper-mill, and causing only the like extent of flowage.—Hathaway v. Mitchell, 34 Mich. 164.

¶ 59. Where a city has used property for market purposes for a sufficient length of time to gain a prescriptive right to do so, continuation of such market will not be restrained.—Cooper v. City of Detroit, 42 Mich. 584.

¶ 60. The representative of a deceased partner in a firm of hotel-keepers who have been occupying the hotel under a lease cannot, after the expiration of the lease, restrain the survivor from separating the furniture which belonged to the partnership from the rest of the hotel property on the ground that its value depends upon its being used in connection with the good-will of the property, and that such separation would cause irreparable injury to the interest of decedent's estate in the partnership assets.—Witbeck v. Chittenden, 50 Mich. 426.

§ 18. Injunction ineffectual or impracticable.

Abstract rights or wrongs not within scope of remedy by injunction, see ante § 13.

¶ 61. An injunction to restrain the use of more than defendant's just share of the water furnished by a dam and canal was denied where assuming jurisdiction would require constant oversight in respect to the conduct enjoined, and would involve perpetual controversies.—Bradfield v. Dewell, 48 Mich. 9.

§ 19. Injunction inequitable to defendant.

See also ante ¶¶ 3, 5, 54.

Necessity that equitable grounds for relief exist, see ante § 1.

Injunctive relief against nuisance disproportionate to the injury, see also Nuisances.

¶ 62. Where an injunction will do the defendant more harm than it will do the complainant good, the court may refuse it in its discretion.—Campau v. National Film Co., 159 Mich. 169.

¶ 63. Where the proofs showed that complainant's land was wrongfully flowed by defendant's dam, but that no general unhealthiness was caused, and where it appeared that to enjoin the flowage would practically abate the dam and would injure defendant to a degree disproportionate to complainant's grievance, it was held that relief should be confined to an allowance of damages.—Fox v. Holcomb, 32 Mich. 494.

¶ 64. Where complainant sought to enjoin perpetually the use of electricity by defendant as a substitute for horse-power in operating a railroad in a street upon which complainant owned unoccupied land, an injunction was refused on the ground that it would cause defendant far greater loss than complainant would suffer, even should all of his apprehensions prove true, and that he had a remedy at law for any violation of his rights.—Potter v. Saginaw Union Street R., 83 Mich. 285.

¶ 65. Where the circuit court refused to enjoin the city of Grand Rapids from emptying its sewage into the Grand River, the supreme court refused on mandamus to set aside the order, since it appeared that the people of the city would be subjected to great inconvenience by the injunction.—Township of Wyoming v. Judge Superior Court of Grand Rapids, 158 Mich. 60.

¶ 66. A complainant leased to a defendant with a provision that no hazardous use should be made of the premises. The complainant knew that defendant intended to use the premises for the storage and sale of inflammable picture films. In a bill by complainant to enjoin such use, held, that he was not entitled to such relief as a matter of right, and the court would not grant it when, as here, injustice would be done defendant.—Campau v. National Film Co., 159 Mich. 169.

¶ 67. Complainant will not be denied an injunction to prevent the defendant from overflowing certain mill tailraces by raising his dam, which is below that of the com-

plainants', and a recovery of damages caused on the ground that the injury to the defendant by the restriction of his use of the dam would be disproportionate to the harm suffered by the flooding of complainant's mill tailraces, where the complainant has shown by a preponderance of the evidence that there is a reasonable fear that the overflowing will be so frequent as to seriously affect the value of his mills, that the mills are of great value, and that the remedy at law is inadequate, and where the defendant's dam can be allowed to stand provided that the water is not ponded above the original height of the dam.—Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423.

¶ 68. In a suit for injunction to prevent the defendant from overflowing certain mill tailraces by raising his dam which is below that of the complainant, even though it appears that the injunction will seriously affect the water supply of the defendant's mills and power plants, which are of great value, yet there is no reason to apply the rule of paramount necessity.—Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423.

¶ 69. Where the owner of a farm outside the limits of a city warns city contractors to desist from using her land to construct a sewage plant, and the warning is disregarded and the plant is completed entailing an expenditure of $50,000 by the city, on a bill for an injunction the city is in no position to urge that it would be inequitable to grant the injunction because it would entail great loss and inconvenience upon the city.—Onen v. Herkimer, 172 Mich. 596.

§ 20. Persons entitled to invoke remedy.

Interest, right or title in plaintiff, see also ante § 11.
Estoppel by acquiescence and laches, see post § 23.
Right of private persons to enjoin obstruction of or encroachment upon streets, see post § 81.
Parties to injunction proceedings, see post § 101.

¶ 70. Attorney-general may act on private relation so long as the grievance is one affecting public interest and while he retains control of suit; so held where he seeks to restrain county board of auditors from exercising inhibited powers.—Attorney-General ex rel. Seitz v. Board of Auditors of Wayne County, 73 Mich. 53.

¶ 71. In a bill to restrain the erection of a church upon premises alleged to be owned in fee by complainant, a bishop of the Roman Catholic Church, the latter, under Comp. L. 1897, § 8844, providing that every express trust (with a certain exception not material) shall vest the whole estate in the trustees in law and inequity subject to the execution of the trust, is entitled to maintain the action even though the title which he holds is subject to a trust, if he is entitled as trustee to maintain the action.—Foley v. Kleibusch, 123 Mich. 416.

¶ 72. The holder of the legal title to land may maintain a bill for an injunction against a stranger to restrain interference with the property, though his deed was intended as a mortgage.—Wilkinson v. Dunkley-Williams Co., 139 Mich. 621.

¶ 73. The owner of lots to which access can be had only by means of a certain street, has such a peculiar interest in that street as to entitle him to bring injunction proceedings to restrain defendant from cutting into the street so as to prevent such access.—Wilkinson v. Dunkley-Williams Co., 139 Mich. 621.

¶ 74. Although the right to fish in a private pond belonging to an estate has been granted to another by the heir who is in possession under an arrangement among those interested this does not prevent such heir bringing a suit to restrain a trespass upon such water for the purpose of fishing.—Winans v. Willett, 197 Mich. 512.

§ 21. ——Taxpayers' suits.

Taxpayers as plaintiffs in suits to enjoin officers and municipalities, see post § 103.
Joinder of taxpayers in injunction suit, see post § 106.
Sufficiency of bill for injunction in taxpayers' suits, see post § 108.

¶ 75. An individual taxpayer whose tax is but a few cents cannot maintain a bill to restrain a threatened diversion of public funds by the board of supervisors. Public wrongs must be redressed by the people's public agents and not by private intervention.—Steffes v. Moran, 68 Mich. 291.

¶ 76. A resident taxpayer whose interest is sufficient to confer jurisdiction may maintain a bill in equity against a municipality to restrain a threatened and imminent illegal expenditure of the public funds.—Savidge v. Spring Lake, 112 Mich. 91.

¶ 77. A taxpayer is entitled to maintain a suit to restrain the illegal action of the municipality in the expenditure of public moneys.—Bates v. City of Hastings, 145 Mich. 574.

¶ 77a. A resident owner of real and personal estate subject to taxation can maintain a bill to enjoin the issue of railroad-aid bonds under a resolution of the township board, such bonds being unlawful.—Curtenius v. Hoyt, 37 Mich. 588.

¶ 78. A taxpayer who has voluntarily paid his tax for the use proposed to be made of it cannot restrain the payment of the money for the purposes for which it was raised, inasmuch as he has no interest in the money.—Bartlett v. Austin & Western Co., 147 Mich. 58.

¶ 79. To entitle a taxpayer to equitable relief as a taxpayer against a city selling electric supplies to its inhabitants at cost and installing equipment at a specified charge, present or prospective damages must be shown.—Andrews v. City of South Haven, 187 Mich. 294.

§ 22. ——Wrongdoers.

Right of one in default of order for restitution to restrain administrator from recovering value of property, see post ¶ 188.

¶ 80. Chancery will not enjoin the closing of a private alley for one who, in order to obtain a preliminary writ, forcibly invaded defendant's possession and destroyed a fence the latter had erected to close the alley.—De Sale v. Millard, 108 Mich. 581.

§ 23. Acquiescence, laches and estoppel.

See also ante ¶ 5.

Propriety of remedy where acts complained of performed, see ante § 2.

Compensation in damages where injunction refused, see post ¶¶ 500, 501.

General law as to laches, see Equity, IV.

Delay in suing pending other litigation as laches, see Equity § 51.

General law as to estoppel, see Estoppel.

Estoppel to seek injunction against local improvements, see Local Improvements.

Estoppel to seek injunction against expenditure of public funds, see Municipal Corporations, III.

Laches, acquiescence and prescription barring relief against interference with or pollution of waters, see also Waters, II-V.

Eleventh-hour action to avoid injunction against monopoly, see also Combinations ¶ 26.

¶ 81. Complainant sought to enjoin the location of a burying ground near his residence for the reason, among others, that it would destroy his well. Held, to be a strong circumstance against his application that he had voluntarily bought and located his residence in the immediate vicinity of a burying ground which defendants were merely proposing to enlarge without bringing it nearer. And it appearing further that complainant's barnyard was nearer the well and more likely to injure it than the burying ground, held, that an injunction should be denied.—Upjohn v. Richland Tp. Board of Health, 46 Mich. 542.

¶ 82. A trustee of a religious corporation has no equities against his fellow trustees because of their action, unless he does what he can to restrain them speedily.—Cicotte v. Anciaux, 53 Mich. 227.

¶ 83. While a millowner was enlarging his mill and raising the height of his dam, not having acquired any additional rights of flowage, complainants remained silent and allowed their minor sons to labor upon the new dam knowing that it would increase the flowing of their premises. Held, that complainants could not ask that the height of the dam be abated, but that they were entitled to compensation for the damage caused by the additional flowage.—Blake v. Cornwell, 65 Mich. 467.

¶ 84. A millowner is not estopped from enjoining the maintenance of a ditch whereby water is diverted from his premises, where he forbade the digging of the ditch in the first instance, and, when it was continued, served upon those engaged in its construction a copy of an injunction issued in favor of his grantors in a similar controversy a number of years previously, although some sixteen months were occupied in the digging of the ditch, and it had been completed at the time the bill was filed.—Stock v. Township of Jefferson, 114 Mich. 357.

¶ 85. An injunction against an obstruction of an area way will not be denied because delayed until the building constituting the obstruction has been erected, where the complainants notified the defendant of their rights and claims before construction was commenced, and made a tender of the sum required by the contract under which they claimed, to secure the right to have the area way open.—Tolsma v. James E. Scripps Corporation, 153 Mich. 14.

¶ 86. Complainant alleged in his bill for injunction and damages that he had purchased a lot from defendant, owner of a plot, on the assurance that certain building restrictions contained in the sale to him would be imposed on subsequent buyers. The evidence showed that many lots were sold subsequent to complainant's purchase and to the knowledge of complainant without such restrictions, and without any protest by complainant. Later the lots were auctioned off; complainant attended and bought one, and gave no notice to the auction purchasers of the said restrictions. Complainant did not file his bill of injunction until six months after the auction. Held, that his conduct was such as to deprive him of any right to equitable relief.—Stott v. Avery, 156 Mich. 674.

¶ 87. The mere fact that one purchases land upon which an adjoining proprietor habitually trespasses does not put the purchaser under any duty to permit the trespasses to be repeated, and he cannot be prevented by such fact, under any doctrine of laches, from enjoining such trespass.—Offley v. Garlinger, 161 Mich. 351.

¶ 88. That a person interested in establishing the illegality of a dam, but not a party to a suit at law to recover damages for wrongful diversion of water, agrees to share the costs if such action is lost will not estop him from prosecuting a bill to secure a mandatory injunction compelling the removal of the dam.—Feldkamp v. Ernst, 177 Mich. 550.

¶ 89. That a municipality permits a person to proceed with the construction of a building in violation of an ordinance does not estop the city from restraining the completion of the structure, where the owner proceeded with its construction after notice to desist.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 90. Where a landowner refused to inform the defendant what he would accept for additional flowage rights in his land, stating that he would wait until he could determine what his damage actually would be, and the defendant proceeded to raise its dam with a considerable expenditure of money, one acquiring such land with full knowledge of all such facts is estopped from claiming injunctive relief, but must seek compensation by way of damages.—Morrison v. Queen City Elec. Light & Power Co., 181 Mich. 624.

¶ 91. The owner of land bordering on a lake who has had full knowledge for ten years of the increased height of the water, due to a dam of a power company, has stood by and allowed the company to spend a great deal of money in acquiring flowage rights and making other large investments, and has recovered and been paid damages for overflow for a series of years, is not entitled to an injunction to compel the lowering of the dam to its former height, but he will be relegated to his remedy for damages in full satisfaction for the damage, past and prospective.—Holcomb v. Alpena Power Co., 198 Mich. 165.

¶ 92. The purchaser of a business of selling and exchanging flour and feed, under a contract providing against the seller's engaging in a like business, was not entitled after a delay of nearly 3 years to restrain the carrying on of a grocery business in which flour was sold with the knowledge and consent of, or at least without objection from, such purchaser.—Buck v. Coward, 122 Mich. 530.

§ 24. Offer of equity or performance of duty by complainant.

General law as to doing or offering to do equity, see Equity § 4.

¶ 93. An insurance company in seeking by bill in equity to enjoin suit on a policy, on the ground that the same was obtained by fraud, must tender back the premiums paid.—Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114.

¶ 94. One cannot obtain an injunction to restrain an officer from levying on the complainant's property an execution against a third person, until he has notified the officer of his claim and given him an opportunity to abandon the levy.—Hinkle v. Baldwin, 93 Mich. 422.

II. PARTICULAR OCCASIONS; WHO AND WHAT ENJOINABLE.

A. IN GENERAL; BREACH OF CONTRACT, TRUST OR ASSUMED DUTY.

Restraining fraudulent execution of trusts, see also Trusts.

Bill to enjoin foreclosure of chattel mortgage, see also Chattel Mortgages § 116.

Jurisdiction on ground of multiplicity to restrain prosecution of numerous actions pending appeal which will be decisive of question involved, see Equity ¶ 137.

Against enforcement of fraudulent contract, see also Fraud ¶ 751.

§ 25. Executory contracts in general.

Injunction to prevent recording of land contract, see ante ¶ 52.

Restraining conveyance, transfer, or incumbrance of property in breach of contract, see post § 63.

Parties to suit to prevent recording of contract, see post ¶ 361.

Assignee of steam heating contract as party to bill to enjoin its breach, see post ¶ 344.

Demurrer to bill to restrain breach of contract and specifically enforce it, see post ¶ 391.

Validity of preliminary injunction enforcing contract by railroad to carry lumber, see post ¶¶ 433, 436.

Retention of suit to dispose of entire controversy, see post § 143.

Actions for breach of contract generally, see Contracts, X.

¶ 95. Injunction will not lie to enforce the carrying out of a mere executory contract for the breach of which damages are recoverable at law.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 96. It is not a ground of equitable jurisdiction that, in case of a violation of a contract, the damages are uncertain.—Attorney-General ex rel. Marr v. Board of Education of Detroit, 133 Mich. 681.

¶ 97. A bill by a book publishing company to enjoin a board of education from changing the textbooks of complainant which were in use under contract in the schools, being in effect an attempt to enforce such contract in equity was not sustained, as its remedy at law was complete if it had a valid contract.—Attorney General ex rel. Marr v. Board of Education of Detroit, 133 Mich. 681.

¶ 98. A court of equity has jurisdiction to restrain work under a paving contract with a city where, through the fraudulent acts of the city officers, the contract has been departed from in fraud of the city and to the benefit of the contractors.—Central Bitulithic Paving Co. v. Manistee Circuit Judge, 132 Mich. 126.

¶ 99. Under a contract for the purchase of one run of first-class power and two runs of second-class power as developed by a canal, the first-class power having priority, and the second-class power being available only when there was more water than necessary to run all the first-class power, the use of a wheel requiring more than one run of first-class power will be enjoined where it is shown that for the greater part of the year none of the second-class power is available, since the purchaser's right is governed by the contract.—Powers v. Perkins, 132 Mich. 33.

¶ 100. Where a mortgage contained a stipulation respecting the sale of only a certain kind of beer on the mortgaged premises equity will not interfere to enjoin the selling of another beer for the reason that the remedy at law for damages is adequate.—Hardy v. Allegan Circuit Judge, 147 Mich. 594.

¶ 101. A court of chancery will not interfere by an injunction which must necessarily operate as a decree for specific performance, to enforce a contract to sell a particular brand of beer, where the only purpose is to insure a brewer the profits arising from such sale, since to do so would be for the court to undertake the supervising of private contracts between parties engaged in the liquor traffic (a business by sufferance), extending over a term of years.—Voight Brewery Co. v. Holtz, 168 Mich. 352.

§ 26. Performance secured by mortgage.

¶ 102. A stipulation for sale of one product exclusively not in its nature enforceable by injunction is not made enforceable by the fact that its performance is secured among other promises by mortgage.—Hardy v. Allegan Circuit Judge, 147 Mich. 594.

§ 27. Contracts in restraint of trade or competition.

Injunction to prevent interference with business, see post § 89.

Weight and sufficiency of evidence in suit to enjoin carrying on of ice business, see post § 112.

Decree in suit to enjoin partners from engaging in business contrary to agreement, see post ¶ 486.

¶ 103. Violation of restrictive covenants not to engage in competitive business accompanying a sale of good-will may be restrained by injunction.—C. H. Barrett Co. v. Ainsworth, 156 Mich. 351.

¶ 104. A corporation participating with its stockholder in the breach of an agreement made by the latter not to engage in a certain business may be restrained, notwithstanding it might be doubted whether it could be restrained from the act complained of, if nothing more than their relationship as stockholder and corporation was shown.—Beal v. Chase, 31 Mich. 490.

¶ 105. Injunction may be allowed to restrain defendants from carrying on a particular business contrary to agreement contained in sale of the business of plaintiff as their successors.—Thompson v. Andrus, 73 Mich. 551.

¶ 106. Defendant's action in opening a hardware store ostensibly in her own name, but really managed by her codefendants of the same surname who had sold out and agreed with complainants not to engage in business, was a fraud upon complainant's rights and should be enjoined.—Thompson v. Andrus, 73 Mich. 551.

¶ 107. One who has made a valid agreement to refrain from carrying on a particular business in a certain place, either as principal, agent, or employee, will not be permitted to build up and carry on such a business, in his own interest, under the guise of doing business for his wife.—Up River Ice Co. v. Denler, 114 Mich. 296.

¶ 108. Where a physician agrees in writing to sell his practice to another and that he will not engage in the practice in the stated locality after a fixed date, he will be restrained from continuing such practice and cannot defend by showing that under a verbal agreement, void under the statute of frauds, the purchaser agreed to rent one of the physician's houses, and that if he continued at the city in question he should purchase the house and in such event the amount paid under the agreement should be applied on the purchase price.—Lemon v. Randall, 124 Mich. 687.

¶ 109. A breach by an employee of a contract not to enter the same business for himself within a certain period will not be enjoined unless the services rendered are of a special, unusual, and extraordinary or intellectual character, the loss of which cannot be reasonably or adequately compensated by damages in an action at law, or unless the contract is ancillary or incidental to another contract, by which the purchaser acquires a business, a profession, or a stock of goods together with the good-will attending them.—Osius v. Hinchman, 150 Mich. 603.

¶ 110. In a contract for employment between complainant, a dental company, and defendant, the latter agreed not to engage in the practice of dentistry within five years after the termination of his employment, in any city where complainant had an office. The bill was filed to enjoin defendant from carrying out his expressed intention of opening an office for such practice in one of said cities; it alleged that defendant was threatening to go into business for himself, and to use and disclose certain formulæ and trade secrets which he had learned from complainant, and the use of which would constitute an irreparable injury to complainant. Upon the hearing, complainant withdrew the ques-

tion of formulæ and trade secrets entirely from the consideration of the court. Held, that since nothing is left as a foundation for the bill except the threatened breach of the agreement not to engage in practice, and since there are no allegations that complainant will suffer irreparable loss on account of such breach, and no showing that complainant's damages are not easily ascertainable, nor that his remedy at law is inadequate, the bill does not state a case for equitable relief.—Osius v. Hinchman, 150 Mich. 603.

¶ 111. Where a business was sold under an agreement that the seller would not engage in the same business and the seller's wife who did not sign the contract enters into such business, a permanent injunction restraining her and her husband from entering into that business is proper, when it appears that she knew of the contract, that the money and credit used by her is that of the husband, that he manages and controls the business as fully as before the sale and that they are attempting to evade the contract with knowledge of its effect.—Weickgenant v. Eccles, 173 Mich. 695.

¶ 112. An agreement "never to tow vessels in competition with" complainants is too uncertain and indefinite to be enforced by injunction.—Caswell v. Gibbs, 33 Mich. 331.

§ 28. ——Agreements not to use trade name or trade mark.

Modification of decree restraining use of trade name, see post ¶ 515.

General law as to trade names and trade marks, see Trade Marks.

Enjoining use of trade marks and trade names where no breach of contract involved, see Trade Marks.

¶ 113. Where the proprietor of a business known as "Little Jake" sells the same others who associate with him subsequently in establishing a rival business under the name "Little Jake" may be restrained to the same extent as the vendor himself.—Grow v. Seligman, 47 Mich. 607.

¶ 114. Where a person had established a business in the use of the name "Little Jake," and afterwards sold the business and stipulated not to make use of it in a rival business to that of his assignee, but that the latter might have the benefit of its use, held, that there was no reason in public policy why the vendor should not be enjoined from violating his agreement; there is no necessary fraud upon the public in such a contract, and no necessary deception.—Grow v. Seligman, 47 Mich. 607.

¶ 115. When an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name or trade mark, the courts will enjoin the continued violation of such agreement.—Williams v. Farrand, 88 Mich. 473.

¶ 116. A bill states a cause for equitable relief and if the charges therein are true complainant is entitled to the relief prayed where it is averred that defendants deliberately violated contract obligations, that a contract not to use a certain name in a business was ratified by a corporation formed by defendants but that a new corporation was formed for the purpose of avoiding it, and that the name is being used and the prayer is for a temporary injunction against defendants from further proceeding with the organization of the new corporation and from using such name in the business and for specific performance of the contract.—George v. Rollins, 176 Mich. 144.

§ 29. Disclosure or use of trade secrets.

¶ 117. One who is given employment by a manufacturer whose processes of manufacture, methods, and machinery are kept secret from the public, upon the agreement, express or implied, that he will not use the information imparted to him in the course of his employment for his own benefit or communicate it to strangers, will be enjoined from breaking his agreement.—O. & W. Thum Co. v. Tloczynski, 114 Mich. 149.

¶ 118. On authority of O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, a decree enjoining the disclosure of trade secrets and the use of them to the defendant's profit may be made on proper evidence that defendant acquired knowledge of them by reason of employment by plaintiff.—Sanitas Nut Food Co. v. Cemer, 134 Mich. 370.

¶ 119. Complainant was engaged in retailing tea. He employed drivers who took orders from customers and delivered the tea on such orders, retaining a percentage of the money collected as compensation. Each driver was required to take the name and address of each customer on the order blanks. Defendant worked for complainant as a driver for about three years. He then made an arrangement to go to work for a third party in a similar enterprise, and in the last week in complainant's employ spoke to his customers and secured the promise of many of them to buy of his new employer. He then erased the names of the customers from the blanks and refused to give a list of them to complainant. Held, that while defendant might be enjoined from using the lists or copies of them, he could not be restrained from soliciting such of the customers as he might remember.—Grand Union Tea Co. v. Dodds, 164 Mich. 50.

¶ 120. Complainant was engaged in retailing tea. He employed drivers who took orders from customers and delivered the tea on such orders, receiving a percentage as compensation. Each driver was required to take the name and address of each customer in the order blanks. Defendant worked for complainant as a driver for about three years. He then made an arrangement to go to work for a third

party in a similar enterprise, and in the last week in complainant's employ spoke to his customers and secured the promise of many of them to buy of his new employer. He then erased the names of the customers from the blanks and refused to give a list of them to complainant. Held, complainant was entitled to damages and to an injunction compelling defendant to supply it with lists of the customers, and forbidding him using the lists or copies of them.—Grand Union Tea Co. v. Dodds, 164 Mich. 50.

¶ 121. Disloyalty of former employees of a corporation in taking lists of customers and using them with special information obtained in their own similar business held not ground for injunctive relief.—Dayton v. Imperial Sales & Parts Co., 195 Mich. 397.

§ 30. Violation of leases.

See also ante ¶ 100.

Injustice to defendant as ground for denying injunction, see ante § 19.

Enjoining operation of street railway in violation of lease, see post § 82.

Evidence in suit to enjoin alterations in leased building, see post ¶ 396.

Continuance of temporary injunction to restrain trespass by grantee of lessor, see post ¶ 476.

Remedies in general for breach of lease contract, see Landlord and Tenant.

Enjoining sale of intoxicating liquors on leased premises, see Comp. L. 1915, § 7050.

Provisions restraining proceedings at law against corporations, see Jud. Act, chap. XLI, § 24; Comp. L. 1915, § 13602.

¶ 122. Injunction may be allowed to restrain sublessee permitted to use the premises for a music store under a restriction in the lease from subletting the premises for a misfit clothing business in violation of lease.—Wertheimer v. Wayne Circuit Judge, 88 Mich. 56.

¶ 123. A lease contained a provision that no intoxicating liquors should be sold on the premises. Complainant consented to the sale of liquors by an assignee of the lessee with the provision that the privilege of selling liquor should not be extended to the heirs or assigns of said assignee or to any other person. Defendant bought the assignee's interest in the lease at a judgment sale. Complainant refused to permit defendant to continue the sale of liquors. Held, complainant was entitled to a permanent injunction forbidding the sale of liquors.—Hammond v. Hibbler, 168 Mich. 66. (Ostrander, C. J., Steere and Stone, JJ., dissenting.)

¶ 124. Where, under a lease providing that defendant saloonkeeper shall buy his beer exclusively from complainant brewer, the former finds his business unprofitable and with the consent and upon the suggestion of the latter the provision of the lease is orally modified so as to permit defendant lessee to sell beer purchased from brewers other than complainant, and under said oral agreement defendant in fact sells only a small amount of said other beer, a bill in equity will not lie to enjoin defendant from violating said provision of the lease but he will be left to his remedies at law.—Voight Brewery Co. v. Holtz, 168 Mich. 352.

¶ 125. Where a landlord has threatened to destroy the leased building, eject the tenant, and terminate the tenancy, this is so serious in its nature, and so difficult of ascertaining the resulting damages and adequately making reparation therefor, as to come within the purview of irreparable injury and confer upon a court of chancery jurisdiction to enjoin the same.—Minnis v. Newbro-Gallogly Co., 174 Mich. 635.

¶ 126. If according to the conditions of a lease, a lessor has an absolute right to prohibit changes in the exterior walls of a demised building, injunctive relief will be granted only on the ground of irreparable injury to the freehold through changes impairing the structural safety of the building; for anything beyond that the remedy at law is adequate.—B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

§ 31. Breach of conditions and restrictions in deeds.

Injunction to prevent cutting and removal of timber by vendee, see post § 76.

Injunction to enforce conditions in deeds of lots in plot as to ways and streets, see post §§ 78, 81.

Enjoining forfeiture for breach of conditions and restrictions, see post § 98.

Preliminary injunction, see post ¶ 408.

Proof and variance in suit to enjoin breach of building restrictions, see post § 110.

Decree in suit to enjoin violation of restrictions in deed, see post ¶ 483.

Violation of building restrictions, see Buildings §§ 20, 25.

¶ 127. A grantee will be enjoined from violating a condition in his deed against erecting a saloon on the land conveyed, where the grantor bought such land to protect other of his property from depreciation in value by the proximity of a saloon, and although before conveying to defendant he had sold adjoining property without restriction and had leased other premises in the vicinity for saloon purposes which use had ceased.—Reilly v. Otto, 108 Mich. 330.

¶ 128. A valid building restriction is binding upon a city as well as an individual, and before it can use a lot charged with such restriction for a purpose prohibited by the restriction it must obtain by purchase or condemnation the title of all owners of any interest therein, and when it has not done so, equity may properly intervene to preserve the status quo until such interests are ac-

quired.—Allen v. City of Detroit, 167 Mich. 464; Frumveller v. Post, Id.

§ 32. Dissipation of estate by personal representative.

Enjoining acts constituting waste, see also post § 73, and Waste.

¶ 129. Equity has jurisdiction in a proper case to restrain an administrator from unlawfully dissipating an estate.—Clifton v. Keeler, 158 Mich. 615.

B. ACTIONS AND PROCEEDINGS IN COURT.

§ 33. Restraining proceedings at law in general.

Injunction as ancillary remedy, see ante § 4.
Injunctive relief pending litigation, see ante §§ 5, 6, 7.
Actions on contract of agency, see post § 42.
Actions on insurance policy, see post § 42.
Actions on negotiable instruments, see post § 43.
Actions on bonds, see post § 43.
Actions on covenants, see post § 44.
Garnishment and attachment proceedings, see post § 45.
Actions in ejectment, see post § 46.
Foreclosure and deficiency proceedings, see post § 49.
Replevin suits, see post § 52.
Parties defendant to suits to restrain legal proceedings, see post § 104.
Pleading in suits to restrain proceedings at law, see post § 107.
Notice of application for injunction, see post § 120.
Necessity of bond or security, see post § 124.
Necessity of bond upon issuance of final injunction, see post § 147.
Operation and effect of decree staying proceedings at law, see post § 150.
Injunction to restrain collection of costs by education and to permit offset, see Costs ¶ 598.
Injunction against illegal levy on partner's share in firm, see also Executions ¶ 295.
Injunctive or other relief against judgments, see Judgments, VI.
Right to restrain actions at law pending foreclosure, see also Foreclosure ¶ 756.
Provisions as to enjoining proceedings at law, see Jud. Act, chap. XIX, §§ 8-21; Comp. L. 1915, §§ 12662-12675.

¶ 130. The enforcement of a legal right will not be enjoined unless a case is made out showing a clear equity superior to that of the legal owner, and such as in a court of equity would control it.—Boinay v. Coats, 17 Mich. 411.

¶ 131. It is not within the province of equity to intervene and enjoin the prosecution in a court of law, having jurisdiction of the parties and the subject-matter, of a cause of action given to plaintiff under the well-settled rules of law, because in the particular case a hardship will be done if the cause of action is enforced.—Wierengo v. Mason, 115 Mich. 646.

¶ 132. Where the rights of the parties depend upon a question of law merely, a bill cannot be sustained to restrain defendant from suing at law.—Rogers v. Schram, 161 Mich. 278.

¶ 133. One who is himself in default of the condition of a decree ordering the reassignment of an interest in an estate, in that he neglected to pay a sum in restitution, cannot restrain an action by the administrator to recover the value of the property on allegations that the decree was self-effectuating and that eventually he is entitled to the estate because the debts are merely nominal, where it appears that the other party makes adverse claim to the estate; since it is the duty of the administrator to get in the estate and distribute it in regular course.—Crane v. Beedle, 95 Mich. 524.

¶ 134. A sale by a guardian of his ward's share in lands whereof the ward was a coheir does not blend the proceeds with the personalty of the ancestor's estate in another's hands and require an accounting, even though such estate has not been settled; and an injunction to restrain an action at law by the coheir for such proceeds was denied.—Cole v. McFall, 48 Mich. 227.

§ 34. ——Grounds and defenses available at law.

¶ 135. The prosecution of an action at law will not be enjoined on the ground that as the plaintiff has assigned his interest to a third person, the defendant may be liable to the assignee, where such action was begun under an agreement between the assignor and the assignee as to the use of the former's name.—Michigan Sugar Co. v. Moffett, 183 Mich. 589.

¶ 136. A bill will not lie in equity to require an accounting of a contract, to restrain the defendant from proceeding with a replevin suit begun by the complainant, to declare such action to have been settled by the parties, and to cancel the replevin bond; since there was an adequate legal remedy for determining such questions in the replevin suit on an issue suggesting the settlement framed under § 10402 et seq., Comp. L. 1897, § 13116 et seq., How. St., 2nd Ed.—C. J. Huebel Co. v. MacKinnon, 186 Mich. 617.

¶ 137. A bill in equity will not lie to enjoin actions at law on the ground merely that the defense relied on is an equitable estoppel; the defense will be as perfect at law.—Barnard v. German-American Seminary, 49 Mich. 444.

¶ 138. After a vendor's death the vendee paid the price of the goods bought to an agent of the vendor, believing him to be a part-

ner of the vendor, and the money was paid over by the agent to the vendor's widow. The vendee being sued in trover by the vendor's special administrator, filed a bill to enjoin the suit and for a disclosure of the moneys received by defendant as special administrator, praying that if any liability should be established in the trover suit it should be decreed to be paid out of moneys, etc., in the hands of such agent and widow of deceased, but not averring that the money had come into the special administrator's hands. Held, that as such facts were available as a defense in the trover suit, the bill would not lie.—Pardridge v. Brennan, 64 Mich. 575.

¶ 139. A bill to restrain the prosecution of an action at law to recover a tax assessed against certain bank-stock cannot be maintained by the bank on the ground that such stock was transferred by the owner before the tax became a lien; the defense is available at law.—St. Johns Nat. Bank v. Township of Bingham, 113 Mich. 203.

¶ 140. A court of equity may enjoin an action at law on grounds which may be urged as a defense to such an action, and may therefore enjoin an action begun on a life insurance policy and cancel the policy on the ground that it had been obtained by means of false statements, and further that the insured had committed suicide.—Fidelity Mut. Life Ins. Co. v. Blain, 144 Mich. 218.

¶ 141. Equity will not enjoin an action at law in which a money judgment only is sought, where adequate relief may be granted the defendant in such action.—Michigan Sugar Co. v. Moffett, 183 Mich. 589.

¶ 142. Injunction will not issue to restrain condemnation proceedings to open a boulevard across a railroad company's tracks, where complainant has a complete remedy by way of defense in the condemnation proceedings.—Detroit, G. H. & M. R. v. Detroit, 91 Mich. 444.

§ 35. To prevent multiplicity of suits.

See also ante § 16.

As ground for enjoining ejectment suits, see post § 46.

¶ 143. The avoidance of many suits may in certain cases justify the filing of a bill of peace.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

¶ 144. A bill of peace, enjoining litigation at law, lies only where the plaintiff has already satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render the direction of a court of equity indispensable to embrace all the parties concerned, and to save multiplicity of suits.—Rogers v. Schram, 161 Mich. 278.

¶ 145. Injunction may sometimes be sought to restrain a suit at law where the latter only involves a portion of the controversy, or is likely to leave an apparent record title clouding the legal title in issue.—Shaw v. Chambers, 48 Mich. 355.

¶ 146. An allegation that the defendants have fraudulently confederated to harass the plaintiff with suits will not uphold an injunction under a bill of peace where the defendants claim adversely to each other.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

¶ 147. An injunction to restain multiplicity of suits will not lie where a court of law is competent to give relief by consolidating them.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

¶ 148. The prosecution of an action at law will not be enjoined on the ground that the contract in issue is similar to many others on which the defendant is liable, and on which it may be sued by hundreds of persons not parties to the action.—Michigan Sugar Co. v. Moffett, 183 Mich. 589.

§ 36. Action brought without leave of court.

¶ 149. In those cases where leave of the equity court to bring suit at law is required such leave is seldom jurisdictional, and when suit is brought without the order granting leave it is usually no more than an irregularity, and the proceedings will not be restrained where nothing substantial can be gained.—Culver v. Detroit Superior Court Judge, 57 Mich. 25.

§ 37. Proceedings of other courts.

Enjoining proceedings pending in other county, see post § 39.

Jurisdiction and venue, see post § 100.

Jurisdiction and powers of courts generally, see Courts, V.

Extent of jurisdiction of circuit in exercise of supervisory powers, see Courts § 55.

Bringing injunction as contemptuous interference with another court's jurisdiction, see Contempt § 4.

¶ 150. One court cannot enjoin another.—People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31.

¶ 151. One court cannot interfere by injunction to restrain proceedings just commenced and already pending in another court of co-ordinate jurisdiction.—E. T. Barnum Wire & Iron Works v. Speed, 59 Mich. 272.

¶ 152. A court has no jurisdiction to restrain competent proceedings upon a judgment obtained in another court of co-ordinate jurisdiction.—Maclean v. Speed, 52 Mich. 257.

§ 38. ——Courts of sister state or Federal courts.

Jurisdiction to relieve by cancellation suit notwithstanding inability to restrain proceedings pending in other state for enforcement of judgment, see Courts ¶ 230.

¶ 153. The court of chancery will not restrain a suit or proceeding previously commenced in a court of a sister state or in any of the United States courts.—Carroll v. Farmers' & Mechanics' Bank, H. 197.

¶ 154. Chancery will not restrain a suit or proceeding previously begun in a court of a sister state or in a federal court.—Carroll v. Farmers' & Mechanics' Bank, H. 197.

¶ 155. A state court will not issue an injunction in a case against a receiver appointed by a federal court, in which the enforcement of the injunction would depend upon the judgment of the federal court appointing the receiver.—Rogers v. Chippewa Circuit Judge, 136 Mich. 79.

§ 39. Proceedings pending in other counties.

Proper county for injunction suits, see Venue, I.

¶ 156. Authority to enjoin a pending action at law is not confined to the chancery court for the county in which the action at law is pending as the injunction restrains the party and not the court, and any court has jurisdiction over the party before it.—Mactavish v. Kent Circuit Judge, 122 Mich. 242.

¶ 157. The circuit court of one county has jurisdiction to restrain an action at law in another county on a bill filed January 1, 1916, as the Judicature Act, Pub. Acts 1915, No. 314, repealed so much of Pub. Acts 1915, No. 283, concerning jurisdiction in injunction cases as was inconsistent therewith.—Long Point Development Ass'n v. McIntosh, 193 Mich. 567.

§ 40. Restraining assertion of defense.

¶ 158. One will not be restrained from relying on a defense simply on the ground that those who could have rebutted it are dead or disqualified from testifying.—Dubois v. Campau, 37 Mich. 248.

§ 41. Enjoining intervention or interference in proceedings.

¶ 159. John Parr in his will left the residue of his estate to his wife, Mary Parr, provided she did not die first. John Parr and his wife were both killed simultaneously in an accident. The probate judge ordered defendant, administrator John Parr, to pay over the residue to the administrator of Mary Parr. From this order complainant, an heir of John Parr, appealed. Complainant brought this bill to restrain the defendant from expending funds of the estate in interfering with such appeal. Held, the bill should be denied, since the defendant had the right to have the disposition of the estate adjudicated in order to see to the proper execution of his trust.—Clifton v. Keeler, 158 Mich. 615.

§ 42. Actions on contracts and debts.

¶ 160. Injunction will lie to restrain an action on a contract of agency delivered in violation of an agreement to hold it in escrow until certain changes in it had been made.—Wyckoff v. Victor Sewing Mach. Co., 43 Mich. 309.

¶ 161. Defendant, the beneficiary, conspired with one Burnham to get insurance on the life of defendant's father. Burnham knew the father had been rejected by other companies, and was uninsurable, but told the agent of complainant company he was a good risk. Held, that a bill would lie to enjoin defendant from suing on the policy, since he would not be allowed to profit by the fraud of his coconspirator.—Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114.

¶ 162. A pending action at law upon an insurance policy that had been reinstated upon a fraudulent certification of the good health of the insured after it had been allowed to lapse, may be enjoined, and cancellation of the policy decreed.—John Hancock Mut. Life Ins. Co. v. Dick, 114 Mich. 337.

¶ 163. A bill in equity charging that the complainant made a parol agreement to sell to the defendant about 13,000 acres of timber land at $3.50 per acre, that the complainant had not estimated the timber and was ignorant of the amount that the defendant's agent represented to the complainant, that he had estimated the timber and that the complainant could not lose and might possibly gain by selling the land upon the basis of $3.50 for every 5,000 feet of timber, that upon these representations the complainant entered into a contract and deeded the land to the defendant, that it turned out that the value of the timber was about $12,000 instead of $45,000 based upon the defendant's value of the land, is sufficient to warrant cancellation of the deed and an injunction against an action at law to recover a part of the purchase price paid.—Noble v. Grandin, 125 Mich. 383.

§ 43. ——On bonds, bills and notes.

Enjoining transfer of negotiable instruments, see post § 68.

Joint maker as party to suit to enjoin enforcement of judgment on note, see post ¶ 356.

Presumptions in suit to enjoin action on bond, see post ¶ 395.

¶ 164. An injunction may issue to enjoin the collection of detached bond-coupons in the hands of one not an innocent holder.—Chicago & G. T. R. Co. v. Turner, 79 Mich. 133.

¶ 165. Defendant, a creditor of a lumber company in the hands of a receiver, agreed to sell for fifty cents on the dollar, its claims

to complainant. Complainant sent a certified check to defendant for the amount, with a letter stating that same was to be paid defendant only if complainant succeeded in buying the assets of said lumber company at the sale and the title thereto was transferred to him and the transaction confirmed by the court. Complainant bought at the sale but the sale was set aside on the ground that two members of the creditors' committee were officers of defendant. Complainant did not receive said assets or pay anything therefor. Held, the conditions attached to the payment of the check not being fulfilled, complainant was entitled to an order enjoining its collection.—Preston v. National Bank of Ionia, 169 Mich. 571.

¶ 166. The enforcement of securities representing no actual debt may be enjoined.—Teed v. Marvin, 41 Mich. 216.

¶ 167. Sureties on a replevin bond can enjoin the prosecution of a suit thereon where their principal without their knowledge has stipulated that defendant may take judgment.—Wright v. Hake, 38 Mich. 525.

¶ 168. Equity will restrain the collection, by one who is not a bona fide holder, of notes against a surety whose signature was obtained by fraud.—Henriques v. Ypsilanti Savings Bank, 84 Mich. 168.

¶ 169. A. advanced money to his son B., who was to support him and his wife for life for the use of it. B. died, and A. of his own motion went to live with a grandson, C., who took care of him at his own request and not at that of B.'s executors or for their benefit. But C. procured from them notes and a mortgage which he claims were given to pay him for keeping the old people. A. had no personal claim against the executors and never proved his claim against the estate or assigned it to C., and it was neither paid nor suspended. Held, that the securities did not represent a debt and should be given up and cancelled, and a perpetual injunction was granted against their enforcement.—Teed v. Marvin, 41 Mich. 216.

¶ 170. A. sold his interest in a partnership to his partner, B., and for a balance of payment took B.'s notes to C., who surrendered A.'s notes to the same amount. Before the maturity of the notes B. discovered that the representations on which he bought the interest were fraudulent, and notified C. that he should not pay the notes. Held, that C., not being cognizant of the fraud, could not be restrained from collecting the notes.—Outhwite v. Porter, 13 Mich. 533.

§ 44. ——On covenants.

¶ 171. The prosecution of an action at law against a mortgagor's vendor, upon a covenant of title, was restrained, and the deed reformed where such vendor, being the owner of only the N. W. ¼ of the S. W. ¼ and the S. E. ¼ of the S. W. ¼ of a section, mistakenly described the premises in his deed as the N. W. ¼ and the S. E. ¼ of the S. W. ¼ of the section, and where the vendee in giving said mortgage followed the description in the deed with the addition, "containing 80 acres more or less" and subsequently, to save the expense of foreclosure, gave a deed to the mortgagee likewise containing the same description as in the original deed, but where the original parties understood that only 80 acres were involved in the transaction and the mortgagee should have known from her mortgage that only 80 acres were involved.—Davis v. Benedict, 122 Mich. 657.

¶ 172. The mere fact that the covenantee, at the time he took the deed containing covenants sued on, knew of the insufficiency or invalidity of the grantors' title and did not disclose it to them, or that one of the grantors has become insolvent since the execution of the deed, thus rendering complainant liable to pay the entire damages for the breach, affords no reason to restrain prosecution of an action on the covenants.—Sparrow v. Smith, 63 Mich. 209.

§ 45. Garnishment and attachment proceedings.

Injunction to protect lien of attachment, see ante ¶ 15.

Validity of preliminary injunction staying garnishment, see post ¶ 434.

Pleading in suits to restrain attachment, see post § 107.

¶ 173. Where, after a receiver has been appointed in Indiana for a benefit association organized there, garnishment proceedings are instituted in this state prior to an ancillary receivership here, in aid of suits against the association upon matured certificates issued to Michigan members, injunction to restrain such proceedings will be refused.—Baldwin v. Wayne Circuit Judge, 101 Mich. 432.

¶ 174. An order of the circuit court in chancery permitting the complainant in a suit pending in that court to begin an action at law for the same cause of action, and to garnish in aid thereof, but restraining all proceedings in the law court after service of process, cannot be sustained, as it ties up defendant's funds without giving him the rights which the garnishment statutes confer.—Foster v. Kent Circuit Judge, 116 Mich. 285.

§ 46. Ejectment suits.

Necessity that complainant have clear right or title, see ante §§ 11, 12.

Multiplicity of suits as ground for injunction, see ante §§ 16, 35.

Refusal of relief where remedy at law adequate, see ante ¶ 24.

Sufficiency of answer in suit to enjoin agreement and to quiet title, see post ¶ 390.

Parties defendant to suit to enjoin ejectment, see post § 104.

¶ 175. Ejectment suits for a part of the premises may be enjoined where complainant has a right to file a bill to quiet title to the whole, thus saving multiplicity of suits.—Woods v. Monroe, 17 Mich. 238.

¶ 176. A railroad company contracted for certain lands, and under the conditions of the contract proceeded to lay its track across them, receiving at length a deed from the only owner of whose rights it had notice. Meanwhile the same land had been set off by deed of partition to a party who held some unrecorded claim to an undivided interest in the premises, and this party afterwards quitclaimed the land by a deed referring to the company's occupancy. Held, that an injunction would lie to restrain proceedings in ejectment brought against the company by the holder of the quitclaim.—Detroit & M. R. Co. v. Brown, 37 Mich. 533.

¶ 177. Where parties claim conflicting descriptions of land under a common source of title, one who had a contract right and had entered into possession before the other purchased, but whose deed was subsequent to the latter's, may maintain a bill to have ejectment enjoined.—Seager v. Cooley, 44 Mich. 14.

¶ 178. One who claims the legal title to land under a will has no reason for resorting to equity to restrain an action of ejectment against him, except when the common law is inadequate to give full relief.—Shaw v. Chambers, 48 Mich. 355.

¶ 179. A man left all his property to his wife, providing, however, that if she should have any children who should reach majority it should be equally divided between her and the children, and that it should be converted into money and securities. She had a posthumous child which died an infant, and she died not long afterwards, leaving the property to a sister, who sold it. But a brother of the original testator claimed it under the statute of descents and brought ejectment against the purchaser who sought to enjoin his action. Held, that the title was a legal question and the bill should be dismissed.—Shaw v. Chambers, 48 Mich. 355.

¶ 180. An equitable owner of lands, in actual possession and claiming title in fee-simple, can maintain a bill to enjoin an ejectment brought against him by persons claiming under a succession of conveyances given in bad faith and for the purpose of defeating creditors; and in the same bill he can also ask for a release of the apparent title held by such claimants.—McKibbon v. Bristol, 50 Mich. 319.

¶ 181. An attorney's assertion of his client's claim of dower in certain lots in an amount greatly in excess of that which the owners believe to be justifiable, and his threat that, if the amount is not paid he will institute additional suits in ejectment, which would involve costs to an extent rendering it more expensive for the owners to litigate than to accede to his demands, is not such an indication of fraud as will justify a court of equity in enjoining the prosecution of the suits at law.—Douglass v. Boardman, 113 Mich. 618.

¶ 182. A defendant who has the legal title to the premises must succeed in an ejectment suit, unless it can be shown that the premises were the homestead of the grantor, and inasmuch as legal title and not equitable title is involved he cannot maintain a bill to restrain the ejectment suit.—Lott v. Lott, 146 Mich. 580.

¶ 183. Complainant, a contractual vendee of land, brought a bill to enjoin an ejectment suit and for specific performance. Complainant was in default in payments, and defendant had terminated the contract by notice. Held, that the bill should be dismissed.—Lafrance v. Griffin, 160 Mich. 236.

¶ 184. Where no equitable title is claimed by complainant, and only legal titles are involved, equity will not restrain an action of ejectment.—Rogers v. Schram, 161 Mich. 278.

¶ 185. Complainant alleged in his bill that as mortgagee he obtained title to premises through foreclosure; that two of the three children of the deceased mortgagor denied the mortgagor's right to give the mortgage, and were suing complainant in ejectment; and that the third child threatened suit. Complainant did not show he had established his title at law. Held, the bill would not lie on the ground of preventing multiplicity of suits.—Rogers v. Schram, 161 Mich. 278.

¶ 186. A bill brought against the children of a mortgagor to enjoin their ejectment suit will not lie where the complainant claims title in fee through the mortgagor, by foreclosure, and then adopts an inconsistent position by claiming an equitable lien upon the assets of the mortgagor's estate to satisfy a breach of warranty of title given by the mortgagor.—Rogers v. Schram, 161 Mich. 278.

¶ 187. A grantee under testator's daughter is without equity to support an injunction against the prosecution of ejectment by the daughter's children, claiming under the will as remaindermen in trust after the daughter's life estate, where that trust was void, so that the land vested in the daughter as heir rather than as devisee, and where she and they, as her heirs, are bound by her assent to and acquiescence in a partition decree of the probate court conforming to the terms of her father's void will, which apportioned to her a life estate only with remainder to her children none of whom were in existence at that time; since in neither view could they in ejectment attack the probate partition because they were not parties.—James E.

Scripps Corporation v. Parkinson, 186 Mich. 663.

¶ 188. Where the complainant has resided on land for more than five years under a state homestead land deed, the issuance of which was unsuccessfully contested by defendant who claimed through mesne conveyances, the latter will be enjoined from prosecuting an action of ejectment to recover such land.—Olson v. Williams, 185 Mich. 294.

§ 47. Trespass actions.

¶ 189. Injunction against the prosecution of an action for trespass for removing timber under a partly executed parol contract will be denied, where the circumstances are such that in equity the logger might have obtained specific performance of his contract to remove the logs.—Oconto Co. v. Lundquist, 119 Mich. 264.

§ 48. Replevin suits.

See also ante ¶ 136.

Enjoining suit on replevin bond, see ante ¶ 167.

¶ 190. Execution of a writ of replevin to retake certain boilers sold to her husband, will not be enjoined at the instance of a wife on the ground that the buildings in which the boilers were placed were owned by her and her husband jointly in entirety, where such boilers did not become fixtures.—Schellenberg v. Detroit Heating & Lighting Co., 130 Mich. 439.

§ 49. ——Foreclosure and deficiency proceedings.

Bill in restraint of foreclosure by purchaser of mortgaged property to test lien, see Chattel Mortgages ¶ 332.

¶ 191. A mortgagee turned over to his wife a note and mortgage in satisfaction of claims held by her against him; and afterwards formally assigned the same, without delivery, to a third person. The mortgagor made payment to the wife, and took up the mortgage. Held, that he might have an injunction restraining the subsequent assignee from proceeding to foreclose.—Haescig v. Brown, 84 Mich. 503.

¶ 192. The fact that under an order of distribution an executor has assigned to a legatee a purchase-money mortgage which he had himself executed to the testator, and that afterwards, falsely representing the mortgaged land to be unincumbered has sold such land to a third person who without examining the records paid the price thereof, gives the grantee no right to enjoin the legatee from foreclosing, for, both parties being innocent, the grantee whose confidence rendered the fraud possible should suffer.—Crow v. Conant, 90 Mich. 247.

¶ 193. On a bill to enjoin foreclosure of certain mortgages held by defendant bank, complainant alleged that in reliance upon statements of defendant's cashier that one of such mortgages had been paid and the other materially reduced, he had prosecuted certain notes to judgment and bought in on execution the land which the bank was now seeking to sell. Held, that the bill should not be dismissed on the ground of want of equity in that the representations of the cashier were not binding on the bank, where it further claimed that one of the mortgages sought to be foreclosed was fully paid, and that the amount due on the other was less than shown in the notice of sale.—Melze-Alderton Shoe Co. v. First State Sav. Bank, 171 Mich. 26.

¶ 194. An action at law for deficiency on a chancery foreclosure sale will be enjoined where plaintiff's conduct caused the deficiency by preventing a fair sale.—Innes v. Stewart, 36 Mich. 285.

§ 50. ——Condemnation proceedings.

See also ante ¶ 142.

Jurisdiction to award injunction in condemnation cases, see post ¶ 340.

¶ 195. The prosecution of a void condemnation proceeding will be enjoined.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

¶ 196. Equity will not enjoin condemnation proceedings which are being conducted according to law, on the ground of irreparable injury, or anticipated and probable danger to the public.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

§ 51. Criminal prosecutions.

¶ 197. Courts of chancery should not enjoint criminal prosecutions on the theory that the law under which they are brought is unconstitutional, as such fact is available at law by way of defense to the criminal charge.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 198. It is a general rule that criminal prosecutions cannot be restrained by injunction.—Michigan Salt Works v. Baird, 173 Mich. 655.

¶ 198a. As a general rule a court of equity will not interfere to restrain a public officer from invoking the criminal law and instituting a prosecution for a violation of a statute; neither will it transfer to its own jurisdiction the trial of a criminal case.—Pratt Food Co. v. Bird, 148 Mich. 631.

¶ 199. The unconstitutionality of the law under which a criminal prosecution is brought being available at law as a defense chancery cannot enjoin such a prosecution.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 665.

§ 52. Enjoining appeal or review proceedings.

Injunction to preserve status quo pending review, see ante § 7.

¶ 200. The heirs, except one, and those having claim against an estate, had a meeting and an agreement was entered into as to the settlement of the claims, which were then allowed by the commissioners of claims. It was claimed that the heir who was not present ratified the settlement, but the assignee of his interest appealed from the allowance of the claims. Held, that the fact that the doctrine of equitable estoppel could be urged in suits at law in support of the claims, would not preclude equity taking jurisdiction of a bill to enjoin the appeal, as a multiplicity of suits and expensive litigation would thereby be prevented.—Roth v. Rubert, 176 Mich. 484. Bird, J., dissenting.

C. ACTS OF PRIVATE CORPORATIONS, ASSOCIATIONS AND OFFICERS OR MEMBERS.

§ 53. In general.

[Note. The propriety of injunction at the suit of a corporation against its officers or members or at the suit of a stockholder or officer against the corporation or one in a corporate relation is usually dependent on the law of corporations or else involves the general law of injunctions. In either case proper classification would place the precedent elsewhere. For the propriety of injunction against a corporation, see Corporations § 204 and cross-references there collated. For the general law of injunctions not involving corporation law but having a corporate party, see other portions of Injunctions.]

Necessity that person seeking to enjoin increase in telephone rates show substantial injury, see ante ¶ 48.

Injunction to prevent erection of depot, see ante ¶ 51.

Restraining corporation from participating with stockholder in breach of contract not to engage in business, see ante ¶ 104.

Validity of preliminary injunction depriving directors of management of corporation, see post ¶ 431.

Decree enjoining interference by one benefit association with another, see post ¶ 523.

Restrainable infringements on corporate names, see also Corporations § 18.

Injunctions against banks preliminary to receivership, see Banking § 75.

Injunctions against insolvent banks, see Banking § 75.

Injunction to restrain building and loan associations from doing further business, see Comp. L. 1915, § 10016.

Injunction by one fraternal benefit society to restrain use of its ritual, badges, name, etc., by another, see Fraternal Associations § 4.

Restraining local lodge of fraternal society from paying claim, see Fraternal Associations § 14.

Provisions as to injunctions to prevent collection of toll by toll roads, see Comp. L. 1915, § 4537.

Provisions as to injunctions against corporations, see Jud. Act, chap. XLI, §§ 1, 25; Comp. L. 1915, §§ 13578, 13602.

Injunction against insolvent insurance companies, see Jud. Act, chap. XLI, § 9; Comp. L. 1915, § 13586.

Provisions as to restraining operations by telephone companies, see Comp. L. 1915, § 6688.

Provisions as to restraining unauthorized use of fraternal association emblems and badges, see Comp. L. 1915, § 10640.

D. ACTS OF MUNICIPALITIES AND PUBLIC OFFICERS.

§ 54. In general.

Injunction against game warden refused where remedy at law adequate, see ante ¶ 25.

Necessity that complainant seeking injunction against municipality show substantial injury, see ante § 18.

Enjoining exercise by city of its lawful right to keep market, see ante ¶ 59.

Inconvenience or disproportionate injury to city as ground for refusing injunction, see ante § 19.

Interest entitling taxpayer to restrain municipal action, see ante § 21.

Restraining breach by city of conditions and restrictions in deeds, see ante § 31.

Enjoining trespasses under color of eminent domain, see post ¶ 249.

Enjoining revocation of license to construct windows extending into street, see post ¶ 287.

Injunctions to prevent construction, obstruction or misuse of streets by city or others, see post § 80 et seq.

Injunction to prevent construction of drain by commissioner, see post § 85.

Restraining violation of municipal ordinances, see post § 93.

Parties to suits to restrain officers and municipalities, see post § 102 et seq.

Persons bound by the decree, see post ¶ 526.

Injunction to prevent enforcement of laws and ordinances, see post II, H.

Remedies for relief from illegal drain proceedings, taxes or assessments, see Drains, II, G.

Remedies for relief from local improvement proceedings and assessments, see Local Improvements, VII, C.

Remedies against illegal taxes and tax sales, see Taxes, VI, B, XII, C.

Injunction or other remedy for appropriation of property to public use without condemnation or compensation, see Eminent Domain, IX.

Whether drain tax imposed in illegal proceedings is such cloud on title of person assessed as to entitle to injunction, see Drains ¶ 306.

When injunction lies to restrain drain proceedings, see Drains §§ 96-112.

Injunction as remedy in highway proceedings, see Highways § 61.
Injunction as proper relief against street opening proceedings, see Highways, II, B.
Injunction or other remedy as proper resort to prevent illegal location and opening of street, see Highways, II, B, 4.
Whether conduct of county drain commissioner amounts to such fraud as to entitle to injunction, see Drains § 106.
Bill to restrain assumption of office, see Officers.
Injunction to protect officer de facto in his incumbency, see Officers.
Restraining enforcement by railroad commission of acts regulating transportation, see Public Service.

¶ 201. The legislative department of a city cannot be restrained from doing any act within its legal discretion, but may be enjoined from any unlawful act.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

¶ 202. Courts do not interfere by injunction with the discretion of the authorized agents of municipalities in the exercise of the powers granted by the legislature except where there is a want of jurisdiction in the proceedings.—Dixon v. City of Detroit, 86 Mich. 516.

¶ 203. The judicial power cannot interfere by injunction with the legitimate discretion of any other department of government, unless it is acting beyond its legal discretion.—Bates v. City of Hastings, 145 Mich. 574.

§ 55. Acts illegal or contrary to public policy.

Interest entitling taxpayers to maintain injunction, see ante § 21.
Taxpayers as plaintiffs, see post § 103.

¶ 204. Equity may restrain public officers by injunction where they are proceeding illegally or improperly, under a claim of right, to do any act to the prejudice of individual rights.—Cooper v. Alden, H. 72.

¶ 205. The ground on which equity interferes to restrain public officers who are acting illegally is to prevent great and irreparable mischief. It will not interfere if the injury is slight or doubtful.—Brown v. Gardner, H. 291.

¶ 206. Where a majority of the electors of a village have filed a petition under Act No. 321, Pub. Acts 1907, protesting against the acceptance of saloon bonds and the issuance of licenses, an injunction will issue to prevent the officers of the village from ignoring such protest.—Village of Wolverine v. Cheboygan Circuit Judge, 162 Mich. 718.

¶ 207. The fact that a city, in the exercise of its proprietary or business powers through its officers engages in a certain line of activity, commercial in its nature, and competes with and thereby damages one of its inhabitants in his business does not entitle him to relief, as the city owes him no immunity from competition.—Andrews v. City of South Haven, 187 Mich. 294.

¶ 208. A municipality may be enjoined in a suit by a taxpayer from making payment to a corporation, of which one of the city officers is a stockholder, for the value of goods delivered under a contract of sale void under the city charter, regardless of whether the contract was fair or unfair, or whether the officer had notice of the contract.—Ferle v. City of Lansing, 189 Mich. 501.

§ 56. Trespass by public officers.

Injunction against trespasses in general, see post § 70.

¶ 209. Where the trespass sought to be enjoined is an act of official oppression by public officers and agents, under color of office, a less grievance constitutes a ground for an interference by equity than when the trespass is by a private person.—Ryan v. Brown, 18 Mich. 196.

¶ 210. It is within the jurisdiction of equity to restrain highway officers from trespassing upon the lands of a private person under the claim that it is a public highway and to try and quiet his title.—Lawrence v. Kirby, 145 Mich. 432.

§ 57. Illegal use of public funds.

Sufficiency of bill to enjoin expenditure of public funds, see post ¶ 389.
Taxpayers as complainants, see post § 103.
In seeking injunctive relief against expenditures of public funds, see Municipal Corporations.

¶ 211. Under How. St. § 6612, the attorney general may file a bill upon the relation of citizens and taxpayers of a county to enjoin the illegal issue by the board of supervisors of such county of bonds to be used in erecting a court house.—McMullen v. Ingham Circuit Judge, 102 Mich. 608.

¶ 212. The attorney general may proceed in equity to enjoin a substantial abuse of municipal corporate power, such as the appropriation of corporate funds in a manner not justified by law, or the award of a paving contract contrary to the city charter. The pretense or purpose in raising the money is immaterial to the issue. But the remedy is extraordinary, and not to be resorted to for trifling amounts and mere errors of judgment.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 213. A taxpayer's bill is not prematurely filed, which seeks an injunction restraining the officials of a municipality from the threatened expenditure for private enterprises,

money raised by the sale of bonds issued in proceedings admitted to have been regular, even though no illegal act is shown to have yet been done by such officials; since such bonds once negotiated, would create a valid debt against the city which such taxpayer could not evade and his only remedy would be the possibility of intervening between the receipt of the money by the city authorities and its expenditure for such illegal purposes. —Bates v. City of Hastings, 145 Mich. 574.

§ 58. Use or misuse of public property.

¶ 214. Where land is dedicated to a particular purpose, and the municipal authorities undertake to appropriate it to an entirely different one, they may be restrained by injunction, on the application of an adjoining lot owner, from so doing.—Cooper v. Alden, H. 72.

¶ 215. A city may be restrained from discontinuing a public market where such discontinuance is not authorized.—Attorney General v. City of Detroit, 71 Mich. 92.

¶ 216. Where the right of a city to certain property has been established by the statute of limitations, the use of such property by the city for a market which purpose is not unlawful will not be enjoined merely because such use may have a bad effect on neighboring property.—Cooper v. City of Detroit, 42 Mich. 584.

¶ 217. Chancery has jurisdiction to enjoin the action of township boards of health in establishing burial places, should they proceed to exercise it illegally or improperly to the injury of others.—Upjohn v. Richland Tp. Board of Health, 46 Mich. 542.

§ 59. Usurpation or destruction of franchises.

Enjoining city from enforcing franchise obligation against street railway, see post ¶ 298.

Restraining city from forfeiting street railway franchise, see post § 99.

¶ 218. The attorney-general can intervene by information in equity to prevent franchises of a public nature from usurpation or destruction.—Attorney General v. City of Detroit, 71 Mich. 92.

§ 60. Public improvements and contracts.

Enjoining work under a paving contract with city, see ante ¶ 98.

Restraining municipality from opening or improving streets, see post § 80.

Parties to bill to restrain performance of public contract, see post ¶ 348.

Retention of suit to decree an accounting, see post ¶ 495.

Injunction to restrain local improvements or assessments for same, see also Local Improvements.

¶ 219. Where no fraud is alleged or any statute which is violated, injunction will not be granted to the lowest bidder for public work to restrain a municipal board from awarding the contract to one who is not such bidder.—Chandler v. Board of Education of Detroit, 104 Mich. 292.

¶ 220. Where city authorities propose to let a contract for an improvement to a bidder not entitled thereto, a proceeding by the attorney general, upon the relation of the bidder entitled to the contract, for an injunction to restrain such illegal action, is the appropriate remedy.—Attorney General ex rel. Allis Chambers Co. v. Public Lighting Commission of City of Detroit, 155 Mich. 207.

§ 61. Issuance and negotiation of bonds.

Parties to bill to prevent approval of bonds for liquor licenses, see post § 102.

Affidavits or showing in support of bill, see post ¶ 426.

Dissolution of temporary injunction restraining approval of liquor bonds, see post ¶ 468.

Relief to defendant in suit to restrain negotiation of village bonds, see post ¶ 513.

Mandamus to compel issuance of injunction restraining negotiation of township bonds, see Mandamus.

¶ 221. A resident owner of real and personal estate subject to taxation can maintain a bill to have the issue by a township of unlawful railroad aid bonds enjoined.—Curtenius v. Hoyt, 37 Mich. 583.

¶ 222. Under the rule laid down by Curtenius v. Railroad Co., 39 Mich. 583, a taxpayer's bill for an injunction to restrain a township from negotiating invalid railroad aid bonds cannot be objected to on the ground that the complainant has an adequate remedy at law.—Dodge v. Van Buren Circuit Judge, 118 Mich. 189.

E. TRANSFERS, CONVEYANCES AND ASSIGNMENTS.

§ 62. In general.

Sufficiency of bill to prevent sale of mortgaged land, see post ¶ 387.

Parties to suits to enjoin foreclosure and execution sales, see post § 105.

Modification of injunction issued in aid of creditors' bill, see post ¶ 474.

Bond as prerequisite to enjoining sale, see post § 124.

Acts constituting violation of injunction against conveying or incumbrancing, see post § 152.

Contempt for violation of decree restraining sale, see post § 154.

Right to enjoin transfer by grantor where conveyance made without consideration for grantor's accommodation failed for misdescription, see Fraudulent Conveyances ¶ 526.

Injunction to prevent forfeiture of dedication for breach of condition therein, see also Dedication ¶ 160.
Restraining the transfer of property by judgment debtors, see Jud. Act, chap. XXXIV, § 5; Comp. L. 1915, § 13382.
Jurisdiction to enjoin attempted sale by representative under order of probate court, see Estates of Decedents ¶ 42.
Right of grantee of heir to injunction against representative for attempt to dispose of his lands for debts, see Estates of Decedents ¶ 679.

¶ 223. Where chattels are purchased under a contract in the nature of a chattel mortgage, and the vendor makes a premature seizure thereunder, a sale of the goods by him will be enjoined.—Lehnen v. Ryan, 185 Mich. 246.

§ 63. Conveyances, transfers or incumbrances in breach of contract.

Injunction to prevent breach of contract, see also ante § 25.
Enforcement of decree enjoining sale of mortgaged property, see post § 154.
Suit to enjoin sale of farm retained for complete relief, see post ¶ 496.

¶ 224. A parent will be enjoined from alienating or incumbering his property except for his personal necessities, where he has agreed with his children that the property should be theirs after his death, if they remained at home after majority and worked a farm.—Hogan v. Hogan, 187 Mich. 278.

§ 64. Disposal of trust or estate property.

¶ 225. Grantees of realty conveyed by heir may have administrator enjoined from selling it to satisfy claims where there is personalty enough to meet them.—Hill v. Mitchell, 40 Mich. 389.

§ 65. Disposal of property by husband or wife.

Operation and effect of injunction decree, see post ¶ 521.
Property rights as between husband and wife, see Husband and Wife, II.

¶ 226. Where, in pursuance of a conspiracy between himself and a third person a husband has fraudulently conveyed his property to the latter, a wife who has ground of divorce but has not resided in this state long enough to maintain a bill therefor, may have an injunction restraining the disposing of or incumbering such property until such time as she can legally maintain such bill.—Smith v. Waalkes, 109 Mich. 16.

§ 66. Collection or disposition of property by assumed agent.

¶ 227. Where parties assumed to be agents for a bank in settling a demand, and procured from the debtor an assignment of property in compromise, and the bank denied their authority to make the compromise, whereupon the debtor made a second assignment of property to complainants, held that complainants might maintain a bill in equity to restrain the assumed agents from collecting and disposing of the property.—Pratt v. Campbell, H. 236.

¶ 228. A subsequent assignee may have an injunction against an agent's disposing of property received under an assignment for creditors, his assumed principals, who have repudiated his act.—Pratt v. Campbell, H. 236.

§ 67. Sale on execution or process.

See also ante ¶ 223.
Wife as party to bill to restrain sale on execution, see post ¶ 343.
Relief upon dismissal of bill, see post § 145.
Retention of suit for further relief by way of accounting, see post ¶ 493.
Bond as prerequisite to enjoining sale, see post § 124.
General law of judicial sales, see Judicial Sales.
Sales on execution generally, see Executions.

¶ 229. Injunction granted to restrain the sale of a wife's land on execution against her husband.—Hill v. Bowman, 35 Mich. 191; Patterson v. Fish, 35 Mich. 209.

¶ 230. Equity will not enjoin a sale under an execution against a third person where complainant's only equity is that of a bona fide purchaser.—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189.

¶ 231. Where a judgment was obtained against a principal and surety, and a levy made on the land of each, and subsequently, by collusion between them, the principal's land was sold to a third person, who was ignorant of the levy, the surety was not entitled to maintain a bill to restrain the sheriff from first selling his land in satisfaction of the judgment, upon the claim that the surety should be protected by the sale of the property of the principal.—Stratton v. Thomas, 133 Mich. 281.

¶ 232. A defendant in ejectment against whom judgment has been rendered in another suit may enjoin the sale under an execution issued under the judgment where as equitable owner of a mortgage on the land he has a lien thereon.—Taylor v. Roniger, 147 Mich. 99.

¶ 233. Where on a proceeding by a grantor to enjoin a judgment creditor of the grantee from proceeding under an execution levy on the ground that the conveyance was fraudulently procured, it appears that the record title of grantee's interest stood in her name for several years and that there was no want of good faith by the creditor or any irregularity in the execution pro-

ceedings, it is improper to issue an injunction.—White v. Herrick Piano Co., 176 Mich. 616.

¶ 234. A sale on execution will not be enjoined on the ground of irreparable injury where the property levied upon is not in immediate use and has peculiar or special value to the owner by reason of association, antiquity or rarity, but is a commercial article and the market value easily ascertainable and can readily be replaced.—City Bank & Trust Co. v. Hurd, 179 Mich. 454.

¶ 235. The wife of a judgment debtor, whose automobile has been seized on a debt of the husband and is about to be sold by the sheriff on the execution, has an adequate remedy at law, precluding equitable relief by injunction, where, although the judgment creditor is insolvent, the sheriff is, officially, solvent, and it matters not that the wife desires the particular automobile.—Allen v. Heft, 200 Mich. 593.

§ 68. Transfer of negotiable instruments.

Enjoining actions on negotiable instruments, see ante § 43.
Provisions as to enjoining defendant in garnishment from disposing of negotiable instruments, see Jud. Act, chap. XXVIII, § 24; Comp. L. 1915, § 13145.
Provisions as to restraining negotiation of bills of lading see Comp. L. 1915, § 8197.

¶ 236. Injunction will issue to restrain the transfer of notes where it would be inequitable to hold complainant on his indorsement.—Maclean v. Fitzsimons, 80 Mich. 336.

F. INTERFERENCE WITH OR DISTURBANCE OF PERSONAL PROPERTY RIGHTS OR BUSINESS.

§ 69. Interference with possession and use of premises.

Necessity that title or right be undisputed, see ante § 11.
Partner's lawful right to remove furniture from hotel not restrainable, see ante ¶ 60.
Necessity that complainant have a clear right or title, see ante § 11.
Exercise by defendant of his lawful rights not restrainable, see ante § 17.
Determining right to possession on application for preliminary injunction, see post § 123.
Acts constituting violation of injunction, see post § 152.

¶ 237. Injunction is the proper remedy to secure to the officers of a church the peaceable possession of its property as against members of the parish who have assumed to exclude them therefrom without right; the proceeding by ejectment being impracticable in such case.—Richter v. Kabat, 114 Mich. 575.

§ 70. Trespasses in general.

Availability of injunction where title or right in dispute, see ante § 11.
Ejectment as remedy where title or possession in dispute, see also ante § 12.
Multiplicity of suits as ground for injunction, see ante §§ 16, 35.
Trespass by public officers, see ante § 56.
Persons entitled to enjoin trespass upon private pond for fishing purposes, see ante ¶ 74.
Restraining trespasses by labor unions, see post § 90.
Injunction to prevent cutting of boat channel across plaintiff's lots, see post ¶ 310.
Enjoining maintenance of drains or sewers, see post § 85.
Acts constituting violation of injunction against trespasses, see post § 152.
Retention of bill for complete relief, see post § 143.
Decree in suit to restrain trespasses upon private fishing pond, see post ¶ 489.
Injunction by dowress against trespasses on lands occupied but not yet assigned, see also Dower ¶ 113a.

¶ 238. While the court has occasionally refused to restrain a threatened trespass, where the remedy at law was adequate, the opposed interests to be affected by the injunction of large proportional consequences, and other and independent circumstances considered negatived the right of complainant to equitable relief, it does not follow that the writ of injunction will issue to protect a confessed trespasser in his occupancy and use of his neighbor's premises, on the ground that his interests are large and the landowner's damages small.—Garth Lumber & Shingle Co. v. Johnson, 151 Mich. 205.

¶ 239. Equity has no jurisdiction of an action to enjoin the trespassing by one person on the land claimed by another to erect a building, as such act would not tend to injure the freehold.—Hendershott v. Moore, 188 Mich. 364.

§ 71. ——Irreparable or permanent injury.

Continuance of temporary injunction restraining trespasses, see post ¶ 476.

¶ 240. Where a trespass is calculated to do permanent damage to the freehold, equity will restrain it, and the remedy does not depend upon the insolvency of defendants.—Ryan v. Brown, 18 Mich. 196.

¶ 241. Where the injury by a threatened trespass is of such a nature as to materially lessen the enjoyment of complainant's property and rights.—Newaygo Mfg. Co. v. Chicago & W. M. R. Co., 64 Mich. 114.

¶ 242. The owner of realty is entitled to the aid of equity to prevent permanent and continually recurring injuries to the enjoyment of his property.—Koopman v. Blodgett, 70 Mich. 610.

¶ 243. Chancery will not grant an injunction in every case of permanent injury to real estate, but will look at all the facts and circumstances and grant or withhold relief as justice and equity may require.—Potter v. Saginaw Union Street R., 83 Mich. 285.

¶ 244. While ordinarily a trespass will not be enjoined it may be upon a showing of irreparable injury.—Brassington v. Waldron, 143 Mich. 364.

¶ 245. Where a person's possession of land is disturbed by those holding adverse claims or by trespassers, an injunction is the appropriate remedy in case of irreparable injury. —Doane v. Allen, 172 Mich. 686.

§ 72. ——Continuing and recurring trespasses.

¶ 246. The jurisdiction to grant injunctions to prevent trespasses upon lands is well established, where the trespass is of a continuing nature, e. g., by flooding, whose constant recurrence renders the remedy at law inadequate, unless by multiplicity of suits.—Davis v. Township of Frankenlust, 118 Mich. 494.

¶ 247. Where a street railway company unlawfully occupies a city street after the expiration of its franchise rights, it is a continuing trespass for the restraint of which the city is entitled to a writ of injunction as well as one for the removal of defendant.—City of Detroit v. Detroit United Ry., 172 Mich. 136; affirmed in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697.

¶ 248. An injunction against trespassing upon the water of a private pond for the purpose of fishing is proper where there is evidence of such an assertion of right by defendants and such conduct that continuing trespasses might be anticipated.—Winans v. Willetts, 197 Mich. 512.

¶ 249. Where the destruction of complainant's premises is threatened by acts under color of eminent domain he is not limited to an action of trespass, but may have the illegal acts perpetually enjoined.—Vanderlip v. City of Grand Rapids, 73 Mich. 522.

§ 73. Waste and nuisance.

Relief refused where legal remedy adequate, see ante ¶ 28.
Necessity that complainant have clear right or title, see ante §§ 11, 12.
Restraining acts by tenant in violation of lease, see ante § 30.
Restraining dissipation of estate by personal representative, see ante § 32.
Erections and obstructions in navigable waters, see post § 87.
Injunction to abate overlooking or obstructing structures, see post § 79.
Restraining revocation of license to construct windows extending into street, see post ¶ 287.
Injunctions to prevent obstruction of streets, see post § 80 et seq.
Enjoining construction and maintenance of sewers and drains, see post § 85.
Parties to bill to enjoin maintenance of saloon, see post ¶ 347.
Joinder of parties in suit to enjoin nuisance, see post § 106.
Necessity of describing the nuisance in the bill, see post § 107.
Retention of bill to give complete relief, see post § 143.
Award of damages where injunction denied, see post § 144.
Operation and effect of decree restraining nuisance, see post § 150.
Enforcement of decree abating nuisance, see post § 154.
Decree restraining waste pending ejectment, see post ¶ 480.
What constitutes waste and proper remedies for redress or prevention of waste, see Waste; and see also Landlord and Tenant, IV, V.
What constitutes nuisance and proper remedies to abate or redress same, see Nuisances.
Injunction to abate nuisance, see Nuisances.
Provisions respecting injunctions to restrain waste, see Jud. Act, chaps. VI, § 4; XXXIII, §§ 20, 149; Comp. L. 1915, §§ 12302, 12964, 13377.
Provisions as to injunctions to prevent nuisances, see Comp. L. 1915, §§ 7782, 7784, 12302.

¶ 250. K. owned certain land and W. agreed to work it on shares with him, and stipulated that his wife should cook and wash for K. Becoming tired of the arrangement Mrs. W. left, and W. afterwards assigned his contract to his father, who notified K. that his wife was ready to do his work, and, entering upon the land began to cut and remove timber. At about the same time the owner sold the land and his grantee filed a bill to stay waste and obtained relief. The decree was affirmed. The contract was practically rescinded by W.'s action and no longer bound K.; it contemplated personal association, and was therefore not assignable, and the grantee, on obtaining his deed, was justified in proceeding without delay to restrain waste.—Litka v. Wilcox, 39 Mich. 94.

¶ 251. A lease gave the lessee the privilege of removing the wheat crop upon the ground at the expiration of the lease if he should have sown the same. The farm leased contained two hundred acres, one hundred and forty acres being tillable land, of which thirty-five were in wheat when the lease was made. Held, that an injunction would lie to prevent the tenant from sowing all the arable lands to wheat, thus leaving the land worth-

less for renting purposes for the coming season.—Chapel v. Hull, 60 Mich. 167.

¶ 252. The cutting of timber not for the purpose of husbandry or clearing will be enjoined in favor of grantees who are trustees for grantor's creditors as against subsequent grantees.—Webster v. Peet, 97 Mich. 326.

¶ 253. A bill states a case for equitable relief where it avers that defendant is inflicting a permanent injury to complainant's freehold by wrongfully removing the rich top soil and by wrongfully refusing to transfer it to the cut last made in removing gravel and to level it fit for husbandry as required by the deed conveying the gravel.—Putnam v. Pere Marquette R. Co., 174 Mich. 246.

§ 74. Removal of buildings, fences or other structures.

Injunction to protect fences refused where remedy at law adequate, see ante ¶ 26.
Injunction to establish boundary where title in dispute, see ante ¶ 35.
Enjoining removal of fixtures, see post § 75.
Validity of preliminary injunction abating fence, see post ¶ 432.
Weight and sufficiency of evidence in suit to compel removal of building, see post § 112.
Relief on bill to restrain removal of house, see post ¶ 480.
Reasons excusing noncompliance with decree requiring removal, see post ¶ 533.

¶ 254. An owner in possession of land may maintain an action to enjoin an adjoining owner from moving a fence, located upon a line recognized for more than 20 years as the boundary, and relocating it 6 feet over the premises occupied by complainant.—F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162.

¶ 255. Where, in a dispute between adjoining owners over a boundary line, a complainant has had continuous possession, and the only right defendant has had was to go upon the land to get water, a bill of injunction will lie, under the statute authorizing a person in possession to file a bill to quiet title, where the defendant attempts to remove a fence erected by complainant as a boundary line.—Cullen v. Ksiaszkiewicz, 154 Mich. 627.

¶ 256. Where the complainant is in possession of land, and builds a boundary fence, equity has jurisdiction to enjoin a defendant from removing the fence in a dispute over the boundary line.—Cullen v. Ksiaszkiewicz, 154 Mich. 627.

¶ 257. A complainant alleged that he was the owner of land; that defendant was taking down his fences, entering upon his land, and injuring his sod and clover, and asked for a temporary injunction. Held, that the bill stated a case for the intervention of equity.—Harbor Springs Lumber Co. v. Emmet Circuit Judge, 160 Mich. 497.

¶ 258. An action in ejectment is the proper remedy where the defendant was in possession of a house built partly on land claimed by plaintiff and partly on land conceded to belong to defendant because the question of improvements could then be litigated under the provisions of Comp. L. 1897, §§ 10994-10996; and a bill to enjoin the removal of the house is inappropriate.—Cromwell v. Hughes, 144 Mich. 3.

§ 75. Removal of fixtures.

Enjoining interference with fences, boundaries and buildings, see ante § 74.
Necessity that applicant for injunction give bond or security, see post ¶ 442.

¶ 259. Subscribers towards the erection of a mill which was operated two years at a loss were denied an injunction against removal of machinery, there being no agreement that the defendant should continue the business for any specified time.—Ayres v. Dutton, 87 Mich. 528.

¶ 260. It is within the discretion of chancery to restrain without bond the removal of machinery from the mill by the conditional seller, where the bill alleges that the removal would destroy the building and impair the security of the mortgagee complainant whose mortgage covered real and personal property, and where it appears that no injury to the machinery would result from its being left in the mill until the rights of the parties are determined in a pending replevin suit, the mortgagee having the right to pay the balance found due the seller of the machinery and keep the building intact.—American Foundry & Machinery Co. v. Charlevoix Circuit Judge, 138 Mich. 167.

§ 76. Cutting and removal of timber.

Restraining cutting of timber pending litigation, see ante ¶ 17.
Necessity that complainant have undisputed title or right, see ante § 11.
Injunction refused where it would aid in enforcing forfeiture, see post § 98.
Joinder of parties in suit to restrain cutting of timber, see post ¶ 374.
Retention of bill to give complete relief, see post ¶ 494.

¶ 261. Where timber is being cut from mortgaged land without the knowledge or consent of the mortgagee, an injunction may be granted and retained in mortgagee's behalf to restrain the cutting.—Sherwood v. Ionia Circuit Judge, 105 Mich. 540.

¶ 262. A court of equity is the proper forum to enforce the rights of a vendor of timber land where the purchaser has agreed and failed to pay the taxes on the land until the timber contracted for has been removed, and the purchaser may be restrained from re-

moving the timber until he has paid the taxes.—Michigan Iron & Land Co. v. Nester, 147 Mich. 599.

¶ 263. A bill to restrain defendants from cutting and removing trees is properly dismissed where the written contract made by the parties as to the sale of trees indicates that the defendant has not gone outside the terms of the agreement in the trees cut and hauled away by him, and where the preponderance of evidence and the circumstances indicate that the terms of the written agreement were not orally modified.—Lockwood v. Pope, 166 Mich. 14.

¶ 264. Where, in a deed conveying all timber on certain land to defendant a provision is inserted that all timber remaining cut or uncut on said land after a certain date should revert to complainant grantor, a bill in equity will lie to enjoin defendant from removing after said date the cut lumber remaining on said land.—Dye v. East Shore Woodenware Co., 169 Mich. 78.

§ 77. Removal of mortgaged property and impairment of security.

Injunction to protect rights of mortgagee refused where remedy at law adequate, see ante ¶ 24.
Sufficiency of bill, see post ¶ 385.

¶ 265. Equity has jurisdiction to enjoin defendant from mixing ore of an inferior quality with other ore that had been turned out to complainants, and from removing the property out of the jurisdiction, thus depriving them of their security.—Glidden v. Norvell, 44 Mich. 202.

§ 78. Maintenance or interference with easements and ways.

Benefits to plaintiff as effecting right to injunctive relief, see ante § 15.
Injunctions to prevent building or obstruction of highways, see post § 80.
Weight and sufficiency of evidence in suits to compel removal of obstructions from ways, see post § 112.
Operation and effect of decree enjoining obstruction of way, see post ¶ 524.
Mandamus to vacate injunction preventing interference with sidetrack, see Mandamus.
General law of easements, see Easements.

¶ 266. Interference with complainant's right of way over defendant's land may be restrained by injunction.—Lathrop v. Elsner, 93 Mich. 599.

¶ 267. Where land along a river is platted and laid out in lots, the plat showing a strip to be reserved as a walk about twenty feet from the water line, complainants who own a lot may have an injunction preventing defendants, grantees of a lot by a deed attempting to convey the strip reserved, from erecting a summer cottage across the strip.—Kendrick v. Louk, 175 Mich. 130.

¶ 268. Where one has a right by prescription to take water from a lake by means of a pipe laid at a certain level, the gist of the easement is in the method of taking and not in the quantity taken, and when the lake is lowered to the level of the pipe, the owner of the prescriptive right cannot lay or use a pipe lower than the original pipe, though the same or a less quantity of water is taken, and the owners of lands upon the shore of the lake may enjoin the laying of such second pipe.—Kennedy v. Niles Water Supply Co., 173 Mich. 474. (Brooks, McAlvay and Bird, JJ., dissenting.)

¶ 269. A decree awarding a permanent injunction to restrain the use of a roadway across complainant's land was sustained as against the claim that complainant had an adequate remedy at law, where it appeared that after all of complainant's timber, for the carriage of which the use of the way had been granted, was drawn, defendant continued the use of the road for the drawing of timber for himself; and the fact that the drawing of defendant's timber had been practically completed, did not deprive complainant of his rightful remedy.—Rhoades v. McNamara, 135 Mich. 644.

¶ 270. On a bill to restrain grantees of land to whom complainant had also granted a private right of way across his land from opening another right of way in lieu of the one used as such, where there was evidence that complainant had prior to the date of the deed to defendant granted the exclusive use of the right of way used by defendant to two different persons, and it appeared also from the deed from complainant to defendant that the new right of way desired by defendant was granted by such deed, held that complainant's bill should be dismissed.—Whitman v. Cook, 191 Mich. 453.

¶ 271. In a suit to restrain the obstruction of a right of way where it was shown that the parties to the suit, the owners of the dominant and servient estates respectively, had within ten years before the filing of the suit executed mutual deeds in adjustment of the boundary between their properties wherein they mutually reserved the easement of way in question, held that an injunction restraining the obstruction of the way by the owner of the servient estate was properly issued.—Berkey & Gay Furniture Co. v. Valley City Milling Co., 194 Mich. 234.

¶ 272. The narrowing of a thirty-foot right of way to fourteen feet by the erection of an obstruction therein, held such a serious interference with the way as to justify the issuance of an injunction to restrain such interference at the instance of the owner of the dominant estate.—Berkey & Gay Furni-

ture Co. v. Valley City Milling Co., 194 Mich. 234.

§ 79. Erection or use of overlooking or obstructing structures.

Spite fences as nuisances abatable by injunction, see Nuisances.

¶ 273. Injunction will not lie against the occupant of premises adjacent to a baseball park to prevent his use of a platform, erected by him on these premises, from which the games may be viewed over the boundary fence.—Detroit Base Ball Club v. Deppert, 61 Mich. 63.

§ 80. Highways and streets; laying out or improving.

Enjoining public improvements, see ante § 60.

Restraining proceedings to condemn property for boulevard, see ante ¶ 142.

Modification of injunction restraining use of certain road material by plank road, see post § 136.

Decree in suit to restrain plank road from using certain material in its road, see post ¶ 487.

General law as to highways and streets, see Highways.

¶ 274. Where a bill was filed and preliminary injunction obtained to restrain commissioners of highways from laying out a highway through the orchard and garden of complainant in violation of the statute, but before the injunction was served or defendants had knowledge of it, the road was opened; and where the equity of the case was doubtful and the injury slight, the court refused to retain the suit and close up the road, and also refused to award an issue quantum damnificatus.—Brown v. Gardner, H. 291.

¶ 275. Complainant went into possession of a lot in Detroit in 1809, and in 1821 received a conveyance of the same from the governor and judges of Michigan territory. Nearly thirty years after she took possession the common council of Detroit, on a claim that a street was laid out through the lot originally, proceeded to open the same. On bill filed for the purpose, held, that the council should be enjoined from opening the street until they had established their title at law. —Devaux v. City of Detroit, H. 98.

¶ 276. Injunction will be granted to restrain a city from grading a street in such a manner as to raise an embarkment upon the front of complainant's premises, thereby burying part of her dwelling-house, where there has been no previous condemnation or compensation.—Vanderlip v. City of Grand Rapids, 73 Mich. 522.

¶ 277. An injunction restraining a city from improving streets and enjoining a contractor from completing his contract is not warranted where the only injustice done the complainants who are taxpayers is a mere irregularity in the matter of assessments, it being entirely proper under the city charter (Local Acts 1889, No. 414, chap. 20, § 22) to correct the injustice without delaying the work.—Bogert v. Jackson Circuit Judge, 118 Mich. 457.

¶ 278. An injunction will lie, at the suit of a township and its highway commissioner, to restrain a plank-road company from using in the construction of its roadbed material which will render the same dangerous, unsafe, and impassable with loaded teams; and this as a police measure independent of any provision in the company's charter.—Detroit & E. P. R. Co. v. Macomb Circuit Judge, 109 Mich. 371.

§ 81. ——Closing, obstructing or encroaching upon.

Existence of title or right in complainant, see ante § 11.

Interest entitling complainant to seek injunctive relief, see ante § 20.

Denial of injunction to wrongdoer, see ante § 22.

Restraining interference with easements and ways, see ante § 78.

Parties to injunction to prevent closing of street, see post § 101.

Necessity of describing encroachment in bill, see post ¶ 384.

Decree in suit to enjoin obstruction of alley, see post ¶ 482.

Injunction by abutter against imposing servitude on street without compensation, see also Highways ¶ 579.

¶ 279. Where a strip of land platted as a public street had been used to some extent as such and the city had built a cross-walk at the end thereof and had not taxed it, held that a grantee who had purchased a lot adjoining the strip in reliance upon the plat could enjoin the closing of such strip by the grantor.—Babcock v. Heenan, 193 Mich. 229.

¶ 280. A bill for an injunction to prevent the closing of an alley will not be denied for the reason that complainant had already summarily removed the obstruction.—Detroit Mineral Bath Co. v. Stroh Brewery Co., 151 Mich. 555.

¶ 281. Injunction lies at the suit of a private person to restrain such an appropriation of the site of a street by another person as leaves no mode of access to complainant's premises, and otherwise prejudices them.—Pratt v. Lewis, 39 Mich. 7.

¶ 282. The obstruction of a highway constitutes a nuisance, and an injunction bill by a highway commissioner is a proper method of abating such nuisance, even when defendant is in possession.—Hinckley v. Dennison, 169 Mich. 361.

¶ 283. Notwithstanding How. St. § 6611, chancery will not ordinarily assume jurisdiction of an alleged encroachment in a township highway, an adequate remedy at law being provided by How. St. §§ 1371-1378.—Township of Lebanon v. Burch, 78 Mich. 641.

¶ 284. Equity will not, in the absence of special circumstances, entertain a bill to remove an alleged obstruction from a township highway, under the provisions of How. St. § 6611, since an adequate remedy at law in such cases is afforded by How. St. §§ 1371-1378.—Township of Greenfield v. Norton, 111 Mich. 53.

¶ 285. Injunction will lie to prevent construction of a channel or turning basin in a river by cutting into lots and an adjacent street so as to cut off access by that street to complainant's lots.—Wilkinson v. Dunkley-Williams Co., 139 Mich. 621.

¶ 286. An injunction bill was filed to restrain certain defendants from closing up premises which complainants claimed the right to use as a street. The bill alleged, in substance, that, in September, 1859, one R., who is also made defendant, being the owner and actual possessor of certain land, conveyed it to complainant, bounding it as on the south side of G street, which did not reach the land conveyed, but which R. expressed the intention of opening through the premises afterwards obstructed by defendants; that complainants had bought relying on such extension, and said R. had aided in preparing the premises for a highway; that defendants hold land on the north side of these premises under a mortgage from R., dated in December, 1859, and recognizing the proposed extension of G street; and that they had erected a small brick office which stands partly on the premises, and for the removal of which complainants ask. Held, that the bill sufficiently alleges the ownership of R. and the source of the other defendants' title to be sustained, at least unless specially demurred to; and that a court of equity could require the destruction or removal of the building under the circumstances, there being no adequate remedy at law.—Karrer v. Berry, 44 Mich. 391.

¶ 287. Where the express terms of a license to construct bay windows extending into the street give the city the right to terminate it at will, the revocation thereof will not be enjoined though made before the windows were completed thereby causing loss to the licensee without any fault on his part.—Forbes v. City of Detroit, 139 Mich. 280.

§ 82. ——Preventing use for railways.

Refusal of injunction causing disproportionate injury to defendant, see ante ¶ 64.

Enjoining continuing trespass by street railway occupying street, see ante ¶ 247.

Issues in suit to enjoin railway from changing curve in its track, see post ¶ 392.

Dissolution of preliminary injunction preventing use of street by railway, see post ¶ 449.

Joinder of parties, see post § 106.

Operation and effect of decree, see post ¶ 522.

Estoppel to have injunction against operation of railroad in street without payment of damages for changing grades, see also Estoppel ¶ 155.

¶ 288. A mere apprehension that injury may result to complainant's property by the substitution of electricity as a motive power by a company operating a street railway line in front of his premises does not warrant a perpetual injunction.—Potter v. Saginaw Union Street R., 83 Mich. 285.

¶ 289. Where complainant sought to enjoin the construction of appliances for the use of electricity in operating a street railroad in front of her premises, and to enjoin the use of electricity for the operation of said road, a decree enjoining the erection of poles in front of her premises without her consent was held to afford all the relief she was entitled to.—Barber v. Saginaw Union Street R., 83 Mich. 299.

¶ 290. Construction of street railway imposing additional servitude without compensation to abutting owners, enjoined.—Nichols v. Ann Arbor & Y. Street R. Co., 87 Mich. 361.

¶ 291. A mining company owned certain land near a city, which it platted, reserving to itself and its assigns "the exclusive right to lay a plank or railroad through and across any of the streets reserved on the map." The street down which it constructed its road was laid out 100 feet wide and the others but 66 feet wide, and the wide street was only partially occupied for such purposes. Subsequently it assigned all rights to a railroad company, which proceeded to build four tracks for general traffic down this street, after having gained the city's permission so to do. Held, that a temporary injunction obtained by a property owner along the street against the railroad company should be made perpetual unless within six months it took legal measures to condemn the right of way for the additional new use claimed, and made proper compensation therefor and for the injury already sustained.—Riedinger v. Marquette & W. R. Co., 62 Mich. 29.

¶ 292. Chancery will restrain a street-railway company from entering upon a road and from constructing its track therein under an expired license from a plank-road company which has possession of the road.—Detroit & B. P. R. Co. v. Detroit Suburban R. Co., 103 Mich. 585.

¶ 293. A plank-road company granted to an electric railway company the right to lay a second track along the highway "in such manner as in no way to encroach upon said roadway," but provided that if at any point it became necessary to encroach upon the roadway, the railway company should extend the roadway on the other side to correspond with the encroachment. In an action to enjoin the laying of the track on the ground that it was proposed to do it in an improper manner so as to encroach on the roadway, held that such encroachment was contemplated by the contract and injunction should not issue there being an adequate remedy at law.—Detroit & B. Plank-Road Co. v. Oakland Ry. Co., 131 Mich. 663.

¶ 294. Equity may entertain a bill by a township to enjoin and to remove a street railway built on its highway without authority, Comp. L. 1897, §§ 4121-4126, providing a legal remedy for "encroachments" not being exclusive, if applicable, in such a case.—Township of Bangor v. Bay City Traction & Electric Co., 147 Mich. 165.

¶ 295. A street-railway company was organized to construct and operate a road connecting two cities and passing through a third city. The third city was willing to grant a franchise but insisted upon a right of way which the company considered too circuitous and expensive, whereupon the latter organized the defendant company under Comp. L. 1897, § 6223 et seq., to construct an electric railroad within the city limits, on a private right of way, crossing city streets and connecting the two portions of the street railway at the city limits. Held, that the construction of the road through the city could not be enjoined although the purpose was to get through the city without a franchise from its common council.—City of Mason v. Lansing & J. Ry. Co., 157 Mich. 1. (Blair, C. J., and McAlvay, J., dissenting.)

¶ 296. Where a railroad company had leased for a term of years the property of a traction company operated in a certain city under an ordinance whereby the latter was authorized to construct, maintain, and operate a street railway along certain streets, and there was a provision in the ordinance to the effect that "no wires carrying an electric current shall be placed in said street except the trolley wire," the putting up of a feed wire in the nighttime by the lessee in one of the streets of the city, without any authority, is an act which will be enjoined and the company may be required to remove it.—City of Monroe v. Detroit, M. & T. S. L. Ry., 143 Mich. 315.

§ 83. ——Preventing interference with railway rights of use.

¶ 297. An injunction was granted to restrain the cutting down by adjoining owners of posts set in a street to aid the propulsion of street cars by electricity.—Detroit City R. v. Mills, 85 Mich. 634.

¶ 298. The writ of injunction cannot be used by a street railway company to aid it in refusing to carry out its agreement contained in a franchise, whereby it agrees to remove a switch constructed in a street, when ordered to do so by the common council of the city which granted permission to construct the switch, originally.—Rapid Ry. Co. v. City of Mt. Clemens, 118 Mich. 133.

§ 84. Injury to public parks.

Weight and sufficiency of evidence, see post ¶ 399.

¶ 299. Where a city owns an island in a navigable river and has made it suitable for park purposes, and has constructed a bathing pavilion thereon at great expense a permanent injunction should be granted restraining the anchoring of house boats within the limits of a line around the island to which the city has been authorized to extend the shore line, and the discharging of garbage and night soil into the water.—Paterson v. Dust, 190 Mich. 679.

§ 85. Construction, maintenance and obstruction of drains and sewers.

Denial of injunction to wrongdoer, see ante § 22.

Decree compelling defendants to remove obstructions from ditch, see post ¶ 481.

Decree in suit to restrain city from maintaining sewage plant, see post ¶ 488.

Award of damages to complainant, see post § 144.

Affirmative relief to defendant, see post ¶ 514.

Restraining creation and operation of nuisances, see Nuisances.

Restraining collection of assessments, see Local Improvements.

Provisions as to enjoining the enforcement of drain assessments, see Comp. L. 1915, §§ 4924, 4926.

¶ 300. Injunction lies to restrain a township drain commissioner from fraudulently running a drain for the special benefit of his own property, and at the expense of complainants who are not benefited, but are injured by the consequent interference with an ancient watercourse in which they have rights.—Zabel v. Harshman, 68 Mich. 270.

¶ 301. An owner of land is entitled to an injunction to restrain another from extending sewer and water pipe, without authority, over such owner's land.—Flitcraft v. Sylvan Beach Resort Co., 157 Mich. 84.

¶ 302. The widening of a drain laid in a highway will not be enjoined at the suit of adjacent landowners on the ground that it would make the roadway so narrow as to be unsafe, where there is nothing to show that

the danger could not be obviated by suitable barriers.—Kiley v. Bond, 114 Mich. 447.

¶ 303. The appropriation by a city of a strip of farm land from two to three feet wide outside the corporate limits and the erection of the retaining wall of a sewer thereon and the casting upon the land the entire sewage from a city of 5,000 inhabitants are such acts as peculiarly call for the interference of a court of equity, and which if permitted to continue unrestrained will unquestionably result in irreparable injury to the owner.—Onen v. Herkimer, 172 Mich. 593.

¶ 304. Where a city appropriated a strip of farm land from two to three feet wide outside the corporate limits and erects the retaining wall of a sewer thereon and cast upon the land the entire sewerage from a city of 5,000 inhabitants, the owner may maintain a bill for an injunction and is not remitted to her legal remedy.—Onen v. Herkimer, 172 Mich. 593.

¶ 305. Where a ditch is constructed by a highway commissioner along a public highway for the purpose of draining the same, also carrying the water from the surrounding territory to a larger drain, and an abutting owner, past whose premises this ditch runs, fills the same, obstructs the flow of water and prevents the removal of the obstructions, he is properly restrained from so acting.—Miller v. Harmer, 173 Mich. 560.

¶ 306. An owner of land adjacent to the limits of a city was enjoined from filling up a ditch on his premises and obstructing the drainage of the city, where the city, in improving the ditch, had substantially fulfilled its obligations to the owner to his apparent satisfaction.—City of Coldwater v. Tucker, 36 Mich. 474.

¶ 307. The owner of a private sewer, who has the exclusive right to use the same, may maintain a bill to enjoin its use by other citizens, who connect therewith without his consent, where such use results in clogging the sewer and flooding the owner's house.—Boyden v. Walkley, 113 Mich. 609.

§ 86. Injunction to protect riparian and water rights.

Action at law for damages as precluding mandatory injunction to remove dam, see ante ¶ 32.
Abating mill dam which defendant has right to maintain, see ante ¶ 58.
Impracticability of enjoining excessive use of water from dam and canal, see ante ¶ 61.
Injury or hardship to defendant as ground for denying injunction, see ante § 19.
Enjoining breach of contract for water power, see ante ¶ 99.
Enjoining trespass upon private pond for fishing purposes, see ante ¶ 248.
Preventing interference with water easement, see ante ¶ 268.
Restraining construction, maintenance and interference with drains and sewers, see ante § 85.
Enjoining interference with rights on navigable waters, see post § 87.
Sufficiency of bill to enjoin obstructions in stream or canal, see post § 107.
Parties to suit to enjoin excessive use of water from dam, see post ¶ 357.
Parties to injunction to prevent flooding of land by maintenance of dam, see post ¶ 360.
Parties to suit to prevent mill company from lowering level of lake, see post ¶ 362.
Joinder of parties, see post § 106.
Effect of withdrawal of parties in suit to restrain building of dam, see post ¶ 375.
Weight and sufficiency of evidence in suit to compel removal of dam, see post ¶ 398.
Suspension of injunction against maintenance of dam, see post ¶ 451.
Decree in suit to enjoin interference with city water supply, see post ¶ 484.
Decree in suit to enjoin construction of dam, see post ¶ 485.
Relief upon dismissal of bill, see post §§ 144, 145, 146.
Modification of decree enjoining diversion of water, see post ¶ 515a.
Conclusiveness of decree, see post ¶ 525.
Violation of injunction against building dam, see post ¶ 532.
[Note. The right to or propriety of injunction to protect water rights and easements is so involved in the law of waters that the cases are treated in Waters, II-V. Matters of general injunction practice arising in water cases but not involving the law of waters are treated in other appropriate portions of Injunctions.]
Restraining maintenance of a mill dam at an unlawful height, see Nuisances.

§ 87. Obstructing or misusing navigable waters.

Injunction to protect hunting rights on navigable waters, see post § 91.
Restraining construction of boat channel cutting off access to complainant's lots, see ante ¶ 285.
General law of navigable waters, see Navigable Waters.

¶ 308. Erections by riparian owners in those parts of a stream that do not reach the line of navigability cannot be restrained unless shown to be nuisances or to be injurious to some public or private interest.—City of Grand Rapids v. Powers, 89 Mich. 94.

¶ 309. Even if a dock line established by the state in a navigable river used in interstate commerce is unreasonable its use will not be restrained as an obstruction to navigation where it merely affects the convenient floating of rafts of logs navigated between points on the river exclusively within the state.—Tittabawassee Boom Co. v. Cunning, How. N. P. 82.

¶ 310. A remedy by injunction is available to prevent defendant from cutting into and across complainant's lots adjoining a river for the purpose of forming a channel for turning a steamboat which is too large to turn in the river.—Wilkinson v. Dunkley-Williams Co., 139 Mich. 621.

¶ 311. One owning to the center of a bayou may maintain a bill for an injunction against one who, claiming under an agreement with complainant's grantor, obstructs the bayou by using it as a booming ground for saw-logs.—Turner v. Holland, 54 Mich. 300.

§ 88. Infringement on pictorial, literary or artistic property rights.

General law as to copyrights, see Literary Property.

¶ 312. One entitled to the exclusive use of certain moving picture films will be granted an injunction against parties wrongfully using and exhibiting the same films.—Gilligham v. Ray, 157 Mich. 488.

§ 89. Interference with business; unfair competition.

Enjoining breach of agreement not to engage in competitive business, see ante § 27.
Restraining employee or agent from disclosing or using trade secrets, see ante § 29.
Injunction to restrain city from engaging in commercial activities, see ante § 55.
Restraining boycotts and strikes, see post § 90.
Injunction against infringement of names used for trade marks or in business as trade names, see Trade Marks, IV.
What constitutes fraud by unfair competition, see Fraud § 75.

¶ 313. There is a remedy at law against a business rival who injures his competitor by false representations, such as that he is dead or gone out of business, or that the former's goods are the same as the latter's.—Smith v. Walker, 57 Mich. 456.

¶ 314. Equity will grant relief on a bill by one to restrain competitors from injuring his business by threatening his customers with law suits if they buy or use goods manufactured by him, and will restrain the competitors from acquiring information as to who are his customers.—Schwanbeck Bros. v. A. Backus, Jr. & Sons, 148 Mich. 508.

§ 90. Boycotts and strikes.

Injunction to prevent unfair competition, see ante § 89.
Dissolution of preliminary injunction against labor union, see post ¶ 450.
Contempt for violating decree, see post § 154.
Mandamus to compel issuance of junction against labor unions, see Mandamus.
General law as to labor unions, see Trade Unions.

¶ 315. Acts constituting a boycott or conspiracy may be restrained by injunction.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 316. A circuit court in chancery has jurisdiction to issue an injunction restraining interference by labor organizations, and their members, during a strike, with the rights of an employer by picketing his premises.—In re Langell, 178 Mich. 305.

¶ 317. Defendants were members of a unincorporated liquor dealers' association. Complainant, the publisher of a newspaper, printed a number of articles attacking alleged unlawful conduct of the liquor and other allied interests. At a meeting of said association, defendants appointed a committee to wait upon the advertising customers of complainant for the purpose of inducing them to withdraw their advertising patronage. The committee went about among complainant's customers and intimated to them that if they did not withdraw their patronage from complainant defendants would influence their friends to withdraw trade from said advertising patrons. These threats and intimidations were made in veiled language, but their meaning was clear to complainant's advertising patrons, many of whom did in fact withdraw their patronage from complainant. Held, complainant was entitled to an injunction against defendants to prevent them from further interfering with his advertising patrons and also to damages.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 318. Const. art. IV, § 42, providing that no one can be enjoined from publishing a libel, does not prevent a court of equity from enjoining, picketing, and the distribution of a boycotting circular that is not only a libel but which seeks to intimidate, threaten and coerce the public, from trading from an employer.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

¶ 319. The remedy by injunction is available where employees issue a boycotting circular, and attempt to ruin an employer's business by intimidation and coercion, and in such case actions at law would be inadequate.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

¶ 320. The distribution of circulars containing false statements and advising persons to boycott an employer is a part of intimidation which may be enjoined.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

¶ 321. A bill for an injunction to restrain the members of a labor union from interfering with complainants' workmen, showing by general averments that the members of the union picketed complainants' premises, threatened their employees and by intimidation and violence interfered with them

going to and coming from their work, establishes a case for granting relief.—Baltic Min. Co. v. Houghton Circuit Judge, 177 Mich. 632.

§ 91. Interference with civil rights.

Restraining interference with hunting rights, see also ante ¶ 50.

Injunction to prevent use of name and picture for advertising purposes, see post § 92.

Civil rights in general, see Civil Rights.

¶ 322. Interference with the right to hunt may occasion an irreparable injury, furnishing a basis for injunctive relief.—Ainsworth v. Munoskong Hunting & Fishing Club, 153 Mich. 185.

¶ 323. A writ of injunction will issue to protect individuals from interference with their right to hunt wild fowl upon the navigable waters of the state.—Ainsworth v. Munoskong Hunting & Fishing Club, 153 Mich. 185.

§ 92. Invasion of right of privacy.

¶ 324. An injunction will not lie by representatives of a deceased person to restrain a manufacturing company from selling cigars with a label bearing the name and likeness of the deceased person, so long as such act does not amount to a libel.—Atkinson v. John E. Doherty & Co., 121 Mich. 372.

G. COMMISSION OF TORTS AND PUBLIC OFFENSES.

§ 93. In general.

[Note. Injunctions against torts are usually based on interference with property or personal rights, and accordingly have been treated ante II, F. When a tort is threatened by an attempt to enforce an invalid law or ordinance, the cases are treated post II, H.]

Restraining acts of private corporations and officers or members, see ante § 53.

Restraining trespass by public officers, see ante § 56.

Enjoining acts of strikers, see ante § 90.

Avoidance of multiplicity as ground for assuming jurisdiction to restrain repeated trespasses, see also Equity ¶ 140.

¶ 325. Courts of chancery have no jurisdiction to restrain the threatened violation of a municipal ordinance unless the act amounts to a nuisance.—Village of St. Johns v. McFarlan, 33 Mich. 72.

¶ 326. The threatened violation of a municipal ordinance, although not expressly declared to constitute a nuisance, will be enjoined where the ordinance provides that its violation may be restrained by injunction, notwithstanding punishable by fine and imprisonment.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 327. The collection of garbage by an unlicensed person in violation of a city ordinance providing a penalty for its violation, may be enjoined at the suit of a board of health, where the city has let a contract for the exclusive collection and disposal of garbage, and is financially interested in the performance of such contract.—Board of Health Grand Rapids v. Vink, 184 Mich. 688.

§ 94. Publication of libel.

Injunction to prevent distribution of libelous, boycotting circular, see ante § 90.

Preventing invasion of right of privacy by wrongful use of name and picture, see ante § 92.

¶ 328. A court of equity as a general rule will not restrain the publication of a libel, but relief by injunction will be granted to restrain the state dairy and food commissioner from placing in the hands of every dealer in the state a bulletin which in effect threatens them with prosecution in case they make use of the complainant's products in the form in which they are lawfully sold to them because the effect would be to absolutely exclude complainant's business from the state.—Pratt Food Co. v. Bird, 148 Mich. 631.

H. EXECUTION OF INVALID LAWS AND ORDINANCES.

§ 95. Enforcement of criminal laws.

¶ 329. Equity will not restrain the enforcement of a criminal statute.—Kleinke v. Oates, 187 Mich. 548.

§ 96. Enjoining official acts under penal statute.

¶ 330. Where complainant files a bill to enjoin the state salt inspector and his deputies from further performance of their official duties as provided by Act 29, Pub. Acts 1896 (§§ 4911 to 4953, Comp. L. 1897), as amended by Act 323, Pub. Acts 1905, defendant's demurrer is properly overruled since equity may be invoked to test the constitutionality of a penal statute where the remedy at law is inadequate and incomplete.—Michigan Salt Works v. Baird, 173 Mich. 655.

§ 97. Enforcement of ordinances.

¶ 331. Interference by officers of a city with the business of a transient trader, whose license has been revoked by the common council, will not be enjoined because of the alleged invalidity of the ordinance under which the license was revoked, where adequate relief may be obtained in a pending prosecution for a violation of such ordinance.—Vernakes v. City of South Haven, 181 Mich. 274.

¶ 332. The fact that the penalties provided by a gas regulation ordinance for a violation of the rates fixed for the gas company are excessive is sufficient to give equity jurisdiction to entertain a bill to determine the validity of the ordinance and to restrain the enforcement of its provisions pendente lite.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 333. Equity will take jurisdiction to enjoin the enforcement of ordinances reducing the rates of fare on the various city railways of a street railroad company and providing for transfers of passengers from one route to another on the payment of one fare of 5 cents where thousands of passengers are carried daily over the tracks of the company and the latter, if the ordinances are enforced, will be subjected to a multiplicity of suits, and where no objection has been raised by answer, or otherwise, as to the jurisdiction of the court, and is not insisted upon.—City of Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

I. ASSERTION OF FORFEITURES.

§ 98. In general; forfeiting conditions in conveyances and land contracts.

Preventing breach of restrictions and conditions in deeds, see ante § 31.

General laws as to forfeitures, see Penalties and Forfeitures.

¶ 334. Under a contract for the purchase of lands the vendee took possession and erected a dwelling. The vendor subsequently declared the contract forfeited for nonpayment of an instalment of purchase money. Pending proceedings to recover possession he applied for an injunction to restrain the vendee from removing the house. Injunction refused on the ground that to grant it would be aiding to enforce a forfeiture.—Crane v. Dwyer, 9 Mich. 350.

¶ 335. Equity will not enforce a forfeiture for breach of the condition in a deed; but if the remedy sought is the enforcement of the condition it will interfere by injunction to restrain the breach thereof. And it will so interfere as against assignees of the persons originally bound by the condition, and notwithstanding the fact that forfeiture is prescribed as the penalty of the breach. —Watrous v. Allen, 57 Mich. 362.

¶ 336. Equity will not enjoin the severing and removing of timber after the expiration of the time reserved by the grantor in a deed for its removal; the legal and equitable title in the timber is in the grantor, and equity will not aid in enforcing a forfeiture.—Hodges v. Buell, 134 Mich. 162.

¶ 337. The assignee of one who had purchased standing timber and had been given an extension of time for the removal thereof will not be restrained from removing the timber because the time for removal had expired; since equity will not aid to enforce forfeitures.—Wallace v. Kelly, 148 Mich. 336.

§ 99. Forfeiture of franchises.

Injunction to prevent city from interfering with or destroying franchise, see ante § 59.

Relief upon dismissal of bill, see post § 145.

¶ 338. The circuit judge is justified, however large the interests involved, in refusing a preliminary injunction to restrain a city from enforcing a forfeiture of the franchise of a street-railway company, where it appears that the city is proceeding in exact accordance with the terms of its contract with the company.—Union St. R. Co. v. Saginaw Circuit Judge, 113 Mich. 694. Writ of error dismissed in 168 U. S. 706, 42 L. ed. 1214, 18 Sup. Ct. Rep. 945.

III. SUITS FOR INJUNCTION.

§ 100. Jurisdiction and venue.

Estoppel by laches and acquiescence, see ante § 28.

Necessity of plaintiffs doing or offering to do equity, see ante § 24.

Power to restrain proceedings in other courts, see ante § 37.

Power to enjoin proceedings pending in other counties, see ante § 39.

Jurisdiction to issue preliminary injunction without notice, see post § 120.

Retention of suit to grant complete relief, see post § 143.

Jurisdiction exercised in restraining proceedings at law, see also post § 150.

Jurisdiction to enforce decree, see post § 154.

Jurisdiction to dissolve injunction in vacation, see post ¶ 457.

Jurisdiction of supreme court to issue injunctions, see Courts § 51.

Venue of suits for injunction, see Venue.

Provisions respecting jurisdiction to restrain proceedings at law, see Jud. Act, chap. XIX, §§ 20, 21; Comp. L. 1915, §§ 12674, 12675.

Effect of appeal to transfer jurisdiction, see Appeal, IX.

Stay of proceedings by appeal, see Stay, II.

Amount necessary to jurisdiction in equity, see Equity § 16.

Provisions as to issuance of injunctions by circuit court commissioners, see Jud. Act, chap. II, § 109; chap. XIX, § 20; Comp. L. 1915, §§ 12178, 12674.

Power to issue injunctions on Sunday, see Jud. Act, chap. XIII, § 26; Comp. L. 1915, § 12429.

¶ 339. Application by a party or privy to stay a proceeding in chancery must be made to the court itself by petition in that proceeding. An officer out of court has no authority to allow an injunction for that purpose. But where the case was such that an order would have been granted, and the objection was not taken on the argument, the injunction was allowed to stand for such order.—Mason v. Payne, W. 459.

¶ 340. The remedy by injunction is strictly equitable, and cannot, in condemnation cases, be awarded by the supreme court, the chancery jurisdiction of which is appellate only.—Traverse City, K. & G. R. Co. v. Seymour, 81 Mich. 378.

§ 101. Parties complainant.

To whom remedy by injunction available, see ante § 20.

Parties to bill for preliminary injunction, see post § 118.

Township as party to bring bill to restrain construction of drain on behalf of landowners of township injuriously affected, see Drains § 107.

Right to injunction against disuse of franchised railroad, proper plaintiff, see Franchises ¶ 20.

¶ 341. A minor, who had purchased in another's name a lot represented on the seller's plat as lying adjacent to land dedicated as a public street, held not a proper party complainant to a suit by his grantee to enjoin the seller from closing the street.—Babcock v. Heenan, 193 Mich. 229.

¶ 342. A grantee of land bought by a minor, the title being taken in the name of an adult and later conveyed to the grantee, held the proper party to enjoin the minor's grantor from closing a public street represented as such on the plat on reliance on which the minor made the purchase.—Babcock v. Heenan, 193 Mich. 229.

¶ 343. A wife is a proper party to a bill to restrain the sale, under an execution directed against her husband, of lands held by them as tenants by the entirety.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 344. The assignee of a steam heating contract, who took an assignment with the purchase of the building to which it applied, may maintain a bill for an injunction against a breach of such contract, it not being a personal contract which the original party only could enforce.—Voigt v. Murphy Heating Co., 164 Mich. 539.

§ 102. ——Suits on behalf of the public.

Bill by attorney general to protect and preserve franchises, see Franchises ¶ 21.

Retaining bill as one by attorney general on dismissal as private bill on appeal, see Appeal ¶ 2194.

Costs on bill by attorney general on relation of private persons, see Cost § 37.

Practice in suits to restrain county action by attorney general, see Counties ¶ 217.

¶ 345. The attorney general is a proper party to proceedings in the nature of an information asking for an injunction to prevent public officers from violating Pub. Acts 1909, Act No. 29, How. St., 2nd Ed., § 9914; known as the Warner-Crampton Law, by approving bonds for licenses for an unauthorized number of saloon keepers.—Hartingh v. Bay Circuit Judge, 176 Mich. 289.

¶ 346. Under § 2556, Comp. L. 1897, a prosecuting attorney may file a bill on the relation of residents and property owners to enjoin a village from illegally accepting saloon bonds and issuing licenses thereon.—Village of Wolverine v. Cheboygan Circuit Judge, 162 Mich. 713.

¶ 347. The prosecuting attorney of a county is the proper party complainant in a bill to enjoin the operation of a saloon in violation of § 37 of Act No. 291, Pub. Acts 1909, § 5091, How. St., 2nd Ed., within four hundred feet from the entrance of a church.—George v. Travis, 185 Mich. 597.

¶ 348. The commissioner of public works of Detroit is the proper party to bring a suit to restrain the common council and the comptroller from performance of a contract entered into with architects for plans and specifications and for supervision of the work of making alterations in and additions to the city hall where such contract was an encroachment upon the duties of his department as prescribed by law.—Moreland v. Common Council of Detroit, 130 Mich. 343.

§ 103. ——Taxpayers as plaintiffs against officers and municipalities.

Interest entitling taxpayer to maintain injunction, see ante § 21.

Costs in taxpayers' suits, see Costs § 37.

¶ 349. Chancery has power to grant an injunction at the suit of an individual injuriously affected by the ultra vires acts of a municipal corporation.—City of Alpena v. Alpena Circuit Judge, 97 Mich. 550; Curtenius v. Hoyt, 87 Mich. 588.

¶ 350. Taxpayers of a city, who are electors therein, are proper parties to a suit to enjoin the city from illegally disposing of the corporate funds, or illegally creating a corporate debt by carrying out a lighting contract.—George v. Wyandotte Electric Light Co., 105 Mich. 1.

¶ 350a. Taxpayers have a sufficient interest to bring a suit to enjoin the construction of a public improvement and to rescind the sale of bonds therefor without the intervention of the attorney general.—Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204.

¶ 351. A taxpayer is a proper party complainant in a suit against a city to enjoin the payment by the city of a claim for legal services under an alleged illegal contract.—Schurtz v. City of Grand Rapids, 199 Mich. 20.

¶ 352. If courts of equity have jurisdiction to interfere by injunction to restrain the action of a municipal corporation on a bill filed by a taxpayer on behalf of himself and other taxpayers, the circumstances to authorize such interference must be such as to show that the proposed action will be inequitable and injurious to the public interest.—Chaffee v. Granger, 6 Mich. 51.

§ 104. ——Defendant.

¶ 353. A bill against a person in his individual capacity to enjoin proceedings at law instituted by him in a representative capacity is defective but amendable.—Pardridge v. Brennan, 64 Mich. 575.

¶ 354. The person entitled to payment under the contract or his legal successor, if it has passed to a successor, is an essential party defendant to taxpayer's bill to enjoin village from paying money under a contract. —Hoppock v. Chambers, 96 Mich. 509.

¶ 355. Where a complainant purchases from the executors land devised in a will, and buys up certain tax titles to protect his ownership, and a devisee under the will brings ejectment, complainant in a bill to enjoin said suit and to quiet title must bring in as party defendants the grandchildren of the testator, who by the will are devised a sixth interest in the land.—Vincent v. Evans, 165 Mich. 695.

¶ 355a. On a bill by an original lessee of a mine to restrain a later lessee from working mines, the owner having relet as on an abandonment, the owner is a necessary party defendant.—Porter v. Noyes, 47 Mich. 55.

§ 105. ——Necessary and indispensable parties.

Omission of necessary party as affecting right to preliminary injunction, see post ¶ 408.

In stockholders' suits on behalf of corporation, see Corporations § 347.

¶ 356. A joint maker of a note need not be made a party to a bill by another joint maker to restrain proceedings on a judgment recovered on the note against the latter alone. —Burpee v. Smith, W. 327.

¶ 357. The owners of a water-power canal on the east side of a river, who have agreed with the owner of a canal on the west side of the stream, taking water at the same dam, upon an equal division of the water between them, are not necessary parties to a bill filed by the west side owner to enjoin the use of water by one of his grantees in excess of the amount granted, and for an accounting as to such excess; nor are other separate grantees of water privileges from the complainant necessary parties to such suit.—Powers v. Hibbard, 114 Mich. 533.

¶ 358. To a bill filed by a husband and wife to restrain the sale under an execution directed against the husband of lands held by them as tenants by the entirety, a tenant in common with them, whose interest is not affected, no levy having been made thereon, is not a necessary party.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 359. On a bill by an execution purchaser to restrain a foreclosure sale of the same land, the mortgagor and his wife are necessary parties where it is sought to determine the amount due upon one mortgage and to have the other declared paid, the mortgagor still having a right to redeem from the execution sale.—Melze-Alderton Shoe Co. v. First State Sav. Bank, 171 Mich. 26.

¶ 360. Where the complainants, the owners of a dam above that of the defendants, bring a bill to enjoin the defendants from backing water upon the complainants' property, and for damages for backing water into the tailraces of complainants' mills, the fact that the defendants' dam was conveyed to a trustee by a trust deed in the nature of a mortgage to secure the bondholders, providing that the trustee could enter into possession in case of the defendants' default, there being nothing in the trust deed to authorize the trustee to defend such a suit, and no default having occurred, does not render the trustee a necessary party to such a suit, for it is not the purpose of the bill to take property, but only to restrain its wrongful use.—Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423.

¶ 361. Where an interest in land is assigned by contract as collateral for a debt and the assignee seeks to enjoin the recording of the contract, one to whom the assignor subsequently assigned his interest in the contract is a necessary party.—Ranney v. Stoll, 174 Mich. 440.

¶ 362. On a bill to restrain a mill company from lowering the level of a lake by opening its flume, lower riparian proprietors engaged in farming, who have acquired the prescriptive right to have the water flow through the flume in sufficient quantities so that their lands may be fit for husbandry, are necessary parties.—Thompson v. Addison Flouring Mill Co., 193 Mich. 6.

§ 106. ——Joinder, misjoinder and withdrawal of parties.

Bill against numerous parties to restrain separate actions at law, multifariousness, see Equity § 75.

¶ 363. Complainants may properly join in an injunction bill where their grievance, though not joint, is common, and the cause thereof and the relief they seek is the same. —Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 364. Several separate owners of distinct property interests that are alike affected may join as complainants, without the attorney-general, in a bill to enjoin the carrying on of a business in the vicinity of their dwellings in such a manner as to create a nuisance, where the grievance stated has one source, and operates in the same general manner against all.—Robinson v. Baugh, 31 Mich. 290.

¶ 365. To avoid multiplicity of suits numerous taxpayers, though not jointly interested, may join in a suit to restrain the collection of an invalid tax that would otherwise be levied on their personal property.—Clee v. Sanders, 74 Mich. 692.

¶ 366. Taxpayers who have a common ground of complaint may join in a bill to restrain injurious actions by a city.—City of Alpena v. Alpena Circuit Judge, 97 Mich. 550.

¶ 367. A bill to remove an obstruction from a public street need not join as defendants other parties making encroachments whose rights are not dependent on or connected with those of the person making the obstruction complained of, and who, as far as appears, have not refused to remove their encroachments when requested.—Village of Grandville v. Jenison, 84 Mich. 54.

¶ 368. Owners of separate lots abutting on the street may join in a bill to restrain the construction of a street railway therein.—Taylor v. Bay City Street R. Co., 80 Mich. 77.

¶ 369. A bill by several landowners to restrain the construction of a street railway in an adjoining street can be maintained only upon the theory that there is some grievance common to all, resulting in a damage common to all.—Nieman v. Detroit Suburban St. R. Co., 103 Mich. 256.

¶ 370. Distinct millowners allowed to join in bill to restrain operation of an upper dam restricting their right of flowage where there is a community of interest.—Cornwell Mfg. Co. v. Swift, 89 Mich. 503.

¶ 371. Where certain mill and factory owners brought a bill in equity to enjoin a booming company from various acts tending to render the water power by which the complainants' machinery was operated, of little value to them, and the bill did not ask for an accounting, it was held that the bill was not demurrable on the ground that the complainants had no common interest; and such a bill could be filed by one alone or by any number that felt the grievance.—Middleton v. Flat River Booming Co., 27 Mich. 533.

¶ 372. The owners of a water power and the corporation in which they are the principal stockholders and to whom they have leased it while they may have a common interest in procuring an injunction to restrain the obstruction of the flow of water have no common interest permitting them to maintain jointly a suit for damages for injury to the power by the obstruction.—Andrews v. Weckerman, 144 Mich. 199.

¶ 373. A grantor who covenants against an outstanding mortgage, which he claims to have subsequently paid, and a subsequent grantee, who, if the mortgage lien is not thus extingnuished, has a remedy upon said covenant if obliged to pay the mortgage, are properly joined as complainants in a suit to discharge such lien of record and enjoin the foreclosure of the mortgage.—Dedrick v. Den Bleyker, 85 Mich. 475.

¶ 374. Inasmuch as a widow may maintain an action to enjoin a trespass in cutting timber and wood on land in which she has a dower right but which has not yet been assigned, she need not join the other tenants in the action.—Delaney v. Manshum, 146 Mich. 525.

¶ 375. In a bill to enjoin the building of a dam, brought by complainant landowners, the fact that several complainants withdraw from the suit does not disentitle the others to relief.—Long v. Schroeder, 162 Mich. 690.

§ 107. Pleading.

Bill for preliminary injunction, see post § 118.
Affidavits or showing in support of application for preliminary injunction, see post § 121.
General law of pleading, see Pleading.
Necessary allegations in attorney general's bill against forfeited corporation, see Corporations ¶ 878.
Information by attorney general, when proper, see Equity § 72.
Sufficiency of averments in bill for injunction in drain proceedings, see Drains § 99.
Cross-bill by mortgagee in injunction to restrain city from forfeiting street railway franchise, see Equity ¶ 494.
Necessity and sufficiency of verification of bills in equity, see Equity §§ 67-69.
Multifariousness of bill against distinct public officers, see also Equity ¶ 268.
Averments as to amount in controversy, see Equity § 84.
Allegations as to want of adequate legal remedy, see also Equity § 85.
Multifariousness of bill for distinct causes, see Equity § 75.
Mandamus to dissolve injunction issued on multifarious bill, see Mandamus.

¶ 376. Where an injunction is asked to stay proceedings at law it is incumbent on the plaintiff to show in his bill the state of the pleadings, and the court in which the suit is pending, that the officer may judge of the propriety of the allowance and prescribe the terms on which it shall be issued.—Carroll v. Farmers' & Mechanics' Bank, H. 197.

¶ 377. A complainant seeking in equity to restrain attachment proceedings on the ground of defects therein, is bound to point out the defects on which he relies.—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189.

¶ 378. Where an injunction is the only adequate remedy the bill of complaint need not show that there is no adequate remedy at

law.—Middleton v. Flat River Booming Co., 27 Mich. 533.

¶ 379. Where a general injunction is sought against obstructions in a stream it is not necessary to give the location and description of the dams in the bill of complaint. —Middleton v. Flat River Booming Co., 27 Mich. 533.

¶ 380. Where an injunction bill is filed against a booming company for acts tending to render the water power of little value to the complainants, an averment in the bill that "the water is detained by dams above complainants' mill," which virtually amounts to the drying up of the stream and destroying its value as furnishing water power, "and that very much is lost by percolation and evaporation, meanwhile," is a sufficient allegation of injury.—Middleton v. Flat River Booming Co., 27 Mich. 533.

¶ 381. Where a bill in equity to enjoin certain acts of a corporation sets forth facts showing direct and unquestionable injury therefrom, it cannot be demurred to on the ground that the acts were authorized by the charter of the corporation, for an incorporation act cannot be understood as intending to authorize the destruction of vested property rights.—Middleton v. Flat River Booming Co., 27 Mich. 533.

¶ 382. In a bill praying that defendant be enjoined from obstructing a certain canal connecting Fox Creek and Lake St. Clair, complainant alleged that he owned land for residential purposes abutting upon Fox Creek; that he could only reach Lake St. Clair by the use of the canal in question; that said canal was a public highway; that complainant had no way of obtaining good drinking water, ice and provisions except to pass by boat through said canal to Lake St. Clair; and that complainant's premises were chiefly valuable for the water privileges afforded by Lake St. Clair. Held, a demurrer to said bill on the ground that it did not sufficiently allege special or peculiar damage separate and distinct from that sustained by the public at large, was properly overruled.—Lepire v. Klenk, 169 Mich. 243.

¶ 383. Where it is not alleged that third persons in possession of the personal property in litigation are insolvent, or transient, or that the fund is in a hazardous condition, an injunction will not be granted to preserve the status quo of the property, as they will be equally responsible to those whose rights to the property or fund should be established, though the property should be converted into money, and the money paid away pending the suit.—Thayer v. Swift, H. 430.

¶ 384. A bill in equity for the removal of an encroachment in a highway should accurately describe the encroachment, and should show the highway commissioner to have ordered removal and authorized the suit.—Township of Lebanon v. Burch, 78 Mich. 641.

¶ 385. A bill which shows, however imperfectly, that complainant has had turned out to him a quantity of No. 1 iron ore, and that an assignee of the debtor has possession of it, and is mixing it with ore of inferior quality and shipping it, makes out an equitable case to which a general demurrer will not lie. —Glidden v. Norvell, 44 Mich. 202.

¶ 386. A bill for injunction alleging that defendant, a discharged salesman, is making use of information gained through his employment to secure complainant's customers for a competitor, and is so doing by fraudulent misrepresentations of fact, is not open to the objection that it disclosed that complainant has an adequate remedy at law.—Grand Union Tea Co. v. Lewitsky, 153 Mich. 244.

¶ 387. A foreclosure bill averred that the mortgage was lost without being recorded, and that defendant threatened to sell the land, and it prayed an injunction. On demurrer the bill was dismissed on the ground that it did not show anything to have become due on the mortgage. Held erroneous. The complainant was entitled to be protected in his lien by injunction whether anything was due or not.—Hawkins v. Clermont, 15 Mich. 511.

¶ 388. A bill alleging that defendant "fraudulently and for the purpose of cheating and defrauding complainant from having the benefit of a release," did procure her appointment as guardian of the releasor, on the ground that said releasor was an incompetent, and that she as such guardian did bring a suit at law upon the released claim, does not entitle complainant to an injunction restraining the suit at law, since the appointment of the guardian can have no bearing upon the merits of the controversy involved in the suit at law.—Gallon v. Wayne Circuit Judge, 150 Mich. 621.

§ 108. ——In taxpayers' and other representative suits.

Pleading in stockholders' suits on behalf of corporation, see Corporations § 347.

¶ 389. The allegation in a taxpayer's bill to restrain the expenditure of public money by the officials of a municipality that such officials have declared or avowed their intention to expend public money for private enterprises, is not a statement of mere apprehension but of a fact which may be traversed and hence its truth is admitted by demurrer. —Bates v. City of Hastings, 145 Mich. 574.

§ 109. ——Demurrer, answer or other defensive pleading.

As to demurrer, see also ante ¶¶ 385, 387.
Admissions by demurrer to bill to enjoin expenditure of public funds, see ante ¶ 389.
Answer to application for preliminary injunction, see post § 132.

¶ 390. In a bill to enjoin an ejectment suit and to quiet title, defendants may impeach complainant's tax title without specifically stating their objections thereto in their answer.—Vincent v. Evans, 165 Mich. 695.

¶ 391. A demurrer to a bill to enjoin a breach and for specific performance of a contract by the defendants to purchase goods exclusively of the plaintiffs, should be overruled where the bill shows a complete cause of action, even though the court refuses specific performance because of the difficulty of supervising the performance; but equity should retain the bill and grant a conditional injunction to protect both parties.—Peerless Pattern Co., v. Gauntlett Dry-Goods Co., 171 Mich. 158.

§ 110. ——Issues, proof and variance.

See also ante ¶ 390.

Reference of issues to jury, see post § 114.

General law as to issues and variance, see Pleading.

Right to office as issue in injunction to protect incumbency of officer de facto, see Officers.

¶ 392. In a suit to restrain a street railway company from changing a curve in its track, it is not necessary to determine whether complainant has been damaged in his business or property by reason of the too close proximity of the track as changed to the curb at his corner, where the suit is based on alleged invalidity of the resolution allowing the change.—Mannel v. Detroit, Mt. C. & M. City Ry., 139 Mich. 106.

¶ 393. In a bill by a purchaser of a lot to enforce an agreement against the owner to impose building restrictions on subsequent buyers, the proof must follow closely and support the main allegations of the bill.—Stott v. Avery, 156 Mich. 674.

¶ 394. Where a bill to enjoin the erection of stores in alleged violation of building restrictions contained in a contract executed by the defendant's predecessor in title claimed to cover the lot in question, contains a prayer that the erection of all buildings thereon be enjoined except those allowed by the contract, the meaning and effect of the agreement is fairly in issue.—Erichsen v. Tapert, 172 Mich. 457.

§ 111. Presumptions, burden of proof and evidence.

General laws of evidence, burden of proof and presumptions, see Evidence.

Proof of adverse possession of street in bill to restrain use, see Adverse Possession § 51.

In aid of bankruptcy proceedings, what court, see Bankruptcy § 16.

¶ 395. On a bill to enjoin a suit to collect interest coupons on a negotiable bond on the ground that the bond was one of an issue that was canceled and destroyed for the maker or else lost or stolen during the process of destruction, it will be presumed that the holder of the bond is a bona fide holder.—Toledo, Saginaw & M. Ry. Co. v. Peters, 177 Mich. 76.

¶ 396. In an action to enjoin on the ground of irreparable injury proposed alterations in a building to which the lessor refuses consent, which the lease requires, offers made by the lessee in connection therewith, may be considered by the court in passing on the equities of the suit.—B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

§ 112. Weight and sufficiency of evidence.

Sufficiency of evidence on appeal, see Appeal § 432.

Sufficiency of showing of reliance on representations to sustain bill, see Fraud ¶ 58.

¶ 397. Evidence in support of a bill to enjoin defendant from carrying on an ice business in a particular locality, in violation of his agreement with complainant's assignor, that complainant has eleven ice houses, containing 8,000 tons of ice, five wagons for delivery, and many customers, while defendant has four wagons engaged in delivering ice to a large number of customers in direct competition with complainant, constitutes a sufficient showing that complainant is damaged by the continuance of defendant's business to an extent that justifies the interference of a court of equity, if he is otherwise entitled to relief.—Up River Ice Co. v. Denler, 114 Mich. 296.

¶ 398. On a bill to secure a mandatory injunction compelling defendant to remove an artificial dam built upon his land, evidence held to establish that defendant wrongfully constructed the dam thereby diverting the natural flow of surface water to complainant's injury.—Feldkamp v. Ernst, 177 Mich. 550.

¶ 399. On a bill by lot and cottage owners against a summer resort corporation to restrain the erection of an addition to a hotel owned by the corporation on land claimed to be a public park, evidence held sufficient to show that such addition was necessary and that it would in no way interfere with certain driveways.—Weihe v. Macatawa Resort Co., 198 Mich. 334.

¶ 400. Evidence held to sustain allegations of bill for mandatory injunction, entitling complainant to relief prayed for by decree commanding defendants to remove that portion of their building encroaching upon a certain five-foot strip claimed by complainant as a way and to pay certain damages.—Longton v. Stedman, 196 Mich. 543.

¶ 401. A bill by the purchaser of an ice business to enjoin the vendor from again starting up an ice plant in the vicinity, will

not lie at the instance of such purchaser, who alleges an oral contract made at the time of the purchase, under which the vendor agreed not to again engage in the business in the vicinity, where the writings make no mention of the claimed agreement, and the testimony does not establish it.—Bunn v. Kernen, 149 Mich. 593.

¶ 402. Where a bill is brought by the city to enjoin encroachment upon a strip of land reserved in the plat as a private way, it is properly dismissed when it appears that the strip is contiguous to a public way, that public use of the greater portion is as consistent with permission as with hostility, that the alleged encroachment is not an interruption of the use of the graded portion of the strip, and that there are other various asserted and recognized rights of the owners, showing that the strip in question is not a public highway.—City of Detroit v. Myers, 152 Mich. 666.

§ 113. Hearing on question of damages or alternative relief.

Granting damages or alternative relief, see post § 143.

¶ 403. It is proper practice to take testimony with reference to damages and to assess them at the hearing on the merits of the bill, if the complainant shows he is entitled to relief, when the bill asks for an accounting at the hearing and that the damages of the complainant be determined.—Walton Cranberry Co. v. Seamon, 171 Mich. 98.

¶ 404. The damages suffered by the additional flooding of land caused by the raising of the height of a dam, is a question of fact where a preliminary injunction preventing the raising was dissolved and the dam completed on the giving of a bond by the defendant.—Slote v. Constantine Hydraulic Co., 182 Mich. 260.

§ 114. Reference or issues to jury.

¶ 405. Where the owner of a farm outside the limits of a city warns city contractors to desist from using her land to construct a sewage plant, and the sewer is completed and is discharging upon her lands, the injury is irreparable, and under the general prayer for relief in a bill for an injunction the court has no right at the instance of the defendant, to refer the matter of damages to the determination of a jury to act as advisory to the court.—Onen v. Herkimer, 172 Mich. 593.

IV. PRELIMINARY OR TEMPORARY INJUNCTION.

A. IN GENERAL; CONDITION OF CASE; BOND, NOTICE AND HEARING.

§ 115. Nature, purpose and grounds.

Grounds for dissolving, see post § 125.
State suit to enjoin receiver of national bank, see Banking § 89, ¶ 285.

¶ 406. The object of preliminary injunctions is to preserve the status quo, so that, upon the final hearing, the rights of the parties may be determined without injury to either.—Gates v. Detroit & M. Ry. Co., 151 Mich. 548.

¶ 407. A mandatory preliminary injunction may issue to compel a carrier to continue delivering cars as it has delivered them for several years, where it is shown that otherwise complainant will suffer serious, if not irreparable, loss, and defendant can suffer but little injury.—Gates v. Detroit & M. Ry. Co., 151 Mich. 548.

¶ 408. Complainant bought one of ten lots advertised as in a residence street and restricted to that purpose by the contract of sale. The vendor sold one of the lots to the city, upon which it proceeded to erect a fire department building. Held, a temporary injunction would issue even though the vendor, a necessary party, was omitted from the bill.—Allen v. Wayne Circuit Judge, 159 Mich. 612.

§ 116. Discretion of court.

See also ante § 1; post ¶ 456.
Power to dispense with bond or security, see post § 124.
Discretion as to modifying, continuing or dissolving, see post § 128.
Mandamus to compel issuance or dissolution of injunction, see Mandamus.
Restrictions on power of court commissioners to grant injunctions, see 1916 C. C. Rule 54, §§ 2-4.

¶ 409. The granting of a preliminary writ of injunction is a discretionary power vested in courts of original jurisdiction, and such writ is not a matter of right, particularly in cases where the parties may be fully protected by final decree or by a suit at law.—Detroit & B. P. R. Co. v. Wayne Circuit Judge, 98 Mich. 141.

¶ 410. It is not an abuse of discretion for the circuit judge to reach a different conclusion as to granting an injunction from what the supreme court might have reached.—Detroit & B. P. R. Co. v. Wayne Circuit Judge, 98 Mich. 141.

¶ 411. Although as a general rule a preliminary injunction will usually be denied when a defendant answers fully and denies all the allegations of the bill, still it is a matter of judicial discretion whether or not to follow the rule.—Mactavish v. Kent Circuit Judge, 122 Mich. 242.

¶ 412. Where a circuit court refuses a temporary injunction restraining the use of property, the supreme court will not interfere with its discretion except upon very clear and strong grounds.—Township of Wyoming v. Judge Superior Court of Grand Rapids, 158 Mich. 60.

¶ 413. To grant or dissolve an interlocutory injunction is a discretionary order of the trial court with which the courts will rarely interfere, and then only on special application and a strong showing of palpable abuse of discretion.—Freeman v. Mitchell, 198 Mich. 207.

§ 117. Time to issue.

Dissolution of injunction in vacation, see post ¶ 457.
Bond or security as prerequisite to issuance, see post § 124.

¶ 414. It is irregular for injunction to issue and be served before the subpoena, which is the first process.—Peltier v. Peltier, H. 19; and see Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313.

§ 118. Sufficiency of bill and parties thereto.

Parties to bill for permanent injunctions, see ante § 101.
Bill for permanent injunction, see ante § 107.
Omission of necessary party to bill to enforce restrictions in deed, see ante ¶ 408.
Filing bond or security with bill, see post § 124.
Dissolution of injunction for want of equity in bill, see post § 127.
Allegations in bill taken as true on motion to dissolve, see post § 130.
Pleadings and notice to sustain injunction closing bank, see Banking § 75.

¶ 415. Where in a bill brought to secure a temporary injunction the allegations are made on information and belief, a preliminary writ will be denied.—Allen v. Wayne Circuit Judge, 159 Mich. 612.

§ 119. ——Verification or oath to bill.

See also ante ¶ 415.

¶ 416. A bill asking for a preliminary injunction must be sworn to on personal knowledge of facts that will justify its issue, or reason must be shown for the absence of such verification.—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189.

Necessity of verified bill, see also Equity § 67.
Positiveness of verification or statement of reasons for belief, see also Equity ¶ 240.

¶ 417. A bill containing no averment of any act or threat by defendants on anything but information and belief, and that is supported by no affidavit or oath upon knowledge, cannot support an injunction.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9.

¶ 418. Whether injunction should issue on information and belief to interfere with defendant's rights in property already in possession, unless in extreme cases where the facts relied on are within defendant's knowledge, quære.—Caulfield v. Curry, 63 Mich. 594.

¶ 419. A bill for an injunction sworn to positively by seven affiants of their own knowledge, "except as to matters therein stated upon information and belief," the material allegations being stated without qualification, is properly verified.—Baltic Min. Co. v. Houghton Circuit Judge, 177 Mich. 632.

¶ 420. Where in a bill brought to secure a temporary injunction, the allegations are made on information and belief, they are sufficient on an order to show cause, to secure the injunction when established by adequate evidence.—Allen v. Wayne Circuit Judge, 159 Mich. 612.

¶ 421. The averments of a bill for an injunction not being denied by defendant are sufficient if charged on information and belief.—Ainsworth v. Munoskong Hunting & Fishing Club, 153 Mich. 185.

§ 120. Notice of application.

¶ 422. An injunction to stay the enforcement of a judgment in legal proceedings cannot be granted without notice to the party to be enjoined. And it makes no difference in this regard that the bill is filed by one not a party to the legal proceedings.—Boinay v. Coats, 17 Mich. 411.

¶ 423. A circuit court commissioner cannot allow an injunction without notice to stay proceedings at law (Chancery Rule 112).—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189.

¶ 424. An injunction master has no authority to grant injunctions without notice, unless the peculiar exigencies require it "for manifest reasons to be shown by affidavit."—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9.

¶ 425. The issuance of an injunction and the appointment of a receiver ex parte is an absolute nullity.—Goldman v. Manistee Circuit Judge, 155 Mich. 47.

§ 121. Affidavits or showing in support of pleadings.

Supporting affidavits on motion to dissolve, see post § 131.

¶ 426. Where a bill for an injunction to restrain public officers from approving bonds for licenses to sell intoxicating liquors in excess of the number authorized by Pub. Acts 1909, Act No. 291, How. 2nd Ed., § 5055, known as the Warner-Crampton Act, states many of the matters upon information and belief, it is proper to support the bill by accompanying affidavits of persons having knowledge of the facts, and a temporary injunction may then issue.—Hartingh v. Bay Circuit Judge, 176 Mich. 289.

¶ 427. The affidavit of one defendant may properly be used in support of the answer of

another in resisting an application for an injunction.—Hart v. Baxter, 47 Mich. 198.

§ 122. Hearing and order.

See also ante ¶ 428.

Affidavits in support of application, see ante § 121.

Decree or order on final hearing, see post § 140.

¶ 428. On a motion for an injunction the statements in the bill must be taken as true, and the relief sought must be consistent with the case made by the bill.—Michigan State Bank v. Hastings, W. 9.

§ 123. ——Scope and extent of relief.

¶ 429. The rights of parties cannot be finally determined on affidavits or on motion for preliminary injunction.—Ladd v. Flynn, 90 Mich. 181.

¶ 430. Possession of lands is not to be disturbed or changed by means of a preliminary injunction.—People ex rel. Messler v. Simonson, 10 Mich. 335; Arnold v. Bright, 41 Mich. 207; Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9.

¶ 431. An ex parte injunction depriving the directors of a corporation of the management of the corporate business is void.—People ex rel. Port Huron & G. R. Co. v. St. Clair Circuit Judge, 31 Mich. 456.

¶ 432. An order made upon a motion for a preliminary injunction and without a hearing on the merits, commanding the removal of a fence alleged to have been erected maliciously, and enjoining its rebuilding, is invalid.—Ladd v. Flynn, 90 Mich. 181.

¶ 433. A preliminary injunction restraining a railway company from running over its road, except on condition of its carrying lumber at a rate that had been agreed on, is illegal and void.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 434. A chancery order permitting a complainant to begin suit at law and to institute garnishment in aid thereof, but restraining all proceedings at law after service of process until further order is unauthorized, as it would impound defendant's funds without giving him the rights conferred by the statute of garnishment.—Foster v. Kent Circuit Judge, 116 Mich. 285.

¶ 435. It is not error for a trial court to dispose finally of a chancery case upon the hearing of a motion to grant or dissolve an injunction pendente lite, where the only question involved is one of law as to the proper interpretation of the statute governing the right of the complainant to pay up a rent claim and retain possession after the affirmance of the judgment of restitution in the supreme court.—Smith v. Nelson, 165 Mich. 488.

¶ 436. Where a railroad contracted to deliver logs from certain lands upon a specified sidetrack, a preliminary mandatory injunction will not be granted compelling it to continue such delivery, where it appears that complainant is made a judge of what logs are shipped from lands covered by the contract, and what logs are shipped from other lands.—Gates v. Detroit & M. Ry. Co., 151 Mich. 548.

§ 124. Bonds or other security.

Bonds or security upon issuance of permanent injunction, see post § 147.

Liability on bonds, see post § 155.

Bond or deposit before injunction against proceedings at law, see Jud. Act, chap. XIX, §§ 8-19; Comp. L. 1915, §§ 12662-12673.

¶ 437. The court cannot dispense with the filing of a bond as preliminary to the injunction when it is required by the statute.—Carroll v. Farmers' & Mechanics' Bank, H. 197.

¶ 438. Interference by injunction should not be allowed where the delay may work great damage, without making full provision for redress by an adequate injunction bond.—Torrent v. Muskegon Common Council, 47 Mich. 115.

¶ 439. Security must be filed with a bill to enjoin proceedings at law (How. St. § 6692).—Jenness v. Smith, 58 Mich. 280.

¶ 440. It is only when a preliminary injunction is issued to stay an action at law, that a bond need be given as required by § 502, Comp. L. 1897, § 12020, How. St., 2nd Ed.—Felton v. Wedthoff, 185 Mich. 72.

¶ 441. Section 507, Comp. L. 1897, controlling the issuing of injunctions to stay proceedings at law, and requiring petitioner to give bond for damages and costs, applies only to suits at law for the recovery of land after verdict, not before verdict.—Skutt v. Ionia Circuit Judge, 158 Mich. 43.

¶ 442. Comp. L. 1897, § 502, requiring a bond in suit to enjoin an action at law does not of necessity require a bond in a suit by a mortgagee to enjoin the removal of machinery from a building although such machinery is the subject of a replevin suit then pending.—American Foundry & Machinery Co. v. Charlevoix Circuit Judge, 138 Mich. 167.

¶ 443. Section 502, Comp. L. 1897, § 12020, How. St., 2nd Ed., does not require the filing of a bond as a prerequisite to the enjoining of a seizure or sale under an instrument in the nature of a chattel mortgage.—Lehnen v. Ryan, 185 Mich. 246.

¶ 444. One who claims property that an officer is about to sell under execution against a third person cannot have a preliminary in-

junction against such sale without filing the bond required by How. St. § 6689.—Hinkle v. Baldwin, 93 Mich. 422.

¶ 445. An injunction restraining defendant from proceeding to sell goods seized under a writ of attachment is void if issued without the bond required by How. St. § 6687, which expressly provides that no injunction shall issue to stay a personal action without bond to pay all moneys recovered or the collection of which may be stayed.—Lawton v. Richardson, 115 Mich. 12.

¶ 446. Proceeding to judgment in attachment proceedings with knowledge of another's claim against the property attached is not fraud, and will not therefore warrant a circuit court commissioner, on allowing an injunction, to restrain proceeding to dispense with security.—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189.

¶ 447. An injunction bond is a perfect obligation as soon as filed with the register in chancery in compliance with the statute.—Lothrop v. Southworth, 5 Mich. 436.

B. DISSOLUTION, MODIFICATION, CONTINUANCE OR REINSTATEMENT.

Right of successors in interest to revive suit in order to dissolve injunction, see Abatement ¶ 102.
Effect of death of husband in bill for divorce with injunction against him and codefendant, see Abatement ¶ 8.
Appearance to law action, effect on injunction staying law action after service of process, see Appearance ¶ 55.

§ 125. Grounds for dissolving.

Grounds for preliminary injunction, see ante § 115.
Dissolution upon plea or answer, see post § 132.
Failure to appear and contest motion, see post § 133.
Dissolution of injunction granted by supreme court, see post § 139.
Dissolution of injunction suspending banking corporation, see Banking § 76.

¶ 448. An injunction will not be dissolved on the ground that no prayer for an injunction was contained in the prayer for process.—Duncomb v. Richards, How. N. P. 274.

¶ 449. A temporary injunction was issued by the circuit judge enjoining relator street railway from running and switching its interurban cars upon the tracks on certain streets within the city. On mandamus to force the judge to dissolve his order, held, that the writ should be granted, since it did not appear that the city would in any way be injured by waiting until a hearing on the regular bill could be had.—Michigan United Rys. Co. v. Kalamazoo Circuit Judge, 159 Mich. 399.

¶ 450. Defendant labor council was composed of representatives sent by the various unions of a city. A certain Local Union, No. 123, including many of complainant's employees, went on a strike, and its members committed illegal acts of interference with the nonstrikers. Said Union No. 123 was not represented in the defendant council, and there was no evidence that defendant as a body had in any way advised or aided said illegal violence. Held, an injunction against defendant should be vacated.—Escanaba Mfg. Co. v. Trades and Labor Council of Escanaba, 160 Mich. 656. (Hooker, McAlvay and Brooke, JJ., dissenting.)

¶ 451. A court of equity will not further suspend an injunction against the maintenance of a dam whereby the lands of another would be overflowed, on the ground that by such injunction the one who constructed the dam would suffer damages greatly in excess of those caused by such overflow, in that he would thereby be prevented from flowing his logs to his mill, where two suspensions of 60 days each, during the season of the year most favorable for getting out timber, have already been granted, of which suspensions the builder of the dam has negligently failed to take advantage.—Michigan Land & Iron Co. v. Cleveland Sawmill & Lumber Co., 109 Mich. 164.

§ 126. ——Invalidity of preliminary injunction.

¶ 452. A preliminary injunction issued, in violation of the statute, to stay the collection of taxes, should be unconditionally dissolved upon motion.—Eddy v. Township of Lee, 73 Mich. 123; Walsh v. King, 74 Mich. 350.

§ 127. ——Want of equity.

¶ 453. An injunction will be dissolved on motion if it is shown by special plea that there is no equity in the bill.—Eldred v. Camp, H. 162.

¶ 454. Where the equity of a bill is denied by answer the injunction will be dissolved on motion—Eldred v. Camp, H. 162.

¶ 455. Where the bill prays an injunction, but it is omitted in the prayer for process, it is good ground for refusing the injunction, but not for dissolving it when it has been allowed.—Taylor v. Snyder, W. 490.

¶ 456. The granting and continuance of injunctions rest in the discretion of the court; and they will not always be dissolved when the equity of the bill is fully denied. If by a dissolution the complainant is likely to be deprived of all benefits he might otherwise derive by succeeding in the suit, it will not be dissolved as a matter of course on the coming in of an answer denying the equity of the bill.—Attorney General v. Oakland County Bank, W. 90.

¶ 457. Without answer or plea the defendant may move to dissolve an injunction for

want of equity in the bill, and this in vacation.—Cooper v. Alden, H. 72.

§ 128. Discretion of court.

See also ante ¶ 456.
Discretion to refuse injunction entailing disproportionate injury to defendant, see ante § 19.
Discretion as to issuance of preliminary injunction, see ante § 116.
Mandamus to compel dissolution of injunction, see Mandamus.

¶ 458. The dissolution of a preliminary injunction is largely within the discretion of the circuit court.—Hulan v. Wayne Circuit Judge, 159 Mich. 605.

¶ 459. The rule that the court will dissolve a preliminary injunction upon the coming in of a sworn answer fully meeting the allegations of the bill is not so rigid as to deny any discretion in the court to continue the injunction.—Chicago, K. & S. Ry. Co. v. Kalamazoo Circuit Judge, 138 Mich. 246.

§ 129. Application or motion.

Provisions as to subsequent applications for injunction after refusal, see Jud. Act, chap. IV, § 15; chap. II, § 109; Comp. L. 1915, §§ 12178, 12262.

¶ 460. Prior to the Judicature Act of 1915, it was proper to combine a contingent application for dissolution of a preliminary injunction with a motion to dismiss the bill as insufficient on questions raised by demurrer.—Freeman v. Mitchell, 198 Mich. 207.

§ 130. ——Issues and questions on motion.

¶ 461. On motion to dissolve an injunction before answer the allegations in the bill are to be taken as true.—Schwarz v. Sears, H. 440.

¶ 462. On a motion to dissolve a temporary injunction, in the absence of answer or opposing affidavits, the allegations in the bill are to be taken as true.—Baltic Min. Co. v. Houghton Circuit Judge, 177 Mich. 632.

§ 131. ——Supporting affidavits.

Affidavits in support of application for preliminary injunction, see ante § 121.
Form and entitling of affidavits for use, see Affidavits §§ 3, 4.
Insufficiency of affidavits to stand as amendments on motion to dissolve, see Equity ¶ 575.

¶ 463. Permitting complainants in a chancery suit to file additional affidavits upon a hearing of a motion to dissolve a preliminary injunction is contrary to the usual practice, but there are exceptions where it may be permitted.—Central Bitulithic Paving Co. v. Manistee Circuit Judge, 132 Mich. 126.

¶ 464. Affidavits will not, as a general rule, be allowed to be substituted for an answer for the purposes of a motion to dissolve an injunction. Exceptions in case of waste or irreparable mischief and partnership.—Sacket v. Hill, 2 Mich. 182.

¶ 465. On motion to dissolve an injunction before answer an affidavit is admissible which goes to show that the injunction was irregularly issued, or that the officer allowing it was misled and induced to grant it contrary to law.—Carroll v. Farmers' & Mechanics' Bank, H. 197.

§ 132. Dissolution upon answer.

See also ante § 127.
Answer to bill for permanent injunction, see ante § 109.
Discretion of court, see ante § 128.
Dissolution upon motion in absence of answer, see ante § 129.
Affidavits in lieu of answer, see ante § 131.
Discretion of court, see ante ¶ 411.

¶ 466. An answer must be positive, full and satisfactory in meeting and denying the equity of the bill, or an injunction will not be dissolved upon it.—Attorney General v. Oakland County Bank, W. 90.

¶ 467. An injunction will not be dissolved on an answer admitting the equity of the bill and setting up new matter as a defense.—Attorney General v. Oakland County Bank, W. 90.

¶ 468. A temporary injunction to restrain public officers from approving bonds for licenses to sell intoxicating liquors in excess of the number authorized by law, will not be dissolved on the ground that the answer denied the material allegations of the bill, where the answer denies that defendants threatened to approve of the applications for licenses, but does not state that they do not intend to approve the applications and proceeds to state that such course would not be a violation of the statute.—Hartingh v. Bay Circuit Judge, 176 Mich. 289.

§ 133. Dissolution upon failure to appear and oppose motion.

¶ 469. Where complainant, having had due notice of a motion to dissolve an injunction, neglected to appear and oppose the motion, the defendant was permitted to take his order dissolving the injunction with costs.—Kellogg v. Barnes, H. 258.

§ 134. Dismissal of bill as dissolution.

¶ 470. Where a bill to restrain certain expenditures by trustees under a will, and an appeal from the order of the probate court approving the account of the trustees, are both pending, and by consent of the parties the bill is dismissed, all the incidents of the bill fall with its dismissal, and the parties are left in the position they would have occu-

pied if the injunction suit had not been instituted.—In re Ward's Estate, 152 Mich. 218.

§ 135. Order for dissolution.

Upon default of complainant to oppose motion for dissolution, see ante ¶ 469.

Retention of bill for further relief, see post § 143.

¶ 471. An interlocutory order dissolving an injunction against obtaining possession does not adjudicate the right of possession when that is in issue, so as to anticipate the final decree.—Ramsdell v. Maxwell, 32 Mich. 285.

§ 136. Modification of injunction.

Modification of decree for final injunction, see post § 149.

Modification of injunction enforcing building restrictions, see Buildings ¶ 118.

Provision in final decree for modification of injunction against violation of restrictions in deed, see post ¶ 483.

¶ 472. A circuit judge, who has issued an injunction restraining a plank-road company from using upon its road material other than that prescribed by the terms of its charter, may modify such injunction, if he is satisfied that to do so will be advantageous to the public, and will not result in the creation of a public nuisance.—Detroit & E. P. R. Co. v. Macomb Circuit Judge, 109 Mich. 371.

¶ 473. Where, after the issue of an injunction restraining a plank-road company from using upon its roadbed any material except that authorized by the existing statute, an act is passed permitting the use of other materials, the injunction should be modified accordingly.—Township of Erin v. Detroit & E. P. R. Co., 115 Mich. 465.

¶ 474. On mandamus to compel the modification of an injunction issued upon the filing of a creditor's bill alleging fraud and conspiracy of the debtors and a third person in placing real estate and a printing business of debtors out of the reach of creditors by forming a corporation, by which injunction the corporation was restrained from disposing of its property or paying salaries to one of the judgment debtors and another person, and a mortgagee from foreclosing a chattel mortgage given by the corporation, held that the injunction should be modified so as to permit the payment of the salaries by the corporation until the final determination of the case in the trial court.—Maple Press Printing Co. v. Wayne Circuit Judge, 191 Mich. 526; Goodman v. Wayne Circuit Judge, Id.

§ 137. Continuance of temporary injunction.

Continuance of injunction against use of streets by railways, see ante § 82.

¶ 475. A temporary injunction issued upon an original bill was properly continued under an amended bill that did not change the character of the controversy.—Earle v. Kent Circuit Judge, 92 Mich. 285.

¶ 476. Where a tenant is in possession of land under a prima facie claim under a lease, and during his absence his possession is disturbed and trespasses made by a grantee of the owner claiming possession, a preliminary injunction issued under allegations showing irreparable injury to enjoin such disturbance is properly continued until a hearing on the merits.—Doane v. Allen, 172 Mich. 686.

¶ 477. A preliminary injunction granted notwithstanding bill's failure to allege requisite facts upon complainant's oath, and allowed to stand until hearing, when sufficient equity appears on the proofs, should be perpetuated.—Smith v. Blake, 96 Mich. 542.

§ 138. Continuance, dissolution or revival on appeal.

Revival of preliminary injunction by appeal, see Appeal § 135, ¶ 599.

¶ 478. A preliminary injunction which has been dissolved on the coming in of defendant's answer, upon motion or upon the final hearing, is not revived by the appeal. If further order is desired or is needed application should be made to the appellate court. Hulan v. Wayne Circuit Judge, 159 Mich. 605.

§ 139. Dissolution of injunction granted by supreme court.

¶ 479. An injunction granted by a justice of the supreme court, in cases where the statute authorizes it, stands upon the same footing, in regard to motion for dissolution, as if granted by the chancellor.—Cooper v. Alden, H. 72.

V. DECREE OR ORDER, AND TERMS OF RESTRAINT OR COMMAND.

§ 140. In general.

Review of discretion in allowing injunction, see Appeal § 411.

Order on application for preliminary injunction, see ante § 122.

Passing upon merits on application for preliminary injunction, see ante § 123.

Extent of relief against use of streets by street railways, see ante § 82.

Scope of decree of injunction in relief against drain proceedings, see Drains § 111.

Rules for awarding costs to parties, see Costs, II, B.

Mandamus to compel issuance of injunction, see Mandamus.

¶ 480. Where, instead of ejectment, a bill to restrain the defendant from removing a house he had built on land claimed in part by complainant but conceded to be owned in part by the defendant was sought, the only appropriate decree would be one to restrain waste pending a determination of the title in the appropriate action of ejectment.—Cromwell v. Hughes, 144 Mich. 3.

¶ 481. A mandatory injunction was proper against the active individual defendants, other than a township, where it appeared that they in conspiracy filled up plaintiffs' ditch enjoyed by prescription, doing so under color of void proceedings to abate a nuisance and to condemn the right to lay a highway in its former location; and they were adjudged to restore the original conditions at their own expense within a time specified, or in the alternative that plaintiffs recover specific sums for the cost of doing the work, an injunction was allowed against all defendants' interfering in any way with the drainage through the ditch as so restored.—Chase v. Middleton, 123 Mich. 647.

¶ 482. A complainant lot owner by bill sought to enjoin an abutting lot owner from stopping up an alley, and claimed the right to use its entire width on the ground that it was a public highway, or, if not so, that the complainant had acquired an easement to pass over it. He failed to sustain either contention. Held, the court would not enjoin the defendant from interfering with the part of the alley to which defendant had no title, since the bill had proceeded upon complainant's claim of right to use all the alley.—Le Roy v. Collins, 154 Mich. 77.

¶ 483. A decree in a bill to enjoin violation of a restriction in a deed against the erection of anything but dwellings, which provided that the decree might be modified on the application of either party in the event that in the opinion of the court circumstances and conditions had so changed that equity and justice required such modification, sufficiently protected the defendant's rights.—Frink v. Hughes, 133 Mich. 63.

¶ 484. On a bill for an injunction by the board of water commissioners of the City of Detroit to enjoin the Village of Highland Park from interfering with or molesting the water supply in that village, which complainant had been furnishing through defendant's water system, which complainant claimed to own, and with which complainant had made connections, held that it was proper to incorporate in the decree for defendant provisions requiring that, upon request of complainant, the village should grant a right of way through its streets for a supply main for the purpose of furnishing city water to residents of the city north of the village who had previously been supplied through the village mains with city water and that the village should supply water to such consumers until the mains were laid, especially as the village had practically consented to such a provision of the decree in its answer and had not appealed from the decree.—Board of Water Com'rs City of Detroit v. Village of Highland Park, 192 Mich. 607.

¶ 485. Complainants filed a bill asking that defendants be enjoined from building a new dam to a height twenty inches greater than an old dam. Later they filed a supplemental bill, asking that the defendants be required to take down the new dam to the height of the old one. Held, the relief asked in the supplemental bill was not inconsistent with that asked in the original bill.—Long v. Schroeder, 162 Mich. 690.

§ 141. Restriction of relief to parties and issues involved.

Terms of injunctions against misuse or pollution of waters, adjustment of decree to relative rights of parties, see Waters, II-V.

¶ 486. Where a sale and agreement in restraint of trade that were sustained as reasonable, and enforced by an injunction, had been made by a firm of two persons, who afterward violated the agreement, one by going into the business alone, and the other as a partner of a third person who was made defendant, the injunction was limited to the third person simply to prevent him from engaging in the business as a partner with either of the other defendants, but did not restrain him individually.—Hubbard v. Miller, 27 Mich. 15.

¶ 487. On a bill to restrain a plank-road company from using gravel in construction of its road on the ground that a nuisance would result, and on the further ground that the corporate franchise did not allow it, the nuisance being disproved equity has no jurisdiction to enjoin a misuser of corporate franchises, or to compel the performance of corporate duties. So held where a township and its highway commissioner sought to restrain a plank-road company from using upon its roadbed material other than that prescribed by its charter.—Township of Erin v. Detroit & E. P. R. Co., 115 Mich. 465.

§ 142. Provisions as to time, duration and operation of restraint.

¶ 488. Where a city appropriated a strip of farm land from two to three feet wide outside the corporate limits and erects the retaining wall of a sewer thereon, and builds a sewage plant at great expense, and casts upon the land the entire sewage of a city, an injunction will issue but the decree may be made inoperative for six months in order that the defendants may take such steps as seem advisable to protect the rights of the city.—Onen v. Herkimer, 172 Mich. 593.

¶ 489. It is immaterial whether an injunction against trespassing upon a private fishing pond is perpetual, and it should continue until such time as the defendants, or some of them, have secured the right to invade the property and will not prevent them from securing or exercising the right when obtained.—Winans v. Willetts, 197 Mich. 512.

§ 143. Alternative and complementary relief.

Hearing on question of alternative relief, see ante § 113.

Retention for further relief of bill to restrain collection of taxes, see Taxes.

General law as to retention of bill to grant complete relief, see Equity § 219.

Propriety of compensation as relief in equity, see also Equity § 217.

Equity jurisdiction to direct lands of estate to be sold in inverse ratio of alienation by devisees on bill to restrain representative's sale, see Estates of Decedents ¶ 817.

Propriety of conditional decree requiring refund by widow of allowance made when estate was solvent, see Estates of Decedents ¶ 346.

¶ 490. The jurisdiction of equity having attached to enjoin improper sale by executors, sufficient cognizance of the whole matter may be taken by the court to declare for what purpose a sale may be ordered.—Ireland v. Miller, 71 Mich. 119.

¶ 491. A bill whereon an injunction was dissolved on giving a bond for damages may be retained, notwithstanding an issue of damages only remains as to that trespass which is past, where it also appears that it is threatened in the future and that a perpetual injunction is necessary to adequate relief.—Hall v. Nester, 122 Mich. 141.

¶ 492. Where equity has jurisdiction of a suit to enjoin a continuing trespass, it should give such relief as will finally dispose of every question involved.—City of Detroit v. Detroit United Ry., 172 Mich. 136; affirmed in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697.

¶ 493. A court of chancery which acquires jurisdiction of an action by the issue of an injunction to restrain a premature sale under an instrument in the nature of a chattel mortgage, may retain jurisdiction and require an accounting between the parties.—Lehnen v. Ryan, 185 Mich. 246.

¶ 494. Where defendants have placed upon record void tax deeds, have claimed to serve the required notices of sale, have attempted to convey away a part of the timber, and have commenced to denude the land of valuable timber, a court of equity has power to restrain the continued trespass, and, having obtained jurisdiction for such purpose, will retain it to give such full relief as will finally dispose of the controversy.—Fitschen v. Olson, 155 Mich. 320.

¶ 495. In a suit to enjoin the carrying out of a contract with an electric company to furnish a plant for a city, the court decreed that the contract was void, and enjoined further payment thereunder. There was no dispute as to the amount of money which the city had paid on the contract. Held, that as complete relief the court should have required the electric company to account to the city for the money it had received, and to refund the same into the city treasury, thus disposing of the entire controversy.—George v. Wyandotte Electric Light Co., 105 Mich. 1.

¶ 496. Where complainant and his wife entered into an oral agreement with defendants, his father and mother, to live on a farm and make a home for them during their lifetime and in consideration defendants agreed to leave complainant the farm on their death and after ten years defendants became dissatisfied with the arrangement, left the farm and attempted to sell it, in an action to enjoin the sale it is ordered that defendants select a homestead in the land and that the amount due complainant as, rightful compensation be determined by the circuit court and made a lien on the land not held as a homestead.—Klett v. Klett, 175 Mich. 224.

§ 144. ——Damages.

General law of damages, see Damages.

Award of compensation as at law for complete relief in equity, see also Equity § 222.

¶ 497. Where equity has acquired jurisdiction for the purpose of granting an injunction, it may retain the suit for the purpose of awarding damages to complainant.—Brown v. Gardner, H. 291.

¶ 498. Where facts exist giving equity the right to intervene by injunction, a court of equity will dispose of the entire controversy and award damages.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 499. Where a bill for abatement contains no equity to an injunction, past and future damages may be allowed for the injury to lands caused by maintaining a dam at an improper height or by interference with rights of flowage.—Blake v. Cornwell, 65 Mich. 467; Cornwell Mfg. Co. v. Swift, 89 Mich. 503.

¶ 500. One who had stood by and allowed the owners of a right of flowage to enlarge their mill and to raise the height of their dam, he knowing that increased flowing would result, was granted compensation for past and future damage instead of an injunction.—Blake v. Cornwell, 65 Mich. 467.

¶ 501. Defendants built a dam at large expense supposing that the mill-site condemnation law was constitutional, and complainant sued at law for damages for flooding his land, but after an agreement to arbitrate the question, which, without any apparent reason, he refused to carry out, he filed his bill for abatement more than four years after the construction of the dam, showing no reason for the delay except the pendency of a suit by another party involving the same

question. Held, that the case was one for pecuniary compensation only.—Miller v. Cornwell, 71 Mich. 270.

¶ 502. Continuing trespass was enjoined but having been dissolved on bond damages were awarded where the defendant had seized complainant's improvements constructed along a river and stream for logging purposes, and had flooded its timber lands, and had retained such improvements for several weeks, and proposed to continue such acts for an entire season, without payment. —Hall v. Nester, 122 Mich. 141.

¶ 503. Upon a bill by a lower riparian proprietor to enjoin the diversion of water by an upper proprietor, where complainant's rights have been infringed, but he has not shown himself entitled to an injunction, equity will award him damages in gross for the injury he has suffered.—Stock v. City of Hillsdale, 155 Mich. 375.

¶ 504. When, in a proceeding for an injunction against interference with the drainage of a cranberry marsh, complainant's damages from the loss of one crop and part of another, and the thickening up of the marsh with grass, was estimated by witnesses to be from $1,000 to $3,000, the defendant has no reason to complain of a decree fixing the damages at $1,000.—Walton Cranberry Co. v. Seamon, 171 Mich. 98.

¶ 505. On denying injunctive relief for the diversion of water from a mill pond a court of equity may award damages for both past and future injuries.—Loranger v. City of Flint, 185 Mich. 454. (Brooke, C. J., and McAlvay, Kuhn and Steere, JJ., dissenting.)

§ 145. Dismissal with terms or relief.

Dismissal of suit to enjoin cutting and removing trees, see ante ¶ 263.

Dismissal of bill to enjoin defendant from opening a way, see ante ¶ 270.

Dismissal of bill as dissolution of preliminary injunction, see ante ¶ 470.

Dismissal without prejudice, see post § 146.

Dismissal of bill for injunction as res adjudicata at law, see Former Adjudication ¶ 48.

¶ 506. Where complainants in a bill to enjoin execution have been required to file a bond to pay the judgment in case they should fail to invalidate it, the final decree dismissing the bill may properly require payment of the judgment.—Hatheway v. Weeks, 34 Mich. 237.

¶ 507. On a bill to restrain a mill company from lowering the water of a lake by opening its flume, where the evidence failed to show complainants to be entitled to the relief prayed, it was error to include in the decree dismissing the bill a finding that defendants were entitled to the prescriptive right to raise the waters of the lake to a certain fixed point above the sill of the flume, where such right was not in issue in the case, and where there were interested persons not parties to the bill, it being improper to foreclose the rights of such parties by such a decree.—Thompson v. Addison Flouring Mill Co., 193 Mich. 6.

¶ 508. Where a decree has been entered dismissing a bill for an injunction to restrain a foreclosure by advertisement sale of real estate, and there is no basis apparent from the record for the action of the court in stopping the running of interest upon the amount bid at the sale and awarding to complainant's solicitor a certain fee, both of such matters should be eliminated from the decree.—First State Bank of Decatur v. Day, 188 Mich. 228; O'Dell v. First State Bank of Decatur, Id.

¶ 509. On a bill by a railroad against a city to enjoin the forfeiture of complainant's rights under an ordinance for the construction, maintenance and operation of a track on a certain street in defendant's city and cross-bill to have such ordinance declared void and a forfeiture of complainant's rights under such ordinance because of failure to build the track within the time prescribed, and to restrain the railroad from using the tracks for the remainder of the distance covered by the ordinance without getting the consent of the city, where it is admitted by counsel that complainant is entitled to relief so far as it has completed the work, the bill of complaint should not be dismissed, but should be retained and a decree entered in favor of complainant positively, affirming its rights under the ordinance so far as it has occupied the streets and enjoining any action or proceedings to disturb such acts.—Muskegon, G. R. & I. R. Co. v. City of Muskegon Heights, 194 Mich. 643.

§ 146. Dismissal without prejudice.

Dismissal where remedy at law adequate, see also ante §§ 8, 9.

Dismissal upon terms and conditions, see ante § 145.

¶ 510. Where the evidence was too vague and conflicting to warrant a decree settling the right in controversy, and the case was proper for a jury, an injunction bill was dismissed without prejudice to any proceedings at law, or any equitable proceedings based upon a verdict.—Christ v. Kusterer, 25 Mich. 354.

¶ 511. An injunction to abate a dam which had existed about thirty years and had been erected under permission to raise the water to a certain height was denied where the proofs did not conclusively show that the height agreed upon had been exceeded. But, as the case contained facts that might properly be submitted to a jury, the denial was without prejudice to any proceedings at law, or to proceedings in equity, if these facts

should be found against defendant.—Cobb v. Slimmer, 45 Mich. 176.

¶ 511a. In an action to enjoin drain commissioners of three counties from proceeding so as to subject lands in one of the counties to part of the cost of enlarging a stream outside of the first county in one of the other counties which was the natural outlet for surface and drain waters from such counties, including waters from a drain from such first county, which it was necessary to enlarge, held that the decree of the lower court dismissing the bill should be modified so as to dismiss it without prejudice, as complainant, after he had exhausted all his statutory remedies, might require the aid of equity.—Hynes v. Barrett, 188 Mich. 154.

§ 147. Bond on issuance of permanent injunction.

Bonds or security upon issuance of preliminary injunction, see ante § 124.
Liability on injunction bonds, see post § 155.

¶ 512. Section 502, Comp. L. 1897, § 12020, How. St., 2nd Ed., does not require the giving of a bond on the issuance of a permanent injunction under a final decree restraining the prosecution of an action at law.—Felton v. Wedthoff, 185 Mich. 72.

§ 148. Relief to defendant.

¶ 513. Where a bill was filed by a village against defendants, to enjoin the negotiation of certain village bonds, and for the surrender and cancellation of the same, and lack of bona fides on the part of defendants in purchasing said bonds is alleged, defendants may, by cross-bill, claim affirmative relief under the statute, to the end that the bonds be declared legal and valid, and plaintiff be decreed to buy the same.—Village of Frankfort v. Schmid, 151 Mich. 85.

¶ 514. In a bill by a village to enjoin a defendant from interfering with a drainage system, the defendant is not entitled to the affirmative relief of a decree ordering the removal of a drain, where he asks no such relief in his answer.—Village of Trenton v. Rucker, 162 Mich. 19.

§ 149. Modification of decree.

Modification of preliminary injunction, see ante § 136.

¶ 515. A decree which enjoins the inventor and patentee of an article which has been sold to a corporation for its manufacture from using his own name in such a way as to lead the public to believe that a firm of which he is a member is manufacturing the patented article is too broad where he is in fact manufacturing the named article under letters patent issued subsequently to those protecting the original article and the decree will be modified so as to permit the defendant the right to state in his advertisements the fact that he manufactures the article provided he further states in an equally prominent manner that his concern is distinct from and has no connection with the plaintiff company.—Gordon Hollow Grate & Blast Grate Co. v. Gordon, 142 Mich. 488.

¶ 515a. An injunction against the diversion of water by the making of road improvements ought not to be so broad in terms as to be susceptible of a construction that would restrain the defendants from making highway improvements of a lawful character within their powers and not affecting the surface drainage; and on appeal may be modified to prevent such a construction.—Smith v. Township of Eaton, 138 Mich. 511.

§ 150. Operation, construction and effect.

Appealable orders and decrees, see Appeal § 56.
Injunction decree as estoppel on the facts, see Former Adjudication § 87.
Effect of judgment in taxpayer's suit as bar on city's action thereafter, see Former Adjudication § 59.
Conclusiveness of judgment in injunction proceedings to restrain its enforcement, see Former Adjudication § 9.
Dismissal of bill for injunction as barring legal remedies, see also Former Adjudication ¶ 173.
Effect of injunction against suing as suspension of limitations on cause restrained, see Limitations, III, A.

¶ 516. In restraining proceedings at law equity does not assume jurisdiction over the court in which they are had, but restrains the proceedings by controlling the parties thereto by injunction.—Burpee v. Smith, W. 327.

¶ 517. A decree enjoining the prosecution of an action at law to recover damages occasioned an abutting owner by the construction of a railroad track in a public street, held not to prevent the maintenance of an action for the negligent or careless operation of trains.—Felton v. Wedthoff, 185 Mich. 72.

¶ 518. An injunction staying proceedings at law in a pending case does not devest a court of law of jurisdiction, nor affect the validity of a judgment obtained therein in disobedience of the injunction.—Geddis v. Wayne Circuit Judge, 151 Mich. 122.

¶ 519. An injunction staying proceedings at law, while not a prohibition upon the action of the legal tribunal, is good ground for a continuance of the action at law in the absence of good reason for a refusal to postpone the trial.—Geddis v. Wayne Circuit Judge, 151 Mich. 122.

¶ 520. An injunction staying proceedings at law in a pending case does not affect the jurisdiction of the law court nor affect the validity of the judgment therein obtained in disobedience of the injunction.—Hulan v. Wayne Circuit Judge, 159 Mich. 605.

¶ 521. It seems that an injunction prohibiting a defendant in divorce from mortgaging his property does not restrain him from mortgaging real estate aside from his homestead for the purpose of raising money to pay alimony.—Froman v. Froman, 53 Mich. 581.

¶ 522. An injunction against a street-railway company's entering upon a street to construct an electric railway track or incumbrance of any kind upon said street, or to prepare in any way to lay such track, does not prohibit operating or repairing a track previously built and used, although repairs in paying the street had required the temporary removal of a part of the track.—Detroit & B. P. R. Co. v. Detroit Citizens' St. R. Co., 97 Mich. 583.

¶ 523. Where on settlement of decree, complainant secret benevolent society, which had been enjoined from interference with defendant secret benevolent society, contended that as the basis of the decree was complainant's own exclusive rights in this state, an injunction should issue protecting those rights, the claim was denied, as such rights were conceded and had never been denied.—Great Hive L. O. T. M. of Michigan v. Supreme Hive L. O. T. M. of the World, 135 Mich. 392.

¶ 524. One who seeks by suit in equity to establish his rights in a way, and to have its obstruction enjoined, may have relief whether the way be public or private. Nor is it material that the court erroneously found it to be private instead of public, so long as the public was not a party to the suit; its rights could not be destroyed by the decree.—Nye v. Clark, 55 Mich. 599.

¶ 525. An injunction that was not irrevocably permanent but which left open to future amicable adjustment between the parties the height of the water in an inland lake as maintained by a dam at the outlet, held not a conclusive adjudication as to the natural level of the water, binding on a subsequent owner of the dam who was not a party to such prior action.—Bacon v. Walden, 186 Mich. 139.

§ 151. ——Parties and persons affected.

¶ 526. An injunction against the city is binding upon the members of the Board of Public Works of the city where they have notice even though they may not have been parties to the bill nor served with the writ.—Phillips v. Detroit, 2 Flip. 92, Fed. Cas. No. 11,101.

¶ 527. In general, a party is bound by an order for injunction of which he has notice, though no writ is taken out.—Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313.

VI. COMPLIANCE OR VIOLATION AND PUNISHMENT.

§ 152. In general; what constitutes violation.

¶ 528. Where an injunction had been granted enjoining defendant from interfering with or incumbering certain lands and premises, and defendant, at and previous to the granting of the injunction, being in possession of, and claiming title to, a mill on the land, forcibly put out two agents of complainant who came into the mill after the injunction had been served and refused to leave when requested, it was held to be no violation of the injunction, which was not intended to dispossess the defendant.—Hemingway v. Preston, W. 528.

¶ 529. Complainant, claiming to be in the actual possession of certain premises, obtained a preliminary injunction enjoining respondents from trespass of a nature likely to injure the buildings, and the writ also enjoined them from in any way interfering or meddling with the possession and from entering into the premises; and it appearing that respondents were actually in possession at the time the injunction was issued, it was held that they could not be punished as for contempt in maintaining this possession by force.—People ex rel. Messler v. Simonson, 10 Mich. 335.

¶ 530. That a member of a striking labor union takes up a position in the highway directly opposite one of the entrances to the employer's premises, held to constitute a violation of an order restraining picketing although such member did not molest the employees nor speak to them.—In re Langell, 178 Mich. 305.

¶ 531. A bill was filed for specific performance of a contract for certain lands, the legal title to which, subject to said contract, was in L., who had executed a deed for said premises leaving the grantee's name in blank, and sent the same to his agent, who filled in the name of a purchaser. Defendants were enjoined from making any conveyance of, or creating any lien upon, said premises, or in any way changing the apparent title. Subsequently one of the defendants obtained from L. a deed confirming the previous one. Whether this was a violation of the injunction, quære.—Romeyn v. Caplis, 17 Mich. 449.

¶ 532. The building of a dam in defiance of a preliminary injunction restraining its erection should not be allowed with impunity.—Stone v. Roscommon Lumber Co., 59 Mich. 24.

§ 153. Excuses or discharge from compliance.

¶ 533. Poverty, sickness and unfavorable weather may sufficiently excuse the failure to promptly comply with a decree requiring the removal of a building.—Scott v. Layng, 59 Mich. 43.

§ 154. Enforcement and punishment for violation.

Disobedience or evasion amounting to contempt, see Contempt, I.

Persons liable or participant in contempt, see Contempt § 13.

Burden of proof of violation in contempt proceedings, see Contempt § 34.

¶ 534. Injunctions, issued by courts of competent jurisdiction, must be fairly and honestly obeyed, and it would be unbecoming the dignity and self-respect of the court if it should permit them to be evaded by mere subterfuges or tricks.—Wilcox Silver-Plate Co. v. Schimmel, 59 Mich. 524.

¶ 535. The compliance by the defendant with specific requirements provided in an injunction against an asphalt plant will not prevent punishment for contempt for the violation of the general order forbidding defendants to allow the escape of smoke, gases, dust, etc.—Northwood v. Barber Asphalt Paving Co., 126 Mich. 284.

¶ 536. Where one is enjoined from selling chattles covered by two mortgages in one of which he is mortgagee, being assignee of the other, and from foreclosing the mortgages, the restraint placed upon his attorney extends to render such attorney guilty of contempt if he, claiming that the assignment of the other mortgage was void, proceeds as the attorney of the assignor to sell the goods covered by such mortgage.—Wilcox Silver-Plate Co. v. Schimmel, 59 Mich. 524.

¶ 537. A boat-house built at the foot of a street in Detroit in a river-slip that had been leased by the city to the owner of the building was enjoined as a nuisance at the suit of neighboring riparian proprietors. The injunction seems to have been improperly granted, but it was not appealed from, and the owner of the building set about removing it and changed it into a floating boat-house, which he moved to the wharf a few feet from the shore and in the slip. Held, that he could not for this reason be punished as for contempt in disobeying the injunction, without some allegation and showing that complainants' water facilities or rights of navigation were impaired.—Scott v. Layng, 59 Mich. 43.

¶ 538. Where a creditor has obtained an injunction against the transfer of his debtor's property, any interference with or sale of the assets thereafter by the debtor is punishable as for contempt of court.—Saginaw County Sav. Bank v. Duffield, 157 Mich. 522.

¶ 539. The president of a trade union is guilty of a contempt of court for having violated an injunction restraining the officers and members of the union from intimidating the employees of the complainant against whom a strike is in progress where he says to a workman being escorted through a crowd of strikers by an officer "I see you are still doing your dirty work."—Ideal Mfg. Co. v. Ludwig, 149 Mich. 133.

¶ 540. Where defendants disobey a temporary injunction forbidding them to build a dam above a certain height, complainants may ask for a decree ordering them to reduce the height of the dam, and they are not confined to proceedings for contempt.—Long v. Schroeder, 162 Mich. 690.

VII. LIABILITY AND DAMAGES FOR SUING OUT.

§ 155. In general; liability on bond.

Bonds or security on preliminary injunction, see ante § 124.

Necessity of bond upon issuance of permanent injunction, see ante § 144.

Injunction preventing performance as breach of contract, see Contracts § 223.

Sufficiency of the bill for injunction as foreclosed question in contempt for violating it, see Contempt § 33.

Damages assessable in contempt for breach of injunction, see Contempt § 42.

Stipulation for dissolution as relieving party from duty to obey, see Contempt § 11.

Liability for damages for wrongful suing out of writ as reason to retain bill for award of such damages, see Equity ¶ 882.

¶ 541. Where a mortgagor, under an order of court, and as a condition to the granting of an injunction against proceedings by a foreclosure purchaser to get possession, gives a bond conditioned to prosecute his bill to redeem to final decree, and, if the decree should be adverse, to pay a fair rental value for the premises, and to pay all taxes and all legal costs, and not to commit waste, it cannot operate, in the absence of any showing of an acceptance of the bond by the obligee, or of any action taken or claim made under it, to deprive the purchaser of any of his substantial rights in the premises or the crops growing thereon.—Scriven v. Moote, 36 Mich. 64.

¶ 542. Where an injunction is allowed on condition that the petitioner therefor give the defendants a bond to indemnify them for any damage which the injunction may cause them, the bond remains valid and will sustain a recovery even though the injunction bill is dismissed for want of jurisdiction.—Kimm v. Steketee, 44 Mich. 527.

¶ 543. Where action is brought upon an injunction bond without procuring it from the files, and without obtaining an order of the circuit judge to take it from the files for prosecution, the want of such order is no defense to the suit.—Lothrop v. Southworth, 5 Mich. 436.

¶ 544. The surety in an injunction bond who has undertaken to abide the decree of the court of chancery and pay such damages

as may be awarded against his principal by reason of the issuing of the injunction is bound by such decree, and can raise no question of its correctness in an action upon the bond.—Lothrop v. Southworth, 5 Mich. 436.

¶ 545. A decree of the supreme court vacating an order of the circuit court for the appointment of a receiver, on a bill to foreclose a mortgage, which decree also restrains a corporation mortgagor from doing business, merely disposes of the propriety of the injunction and the receivership pendente lite, upon the pleadings alone, and cannot be considered final upon the merits. Accordingly such decree does not amount to a final adjudication of illegal interference with the business of the corporation so as to be a legal wrong, releasing surety on its bonds.—Michigan Trust Co. v. Lansing Lumber Co., 121 Mich. 438.

¶ 546. A bond for an injunction is a joint contract that after a surety's death will support a claim against his estate as if it were joint and several (Comp. L. 1871, § 4438, How. St. § 5906).—In re Stewart v. Bruen's Estate, 39 Mich. 619.

INJURIES to INNOCENT TAKERS.

Cross-References.

Injuries—
- Elements of right of action, see Actions § 2.
- Actionable injuries, see Torts; and see also specific topics, e. g., Assault, II; Conversion; False Imprisonment; Malicious Prosecution; Fraud; Negligence; Nuisances; Trespass; Waste. See also topics treating of negligence such as Carriers; Electricity; Buildings; Railroads, VIII; Street Railways, IV; Highways, XII, XIII; Master and Servant, III.
- Damages for injuries, see Damages.

Injustice—
- As ground for application or denial of equitable relief, see Equity; Specific Performance; Reformation; and like topics.
- Manifest injustice as opening error to review without exceptions, see Indictment § 527.

Inland Bills—
- See Negotiable Instruments.

In Loco Parentis—
- See Adoption §§ 3, 4; Parent and Child.

Innocence—
- Presumption as to, see Indictment § 131; Evidence § 49.
- Presumption as to fraud, see Fraud § 28 et seq.

Innocent Parties—
- Equities between two parties equally innocent, see Equity § 9.
- Relief or favor to party not in pari delicto, see Contracts § 90 et seq.; Indemnity and Contribution, II, B (between wrongdoers); Fraud § 85.

Innocent Takers—
- See Negotiable Instruments, XIII; Notice and Record of Title, I; and see also cross-references under Bona Fides.

INNS, RESTAURANTS AND LODGING HOUSES.

TREATS of the law of innkeepers and inns and also of boarding and lodging houses and restaurants under statutes.

Analysis.

§ 1. In general; who are regarded as innkeepers and guests.
§ 2. Duty and liability to guests.
§ 3. ——Valuable property or money.
§ 4. ——Misconduct or contributory negligence of guest.
§ 5. ——Evidence and jury questions and instructions.
§ 6. Lien of innkeeper.
§ 7. Boarding and lodging houses and restaurants.

---

§ 1. In general; who are regarded as innkeepers and guests.

Duty and liability to guests, see post §§ 2-5.
Lien of innkeeper, see post § 6.
Sleeping car proprietors or operators and their liabilities, see Carriers § 243.
Steamboat as inn, see also Carriers ¶ 830.
Duty of innkeeper as consideration for agreement to forward letters and parcels, see also Contracts ¶ 413.
Statutes relative to hotels and boarding-house keepers, see Comp. L. 1915, chap. 131.
"Hotel," defined in act regulating safety and sanitation, see Comp. L. 1915, § 6932.

¶ 1. In order to make one liable as innkeeper at the common law, for goods lost at his inn, it must appear that he was acting in the capacity of innkeeper on the occasion

when the goods were received, and that the owner was his guest. In other words, that the latter visited the inn for purposes which the common law recognizes as the purposes for which inns are kept.—Carter v. Hobbs, 12 Mich. 52.

¶ 2. A ball was given by a fire company at the inn of defendant, the defendant furnishing dancing room, supper and dressing room, and being paid therefor by the company at the rate of one dollar for each supper taken. The ball tickets were sold by the fire company at two dollars each, and these were taken up at the door of the dancing room by a person employed by the fire company, and supper tickets given in their stead. The plaintiff, who was a guest at another inn in the town, went to the ball, purchased a ticket therefor at the baggage room, delivered his overcoat, fur collar and gloves at the office of the hotel to the clerk, and registered his name, and remained at the ball until it broke up in the morning, when, on calling for his overcoat, collar and gloves, they could not be found. During the night the plaintiff had spent some money, for liquor and cigars, at a saloon kept by defendant in connection with the hotel. It was held that these facts did not show the relation of innkeeper and guest to exist between the defendant and the plaintiff; that the former did not receive the goods in his capacity as innkeeper, but merely as an ordinary bailee. —Carter v. Hobbs, 12 Mich. 52.

¶ 3. Whether steamboat proprietors who furnish staterooms and lodging for their passengers are liable to them for the loss of baggage, etc., to the same extent and on the same grounds as innkeepers to their guests, quære; the court being divided.—McKee v. Owen, 15 Mich. 115.

¶ 4. The relation of guest and innkeeper continued after a guest had departed, where an agreement was made for the receipt and forwarding of goods consigned to such guest; as in such case the contract was made with one while he was a guest and not after he had ceased to be a guest, and the contract continued until the innkeeper complied with his contract for forwarding.—Baehr v. Downey, 133 Mich. 163.

¶ 5. The status of one who came to a hotel as a guest, was not changed to that of a boarder, in relation to an innkeeper's lien, where no special arrangements as to length of stay or as to rates were made, excepting that after he had remained one week he was given weekly rates.—R. L. Polk & Co. v. Melenbacker, 136 Mich. 611.

§ 2. Duty and liability to guests.

Duration and cessation of liability, see also ante ¶ 4.
Valuables left to be forwarded, see post § 8.
Voluntary intoxication of guest as contributory negligence, see post § 4.
Burden of proof and evidence as to negligence, see post § 5.
Lien of innkeeper, see post § 6.
Negligence in condition of hotel steps, see also Buildings ¶¶ 17, 47.
Liability of innkeeper for injury inflicted by wild animal kept in public place, see Animals §§ 12-17.
Authority of manager as agent of innkeeper, see Agency § 34.
Embezzlement by innkeeper of guest's property, see Crimes ¶ 288.
Title to support trover against innkeeper, see Conversion § 19, ¶ 86.
General law of buildings as distinguished from that of the business of innkeeping, see Buildings.
General law of bailments, see Bailments.
Liability of bailee for innkeeper's negligence, see Bailments ¶¶ 20, 27, 45.
Operation of Civil Rights Act, see Civil Rights.
Statutory liability, see Comp. L. 1915, § 6929 et seq.

¶ 6. As a general principle innkeepers guarantee the good conduct of all when they admit under their roofs, provided their guests themselves are guilty of no neglect to forfeit the guarantee; beyond this their liability does not extend to losses through purely accidental casualties, riots or acts of force from without, and accidental fires.—Cutler v. Bonney, 30 Mich. 259.

¶ 7. Liability of innkeepers as bailees distinguished from that of a common carrier. —Cutler v. Bonney, 30 Mich. 259.

¶ 8. Innkeepers are not liable for the destruction of the horses, wagons, etc., of their guests, by the burning of the hotel barn with its contents, where the fire is not caused by their negligence.—Cutler v. Bonney, 30 Mich. 259.

¶ 9. A guest at a hotel has a reasonable time to remove his property, and the innkeeper's extraordinary liability would remain until the expiration of such reasonable time, which would vary according to the circumstances.—Baehr v. Downey, 133 Mich. 163.

¶ 10. An innkeeper is liable for the loss of goods received by the office clerk pursuant to his agreement with a departing guest, to receive and forward them.—Baehr v. Downey, 133 Mich. 163.

Liability for injuries to passengers and persons other than employees through negligent maintenance or operation of elevators, see note, 5 N. C. C. A. 505-523.
Liability of innkeeper for death of or injury to guest by fire, see note, 10 N. C. C. A. 964-977.
Liability for failure to exercise care to persons in a helpless or intoxicated condition, see note, 7 N. C. C. A. 337-342.
Liability of innkeeper for insult to guest, see note, 10 N. C. C. A. 144-152.

Liability of innkeeper to guest for unsanitary condition of premises, see note, 2 N. C. C. A. 642-645.
Liability of innkeeper for injury to guest from defective article, see note, 4 N. C. C. A. 707-709.
Liability of innkeeper for injury to, or loss of goods of traveling salesman, see note, 1 N. C. C. A. 321-325.
Liability of innkeeper for loss of goods brought to hotel for sale or show, see note, 15 N. C. C. A. 317-324.

§ 3. ——Valuable property or money.

Contributory negligence, see post § 4.

¶ 11. A guest's obligation to notify the innkeeper if he has property of extraordinary value in his baggage does not attach to a peddler stopping at an inn with his pack, or with the usual appurtenances of his business. So held in the case of a peddler who put up at an inn with a comrade, each having a valise and a small box, their baggage amounting to upwards of $300, and whose goods and valise were stolen while in the landlord's care.—Rubenstein v. Cruikshanks, 54 Mich. 199.

¶ 12. Where money, deposited by a regular boarder at a hotel in a drawer in the office safe, of which drawer he had been given the use and to which he had the only key, was taken therefrom by an employee of the hotel who forcibly opened the drawer, it was held that the proprietor of the hotel, being, at the most, only a bailee for hire, was not liable for the loss of the money if ordinary care and diligence had been used in hiring the employee.—Taylor v. Downey, 104 Mich. 532.

¶ 13. The words "jewelry" and "articles of gold and manufacture," as employed in Act No. 42, Pub. Acts 1905, exempting an innkeeper from liability for loss of the same by theft, do not include watches and chains in ordinary use by guests.—Weadock v. Swart, 163 Mich. 602.

¶ 14. An Elk emblem attached to the chain of a watch is properly a part of such equipment and recovery can be had therefor in an action against a hotel keeper for theft from a room.—Weadock v. Swart, 178 Mich. 80.

¶ 15. The duty of an innkeeper to forward articles to a departed guest pursuant to agreement is the same no matter what the value of the article, but circumstances may exist which would require extraordinary precautions on the part of the guest.—Baehr v. Downey, 133 Mich. 163.

¶ 16. The duty of an innkeeper to forward articles to a departed guest pursuant to agreement is the same no matter what the value of the article and hence the failure of a guest to notify the innkeeper of the contents of a package did not relieve the innkeeper from liability for its loss.—Baehr v. Downey, 133 Mich. 163.

Liability of hotel keeper for loss of guest's valuables, see note, 6 N. C. C. A. 686-695.

§ 4. ——Misconduct or contributory negligence of guest.

Burden of proof and evidence, see post § 5.

¶ 17. An innkeeper's liability for a guest's baggage is not diminished, but rather increased, by the fact that the guest has got too drunk at his bar to take care of it himself.—Rubenstein v. Cruikshanks, 54 Mich. 199.

¶ 18. One who occupies a room in a hotel with another is not chargeable with the negligent acts of the other in leaving the door unlocked.—Weadock v. Swart, 178 Mich. 80.

§ 5. ——Evidence and jury questions and instructions.

Evidence to show what was custom of guests as to keeping of valuables, see Customs § 7.

¶ 19. In an action by a guest against an innkeeper for the loss of goods consigned to the guest and agreed to be forwarded by the innkeeper, the burden of exoneration was on the innkeeper after plaintiff had made out a prima facie case by showing the property in the defendant's possession and refusal or neglect to return on demand.—Baehr v. Downey, 133 Mich. 163.

¶ 20. In an action against a hotel keeper for loss of property taken from a guest's room, evidence of what was said after the robbery with reference to other robberies held admissible as bearing on the negligence of the hotel employees in not informing the guests as to the workings of the lock.—Weadock v. Swart, 178 Mich. 80.

¶ 21. In an action against a hotel keeper for loss of property taken from a guest's room where the kind of lock on the door was in evidence, and where there was but one key though two guests were assigned to the room, evidence was properly excluded as to how the guests could come and go, such fact being for inference for the jury.—Weadock v. Swart, 178 Mich. 80.

¶ 22. Plaintiff and one Loranger took a room together in defendant's hotel. They were informed by the clerk that there was only one key. In the morning Loranger arose first and went for a walk, leaving the door open so that plaintiff could get out, since if he had locked it, plaintiff would have been locked in. Plaintiff's watch and other jewelry were stolen. The evidence as to the number of locks on the door and their kind was conflicting. In a suit to recover for the loss of said valuables, held, that under Act No. 42, Pub. Acts 1905, governing an inn-

keeper's liability for stolen valuables, the question of the adequacy of the locks should have been submitted to the jury.—Weadock v. Swart, 163 Mich. 602.

¶ 23. In an action against a hotel keeper for valuables lost while a guest at the hotel, where the evidence showed that the same room had been robbed a few weeks previously, and the defendant insisted that the thief had entered through a window and it was made possible by the neglect of the plaintiff to fasten it, it was proper for the court in his charge to refer to the fact that the defendant had failed to inform the plaintiff of the other robbery as a reason for not requiring extraordinary care, or such as the actual (but unknown) conditions demanded. —Kerlin v. Swart, 143 Mich. 228.

§ 6. Lien of innkeeper.

Boarding-house keepers' statutory liens, see post § 7.

Agisters' liens for keeping animals belonging to guests or boarders, see Animals § 24.

¶ 24. The proprietor of a hotel has not an innkeeper's lien for boarding a horse under an express agreement with a person not a guest.—Elliott v. Martin, 105 Mich. 506.

¶ 25. A person keeping an inn has a lien under How. St. § 8399, for the keeping and care of a horse if the person who delivered the animal to him and who made the agreement though not the owner of the horse had authority from the owner to make such agreement.—Elliott v. Martin, 105 Mich. 506.

¶ 26. An innkeeper has a lien for the amount due for the keeping and accommodation of a guest, upon property in possession of such guest who had been intrusted therewith by his principal for the purpose of carrying on the business of the principal.—R. L. Polk & Co. v. Melenbacker, 136 Mich. 611.

¶ 27. Comp. L. 1897, §§ 5317-5323, in regard to the lien of hotel keepers, boarding- and lodging-house keepers, does not affect the rights of an innkeeper existing at common law, as the closing section expressly provides that nothing therein shall preclude any other existing remedy for the enforcement of hotel keepers' liens.—R. L. Polk & Co. v. Melenbacker, 136 Mich. 611.

§ 7. Boarding and lodging houses and restaurants.

Nature of relation of hotel keeper to guests at banquet or ball, see ante ¶ 2.

When guest at inn becomes mere boarder, see ante ¶ 5.

Defrauding keeper as misdemeanor, see Comp. L. 1915, § 6964 et seq.

Statutory provisions as to lien, see Comp. L. 1915, § 6947 et seq.

¶ 28. A boarding house, within Comp. L. 1915, § 6947, How. 2nd Ed., § 4308, giving a lien for charges to the keeper of any hotel, inn or boarding house on the baggage or effects of any guest or boarder, is not, in common parlance, every private house where one or more boarders are kept occasionally only, and upon special considerations. It is a quasi public house, where boarders are generally and habitually kept and which is held out by the owner and known as a place of entertainment of that kind.—Friedrich Music House v. Harris, 200 Mich. 421.

¶ 29. One who keeps one or two boarders all the time and has done so for a period of years, but makes no pretense of generally accommodating the public, is not a boarding-house keeper within Comp. L. 1915, § 6947, How. 2nd Ed., § 4308, giving a lien for charges to the keeper of any hotel or inn or "boarding or lodging house" on the baggage and effects of a guest or boarder.—Friedrich Music House v. Harris, 200 Mich. 421.

Liability of proprietor of restaurant for loss of articles of clothing of patron or customer, see note, 5 N. C. C. A. 848-857.

INNUENDO to IN REM.

Cross-References.

Innuendo—
- Pleading in libel and slander, see Libel, VII.
- Slur on witness in cross-questions, see Examination of Witnesses § 84.

In Pari Delicto—
- Denial of relief from fraudulent transactions, see Fraud § 85.
- Denial of relief under illegal contracts, see Contracts, IV, D.
- Contribution among tortfeasors not in equal wrong, see Indemnity, II, B; and see also Highways, XII, G.

In Pari Materia—
- Rule for construction of statutes, see Statutes, V.

Inquest of Death—
- See Corpses and Burial § 2.

Inquiry—
- Notice from facts putting on inquiry, see Negotiable Instruments, XIII; Notice and Record of Title, I.
- Element of inquiry or neglect to inquire in cases of fraud, see Fraud, I.
- Right of person neglecting to inquire to claim estoppel, see Estoppel, III, A.

Inquisition of Damages—
- See Damages, XIII; Defaults, V.

Inquisition of Lunacy—
- See Insane Persons, I.

In Rem—
- Conclusiveness of judgments, see Former Adjudication § 77.
- Garnishment as proceedings in rem, see Garnishment § 1.
- Proceedings to vacate streets, see Highways § 130.

INSANE PERSONS.

TREATS of the legal state or condition of insanity or lack of mental competency and of the consequent rights, disabilities and liabilities of the insane person or of those dealing with him. Testamentary capacity is treated in Wills, II, and donative capacity in Gifts, IV.

Analysis.

I. Existence, ascertainment and adjudication of insanity.

§ 1. In general; what constitutes insanity or mental incapacity.
§ 2. Disability to waive rights or admit insanity.
§ 3. Nature of proceedings for adjudication of insanity.
§ 4. Petition and affidavits.
§ 5. ——Notice of hearing and service thereof.
§ 6. Hearing and procedure thereon.
§ 7. ——Certificate of examining physicians.
§ 8. Burden of proof and presumptions.
§ 9. Admissibility of evidence.
§ 10. ——Adjudication as evidence in subsequent action or proceeding.
§ 11. Weight and sufficiency of evidence.
§ 12. ——Age, physical infirmities and failing memory.
§ 13. ——Unnatural or unwise disposition of property.
§ 14. ——Testimony by expert or physician.
§ 15. ——Determination of insanity as evidence in subsequent suit or proceeding.
§ 16. Instructions and questions for jury.
§ 17. Directing verdict on issue of sanity.
§ 18. Conclusiveness of adjudication and collateral attack.
§ 19. Right of appeal and mode of review.
§ 20. Proceedings for order of restoration.

II. Status, commitment and custody, and support.

§ 21. Order of commitment.
§ 22. Commitment and custody of dangerous or criminal insane.
§ 23. Confinement of sane person and liability therefor.
§ 24. Support and maintenance.

III. Property and liabilities.

§ 25. In general.
§ 26. Liability for necessaries.

IV. Conveyances and contracts.

§ 27. In general.
§ 28. Capacity to hold land and for acceptance of deed.
§ 29. Invalidity or voidableness of conveyances.
§ 30. ——Mortgages.
§ 31. Voidable character of contracts.
§ 32. Avoidance or rescission.
§ 33. Ratification and affirmance.
§ 34. Estoppel to attack conveyance or contract.

V. Actions.

§ 35. In general.
§ 36. Equitable relief to set aside contracts or conveyances.
§ 37. ——Persons entitled to relief.

Incapacity of insane persons for crime, see Crimes § 13.
Power of county or county board to erect insane asylum, see Counties § 19.
Submission to and vote of electors on proposal to borrow money to build asylum, see Counties § 27.

I. EXISTENCE, ASCERTAINMENT AND ADJUDICATION OF INSANITY.

§ 1. In general; what constitutes insanity or mental incapacity.

Disability to waive rights or admit insanity, see post § 2.
Nature of proceedings for adjudication of insanity, see post § 3.
Petition and affidavits, see post §§ 4, 5.
Hearing and procedure thereon, see post §§ 6, 7.
Burden of proof and presumptions, see post § 8.
Admissibility of evidence, see post §§ 9, 10.
Weight and sufficiency of evidence, see post §§ 11-15.
Instructions and questions for jury, see post § 16.
Directing verdict on issues of sanity, see post § 17.
Conclusiveness of adjudication and collateral attack, see post § 18.
Right of appeal and mode of review, see post § 19.
Proceedings for order of restoration, see post § 20.
Mental incompetency caused by drunkenness, see Incompetents § 2.
Testamentary capacity and incapacity, see Wills, II.
Deaf and dumb persons, see Deaf and Dumb Persons.
Insanity as question for lay opinions, see also Indictments § 198.
Mental competency of wife to perform antenuptial contract, see also Husband and Wife ¶ 5.
Institution of insanity proceedings as cruelty to spouse, see Divorce § 21.
Mental capacity of insured to change beneficiary, see Fraternal Associations § 43.

¶ 1. Weakness of mind is not of itself sufficient to warrant the setting aside of a contract otherwise valid and free from any taint of fraud; the question is whether the party had sufficient intelligence to understand the transaction.—Davis v. Phillips, 85 Mich. 198.

¶ 2. The test of the mental competency of a grantor to make a deed is whether, at the time he executes the deed in question, he has sufficient mental capacity to understand the business in which he is engaged, to know and understand the extent and value of his property, and how he wants to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others.—Terry v. Terry, 170 Mich. 330.

¶ 3. The test for competency of a grantor to execute a deed is not whether he was eccentric and occasionally did unusual or even foolish things, but whether, at the time he executed the deeds, he had mental capacity sufficient to understand and fully appreciate the business on which he was engaged.—Demerse v. Mitchell, 187 Mich. 683.

¶ 4. In determining the mental competency of the insured to substitute a new beneficiary, the test followed is whether, at the time in question, he had sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent of his property, and how he wanted to dispose of it, and to understand what persons are dependent upon him.—Grand Lodge Ancient Order United Workmen v. Brown, 160 Mich. 437.

¶ 5. In determining the mental competency of the insured to substitute a new beneficiary in a policy, the same rules of law should be applied to the case as are applied to bequests by will or deed.—Grand Lodge Ancient Order United Workmen v. Brown, 160 Mich. 437.

¶ 6. The rule applied in an action to set aside certain deeds in reference to the mental competency of a husband who was 72 years old when he married his second wife, and who conveyed his property shortly after the marriage to her to the exclusion of his children, was whether at the time of the execution of the deeds he had sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep such facts in mind long enough to plan to effect the conveyances without prompting or interference from others.—Hayman v. Wakeham, 133 Mich. 363.

§ 2. Disability to waive rights or admit insanity.

Immunity of incompetent from imputation of laches, see Equity § 53.

¶ 7. A mentally incompetent person cannot consent to any legal proceedings, or waive any of her legal rights pertaining thereto.—North v. Joslin, 59 Mich. 624.

¶ 8. An admission of insanity can never fix the status of unsound mind in the person making the admission.—In re Phillips, 158 Mich. 155.

§ 3. Nature of proceedings for adjudication of insanity.

Proceedings for commitment, see post II.
Actions and equitable relief for protection or assertion of rights of insane person, see post V.
Proceedings for order of restoration, see post § 18.

Conclusiveness of adjudication and collateral attack, see post § 18.
Due process in lunacy proceedings, see Constitutional Law § 150.
Application of vested rights doctrine to proceedings for commitment of insane, see Constitutional Law § 241, ¶ 1034.
Statutes regulating admission to asylums as investing keeper with judicial powers, see Constitutional Law § 59.

¶ 9. The proceeding leading to an adjudication of insanity is not an adversary proceeding, but one in the interest of the public, to protect deficient citizens.—In re Phillips, 158 Mich. 155.

¶ 10. Proceedings taken for an adjudication of insanity against an individual must be in the strictest compliance with all the statutory requirements provided.—In re Phillips, 158 Mich. 155.

§ 4. Petition and affidavits.

Notice of hearing and service thereof, see post § 5.
Hearing and procedure thereon, see post § 6.
Certificate of examining physicians, see post § 7.
Burden of proof and presumptions, see post § 8.
Admissibility of evidence, see post §§ 9, 10.
Weight and sufficiency of evidence, see post §§ 11-15.
Instructions, jury questions and directing verdict, see post §§ 16, 17.

¶ 11. A petition to have a person adjudged insane need not be verified, as the statute does not require such verification (Pub. Acts 1897, No. 120).—In re Chudek, 118 Mich. 361.

¶ 12. A petition and accompanying affidavits alleging the insanity of a person accused of crime, held sufficient to confer jurisdiction on the court to appoint a committee under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., to inquire into his sanity.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

§ 5. ——Notice of hearing and service thereof.

¶ 13. Where an order of the probate court requiring twenty-four hours' notice to be given a person charged with insanity before the time set for hearing, and setting the time for hearing at four o'clock on the following day, was returned by the sheriff as personally served on such person on the day when issued, it may fairly be presumed that the service was made in time to give the court jurisdiction to make the order of commitment in accordance with section 16, Act No. 217, Pub. Acts 1903.—In re Schnapka, 149 Mich. 309.

§ 6. Hearing and procedure thereon.

Certificate of examining physicians, see post § 7.

¶ 14. Physicians and other witnesses called in a proceeding under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., to determine the sanity of a person accused of crime, must be sworn.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 15. The examination of physicians and other witnesses called under § 19, Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., in a proceeding to determine the sanity of a person accused of crime, must be made a part of the record.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 16. It cannot be contended that an insane defendant's rights have not been sufficiently guarded where the record shows that the proceedings were regular and nothing was done unless he was duly represented, even though no answer was filed for him and a default was entered, but there was a hearing upon the merits, participated in by his attorneys who produced witnesses in his defense, and his guardian ad litem was present and assisted in his defense as a witness.—Eggert v. Eggert, 144 Mich. 182.

§ 7. ——Certificate of examining physicians.

¶ 17. A certificate filed under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., stating that a person accused of crime is "non compos mentis," an imbecile, and unable to resist violent impulses, sufficiently shows his insanity.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 18. A report of an investigation under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., into the sanity of a person accused of crime, based on unsworn testimony, does not confer jurisdiction on the court to commit the respondent to an asylum.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 19. Under Pub. Acts 1903, No. 217, § 16, which makes it the duty of the probate judge, upon petition for an order admitting an insane person to an asylum, to fix a day for hearing and to appoint two reputable physicians to make an examination and file a certificate on or before the day of such hearing, and section 14 which provides that no person shall be admitted to an asylum except upon certificates of insanity, and section 15, which provides that such certificates must be made by two reputable physicians, a judge of probate cannot be compelled by mandamus to proceed with the hearing where the physicians appointed have reported that the person is not insane.—Grinky v. Wayne Probate Judge, 137 Mich. 49.

§ 8. Burden of proof and presumptions.

¶ 20. Every person is presumed sane, and the burden of establishing insanity is upon the party asserting it.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

¶ 21. All persons are presumed to be sane and the burden of proving insanity rests on the challenging party.—In re Phillips, 158 Mich. 155.

¶ 22. The ancient presumption that a deaf mute was an idiot is no longer in force.—Alexier v. Matzke, 151 Mich. 36.

¶ 23. The burden of proving a grantor's mental incompetency is on those who assail the conveyance.—Brown v. Brown, 39 Mich. 792.

¶ 24. The burden of showing mental incompetency is upon one who seeks to set aside his contract on that ground.—Gates v. Cornett, 72 Mich. 420.

¶ 25. To set aside the act of an insured person in changing the beneficiary of his policy, it is incumbent upon the appellant not only to prove insanity, but also to prove that the act of the alleged insane person was not done during a lucid interval.—Grand Lodge Ancient Order United Workmen v. Brown, 160 Mich. 437.

¶ 26. Sanity is the normal condition of the human mind, and where insanity or mental incompetency is claimed, it should be proved by a preponderance of evidence.—Grand Lodge Ancient Order United Workmen v. Brown, 160 Mich. 437.

¶ 27. The conveyance by a 72-year-old husband of his property to his second wife shortly after the marriage, to the exclusion of his children, was not such an indication of mental incapacity as operated to shift the burden of proof on the question of mental capacity to the wife, in an action against her to set aside the deeds in question.—Hayman v. Wakeham, 133 Mich. 363.

¶ 28. On a bill to set aside a deed for the grantor's incompetency, the burden of proving incompetency is upon the complainant, and where the case is left in doubt the complainant must fail, as conveyances when made and acted upon should not be set aside upon slight and uncertain evidence.—Gibbons v. Dunn, 46 Mich. 146.

§ 9. Admissibility of evidence.

Adjudication as evidence in subsequent action or proceeding, see post § 10.

General law of evidence, see Evidence.

Admissibility of opinions and conclusions as to competency, see Evidence §§ 239, 244, 259.

Declarations evincive of rationality or irrationality of declarant, see Evidence § 335.

Inspection of alleged insane person in court as evidence, see Evidence § 574.

Admissibility and sufficiency of evidence in criminal cases, see Indictment §§ 179, 321.

¶ 29. Evidence that a testatrix's sister and niece have been insane is admissible as tending to show a hereditary taint of insanity in the testatrix.—Prentis v. Bates, 93 Mich. 234. Modifying on rehearing 88 Mich. 567.

¶ 30. Sudden irritability, moroseness and unprovoked profanity, indicating a complete and radical change of disposition, may be shown, in connection with other facts, as tending to prove mental derangement.—Conely v. McDonald, 40 Mich. 150.

¶ 31. Where there is no evidence tending to show that an insured person was not sane at the time the policy was issued, or that he had had mental trouble for a period of twenty years, it was proper to exclude evidence that he had been insane some twenty years before the issue of the policy.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

¶ 32. The conduct of relations and others towards an individual is better evidence of what they think of his mental soundness than any term they can use to express it, especially when, without being experts, they recognize in him a condition of mental disorder without thinking it amounts to insanity.—Jacox v. Jacox, 40 Mich. 473.

§ 10. ——Adjudication as evidence in subsequent action or proceeding.

Weight and sufficiency of adjudication of insanity as evidence, see post § 15.

Divorce decree as res adjudicata, of defendant's competency, see Former Adjudication § 85.

¶ 33. A determination by the probate court that a man is mentally incompetent to have the charge and management of his estate is admissible to prove that he was mentally incapable to execute a deed some years later, especially when there is testimony to the effect that his condition, whatever it was, was continuing from boyhood to death.—Chase v. Spencer, 150 Mich. 99.

¶ 34. An order of commitment, void because made on proceedings improperly noticed, is not admissible as evidence of insanity in a subsequent proceedings for an adjudication of insanity.—In re Phillips, 158 Mich. 155.

¶ 35. Respondent was committed to an asylum and petitioned for an order of restoration of soundness of mind. The proceedings under the petition were discontinued. Held, in a subsequent adjudication of insanity, it was improper to admit in evidence the petition and discontinuance as estopping

respondent from denying her insanity.—In re Phillips, 158 Mich. 155.

§ 11. Weight and sufficiency of evidence.

Age, physical infirmities and failing memory, see post § 12.

Unnatural or unwise disposition of property, see post § 13.

Testimony of expert or physician, see post § 14.

Determination of insanity as evidence in subsequent suit or proceeding, see post § 15.

General law of evidence, see Evidence.

Weight of acknowledging officer's testimony to apparent competency of grantor as affected by carelessness in taking acknowledgment, see also Evidence ¶ 2925.

¶ 36. Evidence held not to show that the grantor in a deed of trust was not, when he signed such deed, in such a state of mind as fully to understand the import and effect of the instrument.—Liesemer v. Burg, 102 Mich. 20.

¶ 37. In an action to set aside a deed the weight of testimony was held to be in favor of a grantor's competency and of the validity of his conveyance.—Gibbons v. Dunn, 46 Mich. 146; Case v. Bogart, 188 Mich. 297.

¶ 38. Evidence held sufficient to show that a husband who, after his second marriage, transferred large bank accounts to an account made payable to either or to the survivor, was mentally competent.—Powell v. Pennock, 198 Mich. 573.

¶ 39. Evidence in action to set aside deeds and establish title, held insufficient to show that a grantor was incompetent to execute a deed.—Demerse v. Mitchell, 187 Mich. 683.

¶ 40. Where evidence was presented showing that one who had executed a conveyance of real estate was imbecile and foolish, but other evidence was presented showing that he was afflicted with an impediment of speech and, as a result of this fact, shy and difficult to engage in conversation, but in fact was observing, intelligent, apparently able to read, a good farmer, skilful with cattle, and a voter at elections, the court was justified in concluding that he was capable of understanding and did understand that he owned the property in question, and could dispose of it as he pleased, notwithstanding the fact that some years before a guardian had been appointed for him by the probate court, on the ground that he was incompetent to have the charge and management of his estate.—Chase v. Spencer, 150 Mich. 99.

¶ 41. On a bill to enforce specific performance of a contract to convey land to a railroad company for a right of way the vendor cannot be said to have been incompetent where the evidence showed that his two sons-in-law were present when the negotiations were had and assisted in staking out the strip to be conveyed, and the chief controversy was over the price of the land and afterwards the vendor went to his house and met the agents of the company, and signed the contract in the presence of his son who also signed as a witness, whereupon the company graded the road at a considerable expense, with no protest or claim other than that made by some of the defendants that the road was not being built according to contract, and no one asserted the invalidity of the contract, though witnesses believed him incompetent.—Detroit United Ry. Co. v. Smith, 144 Mich. 235.

¶ 42. A flighty old man deeded his homestead to his daughter and her husband and they gave him back a life lease of it and agreed orally to support him. They all lived together, quarrelled frequently, and finally the son-in-law committed assault and battery upon him and drove him out. The old man consulted a lawyer, to whom he promised to deed the land if the lawyer would get it back for him and take the old man into his home. Whereupon, the lawyer succeeded in inducing the daughter and her husband to deed the land to such lawyer direct, so that the old man's wife should not acquire dower interest in it; the prosecution of such son-in-law for the assault he had committed being thereupon dismissed, and the lawyer giving his note and a mortgage on the land to secure it for a certain sum which such son-in-law claimed to have paid the old man's first wife to induce her to join in the deed to his wife and himself. The old man then went to live with the lawyer but on the next day left him. In an action brought by him and his daughter and son-in-law to set aside the deed to the lawyer as having been obtained by fraud, it was held, that as on the evidence the old man was, and was known to be incompetent to do business, all the deeds in the premises should be set aside and the note and mortgage declared void, and the land deeded back by the lawyer to the old man.—Raynett v. Baluss, 54 Mich. 469.

¶ 43. The deceased, shortly before his death at the age of seventy-five, executed deeds to his lands. The evidence showed that he voluntarily sent for his brothers to assist him; that he remembered all the details of his lands even to their legal description, and had clearly in mind those entitled to his bounty; and that he selected his brother, an expert draftsman, to prepare the deeds. Held, the evidence established that the deeds were not invalid for lack of mental capacity, despite the fact of occasional fainting spells and hallucinations suffered by the deceased.—Beadle v. Anderson, 158 Mich. 483.

¶ 44. Where, in a case involving the mental competency of a grantor, witnesses are found to testify upon both sides of the controversy, and the opinions seem evenly balanced, courts will look to the circumstances surrounding the transaction, its fairness, the

history and character of the grantor and the probability that one in the possession of his faculties would make a transfer of his property in a given case.—Hemphill v. Holford, 88 Mich. 293.

¶ 45. On a bill to set aside a deed on the ground that the grantor was incompetent because of insanity, held that the grantor had acted deliberately and in the full possession of her faculties, although the evidence showed she was a timid and nervous woman but there was no evidence of any insanity until many months after she had signed the deed, and there was no testimony as to her condition at the time the deed was executed, nor for some time prior or subsequent thereto.—Stewart v. Curtis, 85 Mich. 496.

¶ 46. A finding that an old woman was incompetent to make a deed is not sustainable on evidence that she made it when sick to a grandson about to leave her home as a consideration for his remaining, which he did, where he made back to her a life lease and they lived together on the premises for some years pursuant to the agreement, and where no disinterested witness testifies to any impairment of mind but only to weakness caused by sickness, and the interested witnesses testify to opinions without any facts on which to base them, and all the facts in the record show her to be possessed of unusual mental vigor for her age and to have had no difference with the grantor until selfish interference by others caused her to seek annulment of the deed.—Arnold v. Whitcomb, 83 Mich. 19.

¶ 47. Where a respondent in insanity proceedings shows on cross-examination an acquaintance with business affairs, intelligence in dealing in stocks, and knowledge of her property and her transactions relative to it, the cross-examination affords no evidence upon which to base the appointment of a guardian for insanity.—In re Phillips, 158 Mich. 155.

¶ 48. A mother deeded her land to her daughter, reserving a life estate. In a bill brought by her guardian to set aside the deed on the ground of mental incompetency. the lower court found that there was no direct evidence of incompetency on the day the deeds were executed, but that she was incompetent shortly before and shortly after that time; that while she was not insane, she did not understand the legal import of the deed and did not intend to pass title to the land; and that the legal import of the deed was not explained to her. Held, the decree for complainant should not be disturbed.—McGraw v. Muma, 164 Mich. 117.

¶ 49. Where a decedent had conveyed land to his sons so as to provide a home and to protect himself against his intemperance, and where after the death of one of the sons such decedent delivered in escrow for the benefit of a widowed daughter-in-law, a deed to the proportion which came back to him through the death of his son, with directions for delivery at his death, and where the attorney who drew the deed testified that the father was then of sound mind and knew perfectly what he was doing and that the deed was executed and delivered to such attorney in escrow after he had endeavored to dissuade the decedent from his purpose; the conveyance was sustained.—Williams v. Williams, 133 Mich. 21.

¶ 50. A showing of business incapacity which consists of evidence of inability to learn to read beyond the alphabet, or to count more than twenty, and of a preference for large coins over small ones, regardless of value, is largely counterbalanced by proof of industrious habits, moral living, exercise of the electoral franchise, and the occasional transaction of business in buying, selling and giving security.—Shoulters v. Allen, 51 Mich. 529.

¶ 51. An objection to draft of will which was read to testator was evidence tending to show mental competency at the time of the execution of a deed which is sought to be set aside on ground of the testator's mental incompetency.—Stuyvesant v. Wilcox, 92 Mich. 228.

¶ 52. In a suit to set aside deeds on the ground of the grantor's incompetency, the evidence was not sufficient to show mental incompetency where the testimony indicated that the grantor, although aged, was a person of unusual vigor and activity of mind and that the deeds in question carried out a previously expressed and long delayed purpose.—Reagan v. Murray, 176 Mich. 231.

¶ 53. Evidence held to show that complainant's deceased grandaunt executed certain deeds conveying to him certain property and transferred to him certain money in consummation of an agreement so to do upon certain conditions on the part of plaintiff which he had fully performed or offered to perform, and that decedent was mentally competent at the time she executed such deeds.—Guntzviller v. Gitre, 195 Mich. 695.

¶ 54. A bill by the heirs of a decedent to set aside deeds on the ground of mental incompetency, was properly dismissed, where it appeared that the decedent's relatives, knowing of his ownership of the property, permitted him to deal with it unrestrained for a long term of years and took no steps to have a guardian appointed to care for his estate; that the decedent dealt with others, and among other transactions gave mortgages to two reputable members of the bar, and also that the value of the property conveyed exceeded the price paid but slightly, if at all, and there was no overreaching by way of driving a hard or unconscionable bargain.—Corby v. Moran, 119 Mich. 272.

¶ 55. Evidence of the weakness of mind shown by vacillation, shiftlessness, improvidence, occasional despondency and a religious hobby is not sufficient in itself to render one incompetent in any such sense as to make business dealings with him prima facie fraudulent.—West v. Russell, 48 Mich. 74.

¶ 56. Annulment of marriage on the ground of insanity of the wife at the time of marriage denied for insufficiency of evidence of insanity where it appeared that complainant was 75 and defendant 60 when the marriage took place, that they lived together for three years then separated, but the wife returned at complainant's request for a time then left him again and some time thereafter was adjudged insane and a guardian appointed who sought to compel complainant to support her, after which the suit for annulment was brought. The wife was a religious enthusiast, believed in visitations by spirits and claimed that she saw spirits and angels, but complainant made no charge that she was insane so long as she was willing to live with him.—Van Haaften v. Van Haaften, 139 Mich. 479.

¶ 57. Incompetence to make a deed is not shown by evidence that the grantor was 80 years old with physical strength somewhat impaired by sickness, where the draftsman and others testify that on the day it was executed he appeared bright and intelligent as ever and talked with them on various matters with customary clearness of mind, and where witnesses who knew him testified that mentally he was a strong man.—Hodges v. Cook, 93 Mich. 577.

¶ 58. On a bill to set aside deeds on the ground of the grantor's incompetency, testimony of the grantor's daughter and her husband that after the death of his wife the grantor failed rapidly and his memory was perceptibly impaired though undisputed is not evidence that he was mentally unsound.—Reagan v. Murray, 176 Mich. 231.

¶ 59. Where the record discloses no reason why the aged and infirm father of two children, two months before his death should have made a deed of practically all his property to one child, and shows that he regretted his act almost immediately after he made the deed, and there was little doubt that his mental condition was far from normal, a decree of the trial court setting the deed aside will not be reversed on appeal.—Noban v. Shoup, 171 Mich. 191.

¶ 59a. In an action to set aside a deed on the ground of mental incompetency induced by the excessive use of liquor the burden of proof is on the plaintiff, and cannot be said to have been met where the evidence is very conflicting and largely given by interested witnesses, and where the draftsman and the family physician who witnessed the deed testified that they would not have done what they did had they doubted grantor's competency.—Behrns v. Qualman, 147 Mich. 635.

§ 12. ——Age, physical infirmities and failing memory.

¶ 60. Evidence that a grantor 76 years old was worn out and had all the symptoms of senile decay and was paralytic will support a finding that he was incompetent to make a discharge of a mortgage to his son the effect of which was to impoverish the aged wife of the grantor and his other children without any natural reason for it.—Smith v. Gardner, 147 Mich. 670.

¶ 61. On a bill to set aside a deed from an uneducated man 86 years of age to his daughter, evidence held insufficient to establish mental incompetency at date of execution of the deed.—Akers v. Mead, 188 Mich. 277.

¶ 62. On a bill by heirs at law of a deceased person to set aside a deed by deceased to defendant, her brother, evidence held insufficient to show that deceased, who died from hyperæsthetic pneumonia, had passed into a coma or was otherwise mentally incompetent at the time of the execution of the deed.—Luce v. Luce, 197 Mich. 465.

¶ 63. Evidence of the nature of pneumonia in an advanced stage and of the stage of the disease to which a person had progressed, including the fact that she was in a state of coma, held sufficient to show that she had ceased to have that mental activity necessary to an understanding of the nature of a release of her mortgage to her brother in lieu of a will, it constituting her entire property and the other relatives being thus cut off.—Worthington v. Major, 94 Mich. 325.

¶ 64. In an action to set aside a deed on the ground of mental incompetency induced by the excessive use of liquor, such mental incompetency is not shown by a preponderance of evidence, where it appeared that the grantor though much weakened physically and mentally by his continued use of liquor, in consideration of $6,000 had sold his farm after his wife had died and his children would not live with him; that the family doctor and notary who witnessed the deed testifying that he understood and was competent at the time; that the consideration was paid as agreed, and a month before the grantor had stated to witnesses that he intended to sell, and after the sale that he had sold because his girls had left him; though there were some suspicious circumstances, such as his having insisted to have paid as part of the consideration $500 to the boy who took care of the house for him, and that large sums of money had been received by him for which no account could be made.—Behrns v. Qualman, 147 Mich. 635.

¶ 65. On a bill by the guardians of an alleged incompetent person 75 years old to cancel a contract whereby the ward agreed to turn over to defendant over $2,000 and his monthly pension and the sum of $6,000 at his death in consideration of board, lodging and care for life, evidence held sufficient to sustain a finding that the ward was mentally incompetent at the time of signing the contract.—Aull v. Peterson, 200 Mich. 99.

¶ 66. Evidence held to show that complainant's deceased father was mentally competent at the time he executed certain deeds in question, notwithstanding he was at the time sick in bed and had been prior to that time under a high fever and delirious or in an apathetic condition from typhoid.—Noble v. Hunter, 195 Mich. 713.

¶ 67. Evidence held to show plaintiff was competent, notwithstanding her age, at the time she executed the deed in question, to execute such deed.—Howard v. Howard, 196 Mich. 19.

¶ 68. The testator three days before his death, while his mind was clear and he was mentally competent, decided on the disposition of several pieces of his property by will and deed to a number of persons, and gave instructions to an old friend, a justice of the peace, to draw the instruments. The instruments were drawn as directed and testator executed the same a few hours before his death. He was at that time in a sort of stupor and incapable of comprehending the elements of the transactions, though he knew he was signing the instruments in question. Held, the instruments were invalid for mental incompetency.—Lane v. Lane, 160 Mich. 492.

¶ 69. A deed by an aged father to one of his daughters in consideration of her agreeing to support him during his lifetime was set aside because of the grantor's mental incompetency, it appearing that he did not know what sort of an instrument he had made, and that he was not competent to make a sale of his land for money and protect his interest therein.—Sponable v. Hanson, 87 Mich. 204.

¶ 69a. Where the evidence shows that the insured at the time of making a change of beneficiary on his policy took counsel and in stating his purposes seemed to understand and fully comprehend what he was doing, his act will not be set aside on the ground of mental incompetency though he was sick and depressed.—Andrews v. Lavery, 159 Mich. 26.

§ 13. ——Unnatural or unwise disposition of property.

¶ 70. Where a grantor makes a deed of property preparatory to committing suicide, the fact that the provision therein is partial to some of his children and is unwise and unnatural, is not proof of his mental incompetency, where it appears that he had a reason for so acting, made the deed pursuant to his settled judgment, and not under a delusion.—Cooper v. Cooper, 162 Mich. 304.

¶ 71. Evidence that a decedent did not give equal amounts of property to those whom he apparently held in equal regard is not sufficient to show mental incapacity as a ground for setting aside his deeds.—Beadle v. Anderson, 158 Mich. 483.

¶ 72. While an improvident business transaction may be competent evidence in support of an application for guardianship it becomes cogent proof of mental incompetency only as it is reinforced and explained by other facts and circumstances.—In re Chappelle's Estate, 189 Mich. 526.

¶ 73. A man who on his death bed assigned, without the knowledge of his wife—she having retired for the night—notes and mortgages amounting to more than $16,000, was held to have been mentally incompetent to transact business of that nature, there being testimony of his mental condition evincive of incompetency.—Peters v. Peters, 101 Mich. 291.

¶ 74. On a petition to have a guardian appointed for a woman seventy-five years of age who had made some improvident business transactions, evidence held insufficient to establish mental incompetency so as to authorize the appointment of a guardian under Comp. L. 1897, § 8709, How. St., 2nd Ed., § 11565.—In re Chappelle's Estate, 189 Mich. 526.

§ 14. ——Testimony by expert or physician.

Expert evidence in general, see Evidence, VI, B.
Opinion evidence and conclusions as to sanity and competency, see Evidence §§ 239, 244, 259.

¶ 75. Mental incapacity of the deceased is not shown where the expert testimony to establish such incompetency was based on hypothetical conditions not supported by the weight of the evidence but based on the extreme testimony of interested witnesses opposed by other credible evidence.—Beadle v. Anderson, 158 Mich. 483.

¶ 76. One who has always managed his own business affairs, owning houses and lots and lending money on notes and mortgages, must be regarded as having sufficient intelligence to make a contract for the purchase of an interest in a patent, although his physician testifies that he is of weak mind.—Davis v. Phillips, 85 Mich. 198.

¶ 77. Mental incompetency is not made out by testimony of a physician and others that the promisor was physically ill and her mind was clouded at times where her own testi-

mony shows that she fully understood the nature of her obligation at the time she signed it.—Milks v. Milks, 129 Mich. 164.

¶ 78. Insanity must for legal purposes be judged of by manifestations in conduct or language and not by symptoms which only physicians can perceive and which have no apparent effect upon one's ability to transact business.—Fraser v. Jennison, 42 Mich. 206.

¶ 79. Undisputed evidence of periods of insanity prior to making of a deed and a subsequent recurrence of the trouble are not sufficient to show mental incompetency as against the testimony of two physicians and a lawyer showing the competency of the grantor at the time of executing the deed.—Ramsdell v. Ramsdell, 128 Mich. 110.

¶ 80. In a suit to set aside a deed for mental incompetency evidence that the grantor was able to describe the land from memory, testimony by two physicians who were there to ascertain his mental condition, that they found him competent, as also the attorney who drew the papers who testified that the grantor stated that he made the deed to his son knowing that the son could turn him out but trusting him, is sufficient, in spite of previous and subsequent insanity to show mental capacity sufficient to reverse a decree for the complainants.—Ramsdell v. Ramsdell, 128 Mich. 110.

§ 15. ——Determination of insanity as evidence in subsequent suit or proceeding.

Admissibility of adjudication of insanity as evidence in subsequent suit or proceeding, see ante § 10.

¶ 81. A determination by the probate court that a man is mentally incompetent to have the charge and management of his estate does not necessarily prove that he was mentally incapable to convey real estate some years later.—Chase v. Spencer, 150 Mich. 99.

§ 16. Instructions and questions for jury.

Instructions on insanity in prosecution for crime, see Indictment § 409.

¶ 82. Insanity is a physical disease, and is a question of fact, not of law.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

¶ 83. Evidence tending to show that one who had disappeared had been for a considerable time laboring under a severe and dangerous disease of the brain and spine, which, in the opinion of his physician, must have proved fatal in a short time, and must probably have rendered him insane, with evidence of its effect on his feelings and conduct, indicating that his mind was affected by the disease, is sufficient to warrant the submission of the question of his insanity, in a case where it was material, to the jury as one of fact.—John Hancock Mut. Life. Ins. Co. v. Moore, 34 Mich. 41.

¶ 84. If there is evidence that a man of good mind and education, genial and pleasant disposition, full of life and vigor, talkative and apparently happy, having pleasant domestic relations and being under no strain for their support and maintenance, becomes moody, nervous and restless, cannot sleep at night, and by day walks the floor, is abstracted and fails to respond to the salutation of friends, complains of pains in the head and looks haggard and sick, and, a few weeks after this change sets in, takes his life at the age of fifty-five, such evidence is sufficient to go to the jury on the question whether, as an insured person who committed suicide, the man was insane.—Blackstone v. Standard Life & Accident Co. 74 Mich. 592.

§ 17. Directing verdict on issue of sanity.

¶ 85. The deceased in 1904, at the age of seventy-two, gave to the claimant, her son, a paper in which she stated that she had received $450 from him in 1889, to pay off a mortgage, and $50 in 1904 to pay off taxes on her property, and requested that these sums be repaid to him out of her estate after her death. On the question of her mental competency at the time of executing the paper, a doctor, called by the defendant executor, testified that he treated her in 1905 and 1906, but did not know of her mental condition in 1904. Another physician stated that he had treated her for several years, and found her perfectly rational at times and perfectly irrational at other times. A neighbor testified that the deceased was sometimes a "little off"; other times she was not. The defendant executor was acting under a will executed by the deceased one year after the paper in question. Held, there was no evidence to go to the jury of mental incompetency to execute the paper, and a verdict was properly directed for claimant.—McGregor v. McGregor's Estate, 156 Mich. 487.

¶ 86. On a petition by a woman 83 years of age to be relieved of guardianship on the ground of incompetency where it appeared that petitioner was old, physically infirm, and not tidy about her person and home and that she had developed an unfriendly attitude towards two of her children owing to the fact that they had originally procured the appointment of a guardian for her and had otherwise acted contrary to her wishes, but that she possessed a memory remarkable for a woman of her age in remembering names, dates and events, held that a direction of a verdict in behalf of petitioner was correct.—In re Stroebel, 194 Mich. 634. Appeal of Runge, Id.

§ 18. Conclusiveness of adjudication and collateral attack.

Conclusiveness of probate orders and decrees in general, see Probate Courts, III.

General principles of res adjudicata, see Former Adjudication.

Special findings on sanity in criminal verdicts, see Indictment § 470.
Adjudication of insanity as evidence on issue of testamentary capacity, see Wills, II.

¶ 87. Complainant heirs of the deceased brought a bill to set aside on the ground of mental incompetency the interest of defendant in certain real estate conveyed by a third person to the deceased and defendant as joint tenants. The deceased had been found mentally incompetent by the probate court under a petition filed by one of complainants prior to the date of said conveyance, but not decided until after his contract was made. Defendant cograntee, a sister of decedent, was not a party to said proceeding in the probate court. Held, the decree of the probate court was evidence but was not a final and conclusive adjudication that the deceased was mentally incompetent with respect to the rights of defendant under said conveyance.—Hale v. Harris, 169 Mich. 172.

¶ 88. Jurisdictional defects which appear upon the face of the proceedings for the ascertainment of insanity may be raised at any time between the parties, even in a collateral proceeding, when the rights of innocent third persons are not concerned.—In re Phillips, 158 Mich. 155.

§ 19. Right of appeal and mode of review.

Consideration of errors affecting persons non sui juris on appeal without complaint by them, see Appeal § 224.
Dismissal of appeal from commitment, where subject has been discharged, see Appeal ¶ 687.
Appeals from probate orders and decrees in general, see Probate Courts, III.

¶ 89. The remedy for redress of an erroneous order adjudging one incompetent and appointing a guardian for him is by appeal from the decree of the probate court within the time allowed and not by petition for rehearing addressed to the probate court.—Jaquith v. Benzie Circuit Judge, 142 Mich. 174.

¶ 89a. A probate court which has adjudged petitioner incompetent and appointed a guardian has no jurisdiction to entertain a petition by him within the year for appeal praying that the guardian be removed and discharged on the ground that petitioner was wrongly adjudged incompetent; since the effect of such a petition is that of asking for a rehearing of the former decree.—Jaquith v. Benzie Circuit Judge, 142 Mich. 174.

§ 20. Proceedings for order of restoration.

Discharge of patients from hospital for insane persons, see Comp. L. 1915, §§ 1341, 1342.

¶ 90. Section 1942, Comp. L. 1897, providing proceedings for an order of restoration of soundness of mind are directory only.—In re Phillips, 158 Mich. 155.

II. STATUS, COMMITMENT AND CUSTODY, AND SUPPORT.

§ 21. Order of commitment.

Commitment of dangerous or criminal insane, see post § 22.
Confinement of sane person and liability therefor, see post § 23.
Sufficiency of order of commitment, see also post ¶¶ 96, 97.
Habeas corpus to review commitment or custody, see Habeas Corpus § 5.
Institutions for care of insane persons to be fostered and supported, see Const. art. XI, § 15.
Confinement of insane convicted of crime in Ionia state hospital, see Comp. L. 1915, § 1346.

¶ 91. An order of commitment made by the judge of probate of Lenawee county of a woman to the Michigan asylum for the insane at Kalamazoo, which recites that it is made upon a hearing on a petition on file which alleges that the woman is a resident of the industrial school for girls in said county, and is insane, and prays that she may be admitted to said asylum, there to be supported at the expense of said county, recites sufficient facts to give the probate court jurisdiction on the basis of her being such resident.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

¶ 92. An order of commitment is void where record shows that a petition to have a person declared insane and committed to an asylum was filed May 21st; that it was set for hearing at four p. m., May 23rd, but was actually heard and decided at four p. m., May 22nd.—In re Phillips, 158 Mich. 155.

§ 22. Commitment and custody of dangerous or criminal insane.

Law for sterilization of mental defectives as class legislation, see Constitutional Law § 216, ¶ 905.
Admission and support of insane persons in hospitals, see Comp. L. 1915, §§ 1323-1339.
Yearly report as to treatment and care of ward, see Jud. Act, chap. LVIII, § 33; Comp. L. 1915, § 13962.

¶ 93. The confinement of a dangerous insane person is always justifiable.—Lott v. Sweet, 33 Mich. 308; Van Deusen v. Newcomer, 40 Mich. 90.

¶ 94. It seems that Laws of 1883, Act No. 190 (How. St. §§ 1943a-1943g5), relating to the commitment of insane persons to asylums applies to insane criminals confined in the state industrial home for girls.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

¶ 95. An order committing a person accused of crime to an asylum under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How.

St., 2nd Ed., must contain a judicial determination of his insanity.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 96. A person accused of crime cannot be committed to an asylum under § 19 of Act 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., under an order which does not judicially determine his insanity.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 97. An order committing an accused person to an asylum under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., need not contain a recital of the report of the committee which examined him.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 98. Query, whether § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., permitting persons accused of crime when insane, to be confined in asylum, is rendered unconstitutional by reason of leaving to the discretion of the circuit judge whether the superintendent of the asylum shall inform the judge and prosecuting attorney when the accused shall be restored to his right mind.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 99. A person informed against for murder and at large on bail may be committed to an asylum under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., although he may have not been placed on trial.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 100. A person charged with crime who, in a proceeding under § 19 of Act No. 238, Pub. Acts 1905, § 15408, How. St., 2nd Ed., is found not to "possess sufficient self-control to resist violent impulses" may be committed to an asylum.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 101. An order of commitment to the insane asylum which states that the female committed was a resident of the state industrial home for girls does not show upon its face that she was serving a term of imprisonment at that home, and does not, therefore, exclude the jurisdiction of the probate judge to make the order under How. St. § 1930c2.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

§ 23. Confinement of sane person and liability therefor.

False imprisonment in general, see False Imprisonment.

Detention of person as insane as a false imprisonment, see False Imprisonment § 17.

Evidence admissible in action for detaining person as insane, see also False Imprisonment ¶¶ 124, 125.

¶ 102. One cannot lawfully be placed or detained in an insane asylum against his will unless actually insane.—Van Deusen v. Newcomer, 40 Mich. 90.

¶ 103. Whether, in doubtful cases, an inquisition to determine the insanity of a person is prerequisite to his confinement in an insane asylum, and whether the superintendent of an asylum is liable for detaining a sane person whom in good faith he believes to be insane, quære; the court being equally divided.—Van Deusen v. Newcomer, 40 Mich. 90.

§ 24. Support and maintenance.

See also post ¶ 140.

Liability of insane person for necessaries, see post § 26.

Liability of state for support of insane person, see Poor Persons.

County to be charged with support of indigent insane, see Poor Persons.

Powers, duties and liabilities of guardians respecting insane ward's custody and support, see Guardianship, III, B.

Support of indigent insane, see Poor Persons.

Notice and proceedings necessary to charge parent with support of insane child, see Poor Persons.

Evidence of terms of contract for care and of change of terms, see also Contracts ¶ 1395.

Charges for insane patients, see Jud. Act, chap. LVIII, § 34; Comp. L. 1915, § 13983.

Support of patients in hospitals for insane, see Comp. L. 1915, §§ 1326-1333.

Liability of estate of insane person for support while in asylum, see Comp. L. 1915, § 1328.

¶ 104. One who on the credit of a prospective legacy was, at the instance of the person from whom the legacy was to proceed, advanced money for the maintenance in an asylum of an insane woman whose husband was unable to provide for her may recover from the legacy what he had paid.—In re Renz's Estate, 79 Mich. 216.

III. PROPERTY AND LIABILITIES.

§ 25. In general.

Conveyances and contracts, see post IV.

Support and maintenance of insane person, see ante § 24.

Jurisdiction of probate court for settlement of estates of insane persons, see Guardianship ¶¶ 14, 15.

Powers, duties and liabilities of guardians respecting insane ward's property, see Guardianship, III, A.

¶ 105. One who in good faith takes a note signed by a person of whose incompetency to do business he has no notice, and in a transaction which is not likely to call his attention to it, can recover on the note.—Shoulters v. Allen, 51 Mich. 529.

§ 26. Liability for necessaries.

¶ 106. Where action is brought against the estate of a decedent for services rendered by an attorney in an endeavor to secure her release from an asylum such services are considered as necessaries and a promise to pay therefor will be implied though she was in fact incompetent.—In re Freshour's Estate, 174 Mich. 114; Lyon v. Minor, Id.

IV. CONVEYANCES AND CONTRACTS.

§ 27. In general.

Capacity to hold land and for acceptance of deed, see post § 28.
Invalidity or voidableness of conveyances, see post §§ 29, 30.
Voidable character of contracts, see post § 31.
Avoidance or rescission, see post § 32.
Ratification and affirmance, see post § 33.
Estoppel to attack conveyance or contract, see post § 34.
Contract powers of guardian for insane ward, see Guardianship § 32.
Authority or power of guardian to ratify conveyance made by his incompetent ward, see Guardianship ¶¶ 132, 133.
Guardianship sale of estate of insane ward, see Guardianship § 37.
Partition of lands of insane persons, see Jud. Act, chap. XXXI, §§ 73-75, chap. LVII, § 14; Comp. L. 1915, §§ 13330-13332, 13926.
Proceedings relating to conveyance of lands held by insane persons, see Jud. Act, chap. XIX, §§ 39-54; Comp. L. 1915, §§ 12693, 12708.
Incapacity of insane person to contract marriage, see Comp. L. 1915, § 11367.
Chancery proceedings for sale and conveyance of insane persons' lands, see Jud. Act, chap. XIX, § 39 et seq.; Comp. L. 1915, § 12693 et seq.
Invalidity of insane person's marriage, see Comp. L. 1915, § 11392.
Chancery power and procedure to bar dower of insane married woman, see Jud. Act, chap. XIX, § 71 et seq.; Comp. L. 1915, § 12725 et seq.

¶ 107. The law protects those who from any cause are mentally incompetent; and while in some cases it permits them, if not under guardianship, to make contracts, such contracts are binding only so far as they rest upon adequate consideration, and are free from fraud or overreaching.—Gates v. Cornett, 72 Mich. 420.

¶ 108. Bargains cannot be made with a person who is an imbecile; but where a man is merely weak and helpless, and in the exclusive care of his children, there is no legal impediment to their dealing with him if he retains legal capacity, though their bargains should be closely scrutinized.—Mason v. Dunbar, 43 Mich. 407.

¶ 109. A deed of a mentally incompetent person to her brother in March will be set aside as invalid when the property in question was deeded to the sister in January by her father and the deed then recorded though in March a deed of other property was made by the father to her brother contemporaneous with her deed to the brother in expressed consideration of his promise to support both her and her father for life; the deed to her and the subsequent deed by her to her brother cannot be regarded as one transaction.—Domling v. Domling, 128 Mich. 588.

§ 28. Capacity to hold land and for acceptance of deed.

Statutory provisions as to property held in trust by insane person, see Jud. Act, chap. XIX, §§ 39, 40; Comp. L. 1915, §§ 12693, 12694.

¶ 110. A deed left unconditionally with a third person for the use of a grantee who is not under guardianship, and received by the grantee under circumstances indicating acceptance, is sufficiently delivered, and conveys title even although the grantee be of unsound mind.—Campbell v. Kuhn, 45 Mich. 513.

§ 29. Invalidity or voidableness of conveyances.

Mortgages, see post § 30.
General law of rescission, see Rescission.

¶ 111. A conveyance made by an insane person not under guardianship is not void but voidable only.—Wolcott v. Connecticut General Life Ins. Co., 137 Mich. 309.

¶ 112. The deed of a mentally incompetent person, executed before he had been adjudicated to be such, is not void but voidable only.—Moran v. Moran, 106 Mich. 8.

¶¶ 113, 114. An insane person's deed is not merely voidable, but is void as against third persons, if he never recovers his reason, nor so conducts himself when he does so as to ratify the deed.—Rogers v. Blackwell, 49 Mich. 192.

§ 30. ——Mortgages.

¶ 115. Mortgages given by a weak-minded person and bought up by one who knew of his condition and habits should be allowed to stand only for the amount of benefit, if any, conferred by the work for which the mortgage notes were given.—Gates v. Cornett, 72 Mich. 420.

¶ 116. The lien of a mortgage taken with notice that the mortgagor's grantor was an incompetent person was sustained to the ex-

tent of the money received by such grantor on account of the mortgage.—Sponable v. Hanson, 87 Mich. 204.

¶ 117. A mortgage by an insane person may be set aside even though at the time of its execution the mortgagor may have been not so manifestly insane as to make fraudulent the conduct of the mortgagee in making the bargain it was meant to secure.—Curtis v. Brownell, 42 Mich. 165.

¶ 118. The mortgagees of an insane person's grantee cannot be considered bona fide purchasers in order to uphold the deed.—Rogers v. Blackwell, 49 Mich. 192.

§ 31. Voidable character of contracts.

Avoidance or rescission of contracts, see post § 32.

¶ 119. Contracts with persons who are merely weak in intellect are usually regarded as voidable merely.—Gates v. Cornett, 72 Mich. 420.

¶ 120. Where a grantor was incompetent to make a contract, and has suffered in consequence, courts will set the transaction aside without regard to actual fraud.—Reason v. Jones, 119 Mich. 672.

¶ 121. A contract for the purchase of land made by a person mentally incompetent is not necessarily void; if found to be for his interest a court of equity will protect him in the premises.—McWilliams v. Doran, 103 Mich. 588.

¶ 122. The contract of a person temporarily insane for the sale of his lands is voidable by him on his restoration to sanity.—DeVries v. Crofoot, 148 Mich. 183.

¶ 123. An insane person cannot make a valid assignment of a certificate of deposit payable to her.—Hannahs v. Sheldon, 20 Mich. 278.

¶ 124. A contract made during a lucid interval by one who at times was mentally incompetent as the result of disease, is valid.—Griffith v. Fuller, 181 Mich. 553.

¶ 125. Even if the seller of a business is suffering from a nervous disorder which affects his mind when he makes a contract providing that he will not engage in the same business, such contract is valid where the buyer pays all the business is worth and no attempt to overreach the seller is shown and the seller's own testimony shows that he is satisfied with the sale and has never complained of its unfairness but only wants to go into the business again.—Weickgenant v. Eccles, 173 Mich. 695.

¶ 126. A bond made by an insane person is void, and a claim thereon should not be allowed against his estate.—Davis Sewing Machine Co. v. Barnard, 43 Mich. 379.

§ 32. Avoidance or rescission.

Equitable relief to set aside contracts or conveyances, see post § 86.

Right of representative to recover money paid to defendant by decedent when mentally incompetent, see Estates of Decedents ¶ 268.

Grounds for rescission generally, see Rescission, II.

Mental incompetency coupled with fraud, duress, undue influence or other circumstances as grounds for rescission, see Rescission, II.

Delay in suing for rescission until death of incompetent grantor, see also Equity ¶ 183.

¶ 127. A suit by a person previously temporarily insane to set aside a deed made in pursuance of his voidable contract will be treated as an avoidance of the contract.—DeVries v. Crofoot, 148 Mich. 183.

¶ 128. Contracts which are voidable because of the weakness of intellect of a party can be enforced or repudiated in a court of equity upon equitable grounds.—Gates v. Cornett, 72 Mich. 420.

§ 33. Ratification and affirmance.

¶ 129. Ratification of a conveyance made by an insane person not under guardianship is shown by evidence that he knew of the conveyance when restored to reason and did not bring any action to set it aside for one and one-half years thereafter, that he talked of the matter to various persons, admitting the conveyance, and that he treated it as being valid.—Wolcott v. Connecticut General Life-Ins. Co., 137 Mich. 309.

¶ 130. Where an agreement ratifying a prior quitclaim deed is made by a person pending guardianship proceedings in which he is adjudged to be mentally incompetent such ratification is not binding.—Longenecker v. Graham, 176 Mich. 84.

¶ 131. Where a mentally incompetent person, making a conveyance of realty, later becomes competent, she may ratify or repudiate the grant, and if she continues incompetent until her death that right passes to her heirs.—King v. Sipley, 166 Mich. 258.

§ 34. Estoppel to attack conveyance or contract.

General principles of estoppel, see Estoppel.

¶ 132. Persons making a contract for the sale of real estate with a person mentally incompetent cannot assert his mental incapacity to avoid the performance of the contract where a court of equity finds that the contract is for the interest of the insane person.—McWilliams v. Doran, 103 Mich. 588.

¶ 133. One who has had extensive business dealings with a woman extending over a long period of time without ever questioning her

mental competency, cannot on that ground, after her death, as her administrator, attack a contract made with a third person during the time the administrator was dealing with her, where there is nothing to show that he then believed her to be or that she was mentally incompetent.—Hannan v. Larsen, 181 Mich. 595.

¶ 134. Those who permit a third person to purchase land from their father in the belief that he is mentally competent and without giving purchaser knowledge or information to the contrary, and whose acts in that transaction amount to an assertion that he was competent, are estopped from asserting incompetency in a suit brought by them as heirs to set aside the deed on that ground.—Burt v. Mason, 97 Mich. 127.

¶ 135. A bill to set aside a deed as against a subsequent bond, on the ground that it was made by a person who was insane at the time, and continued so until he died, establishes no equity greater than that of the grantee, and should be dismissed.—Davis Sewing Machine Co. v. Barnard, 43 Mich. 379.

¶ 136. Where the deceased, being mentally incompetent from the use of liquor, conveyed real estate to a son, and the other children refrained from doing anything out of consideration for the miserable condition of the deceased, they are not thereby estopped to question the competency of the deceased, in a bill to set aside the conveyance.—Troub v. Thorp, 152 Mich. 363.

V. ACTIONS.

§ 35. In general.

Equitable relief to set aside contracts or conveyances, see post §§ 36, 37.
Actions and proceedings for adjudication of insanity, see ante I.
Necessity for appointment of next friend or guardian ad litem for insane litigants, see Guardian ad Litem § 3.
Equitable relief to set aside default judgment taken against insane person without notice to guardian, see Judgments, VI.
Action by insane persons in justice court, see Jud. Act, chap. LXVII, §§ 22, 23; Comp. L. 1915, §§ 14199, 14200.

¶ 137. There is no distinction at law between sane and insane persons, as to the proceedings for obtaining jurisdiction of their persons, and the same rule obtains in suits in equity.—Erwin v. Fay, 165 Mich. 503 (reported sub nom. Love v. Merrill).

¶ 138. An insane or feeble-minded person not under guardianship may file bill by solicitor and counsel.—McDaniel v. McCoy, 68 Mich. 332.

¶ 139. An insane person under guardianship continues liable to suit and to the personal service of summons.—Ingersoll v. Harrison, 48 Mich. 234.

¶ 140. The circuit court has jurisdiction of a suit by superintendents of the poor to recover money paid by the county for the support of a poor insane person, who acquires property after commitment, as the statute (How. St. § 1930dl) makes every insane person supported in the asylum personally liable for his maintenance therein; and when he has come into possession of property sufficient to reimburse the county or the state, and to maintain him thereafter in the asylum, such estate or the income thereof must be applied to his support, and there is no express provision of the statute conferring exclusive jurisdiction upon the probate court.—Simons v. Van Benthuysen, 121 Mich. 697.

§ 36. Equitable relief to set aside contracts or conveyances.

Persons entitled to relief, see post § 37.
Burden of proof in action to set aside conveyance, see also ante ¶¶ 27, 28.
General principles of equity, see Equity.

¶ 141. After the death of a mentally incompetent person his heirs may have a deed made by him during his insanity declared void by a court of equity.—Rogers v. Blackwell, 49 Mich. 192.

¶ 142. Where plaintiff's incompetent ward has conveyed real estate, plaintiff's remedy is in a court of equity, where the rights of all parties can be protected.—King v. Sipley, 166 Mich. 258.

¶ 143. The voidable deed of a mentally incompetent person cannot be assailed in ejectment, but the proper remedy for the grantor is in equity where the interests of all the parties may be protected.—Moran v. Moran, 106 Mich. 8.

¶ 144. On suit to set aside for mental incompetence, the fact that the father had previously deeded property to all of the other children and that in this instance he relied on the grantee son for care and protection takes it out of the rule as to equities laid down in Hemphill v. Halford, 88 Mich. 293, where all of it went to the one grantee.—Ramsdell v. Ramsdell, 128 Mich. 110.

§ 37. ——Persons entitled to relief.

See also ante ¶ 141.

¶ 145. The deed of an insane person can be avoided only by privies in blood and legal representatives of the grantor.—Hunt v. Rabitoay, 125 Mich. 137.

INSERTING WORDS to INSPECTION.

Cross-References.

Inserting Words—
Filling blanks or interlining, see Alteration of Instruments; Execution of Instruments § 10.
Amendments by inserting or interlining, see Equity § 141; Pleading, VI.

Insolvency—
See general Bankruptcy; Assignments for Creditors; Corporations, XXIII.
Fraudulent conveyances by insolvents, see Fraudulent Conveyances.
Of banks and winding up, see Banking, IX.
As condition prerequisite to assignment, see Assignments for Creditors, §§ 2, 3.
As evidence bearing on fraud, see Fraud § 39.

Insomnia—
Complaints of sleeplessness as res gestæ, see Evidence § 454.

Inspection—
Discovery and inspection of books and papers, see Discovery.
Inspection laws and regulations, see Inspection Laws.
Of goods sold, see Sales.
Of place or thing as duty and lack of inspection as negligence, see Negligence; and see Highways, XII; Master and Servant, III; Carriers, II-V; Railroads, VIII; Street Railways, IV; and like topics.
Of articles and writings and persons by jury as evidence, see Evidence §§ 568, 569, 573; Indictment § 277 et seq.
Right of inspection of corporate books and papers, see Corporations § 182.
Right of counsel to inspect offered document before reception in evidence, see Examination of Witnesses § 26; Trial, V, B; Indictment § 341.
See also specific topics treating of the thing or place which is the subject of inspection.

INSPECTION LAWS.

TREATS of public regulative inspections other than regulations pertaining distinctively to some subject which is given topical treatment in this digest, e. g., Food.

§ 1. In general.

Food inspections, see Food § 1.
Health inspections, see Health.
Regulations of commerce, see Commerce §§ 7-10.
Constitutionality of inspection laws, see Constitutional Law.
Police and regulative powers of municipalities, see Municipal Corporations, IX.
Custom repugnant to inspection laws, see Customs ¶ 20.
Crime of resisting factory inspector, see Crimes § 113.
For the text of the various statutes providing for inspection, see indices to the published statutes.

INSPECTORS to INSTRUCTION.

Cross-References.

Inspectors—
Of elections, see Elections § 10.

Instalments—
Mortgages for instalments, see Chattel Mortgages; Mortgages; Foreclosure of Mortgages.
Calls on stock subscriptions, see Corporations § 51.
Terms of payment under contract, see Contracts, VI, D; Sales, VII; Vendors and Purchasers, IV; Building Contracts, III.
Application of payments, see Payment, III.
Local assessments payable in instalments, see Local Improvements, VI.
Nonpayment or delay as breach or excuse for nonperformance, see Contracts, VII, C; Building Contracts, III; Sales, V, C, VIII.

Instantaneous Death—
What constitutes, applicability of Death Act, see Death by Wrongful Act § 5.

Instruction—
In the sense of education, see Schools; University of Michigan.
To trustees in cases of doubt, see Trusts, VI, B, XII; Wills, VI, J.

INSTRUCTIONS.

TREATS of the general law regulating the instructing or charging of the jury in a civil trial of issues of fact upon the law by which the decision of the facts and the consideration of the evidence and the conduct and deliberations of the jury are to be governed. The general conduct of civil trials is treated in Trial. Instructions in prosecutions for crime are treated in Indictment, IX, E.

Analysis.

I. Object and purpose; province of court and jury.
§ 1. In general; purpose and necessity.
§ 2. Duty to instruct and scope and nature of charge.
§ 3. Relative functions of judge and jury.
§ 4. Duty to heed and follow instructions.

II. Form and phrasing.

A. Oral or Written.

§ 5. In general.
§ 6. Necessity of signing.

B. Wording, Terms and Manner of Statement.

§ 7. In general.
§ 8. Manner, style and spirit of charge.
§ 9. Connection, sequence and clarity of charges.
§ 10. Concreteness or general and abstract statements.
§ 11. Argumentative instructions.
§ 12. Reading from or incorporating statutes, law reports and treatises.
§ 13. Using illustrations, analogies or anecdotes.
§ 14. Apparent inadvertencies or errors of expression.
§ 15. Repetition of instructions or portions thereof.
§ 16. Colloquy between judge and counsel as instruction.

C. Conflicts and Ambiguities; Construction of Charge as a Whole.

§ 17. Ambiguous and contradictory instructions.
§ 18. Construction of charge.
§ 19. Construction as a whole.
§ 20. ——Predicating error on detached, isolated portions of charge.

III. Requests and modifications or refusals.

§ 21. Necessity for requests.
§ 22. ——For additional, fuller or more specific charges.
§ 23. Time to make requests.
§ 24. Form of request; oral or written.
§ 25. ——Length, clearness and accuracy.
§ 26. Duty of court to give proper requests.
§ 27. Modification of requests.
§ 28. ——Erroneous modification cured by charge as a whole.
§ 29. Grounds and reasons for refusal.
§ 30. ——Ambiguous, obscure or misleading requests.
§ 31. ——Abstract, irrelevant and inapplicable requests.
§ 32. ——Requests invading jury province.
§ 33. ——Requests on the facts.
§ 34. ——Requests ignoring evidence.
§ 35. ——Requests assuming facts, claims or theories.
§ 36. ——Requests coupling proper and improper instructions.
§ 37. Requested instruction covered by those given.
§ 38. ——Covered by general charge.
§ 39. ——Equivalent instructions in language of court.
§ 40. Requesting instructions already given.
§ 41. Ruling or decision on request.

IV. Applicability and conformity to pleadings, evidence and issues.

§ 42. In general.
§ 43. Applicability to cause of action and issues.
§ 44. Diverse theories, hypotheses and claims.
§ 45. ——Theories or claims not asserted.

§ 46. ——Evidence to support theories.
§ 47. ——Ignoring or assuming theories and claims.
§ 48. Ignoring or assuming part of issues.
§ 49. Applicability and conformity to evidence.
§ 50. Charging upon matters not in evidence.
§ 51. ——On immaterial evidence.
§ 52. ——Testimony excluded or stricken out.
§ 53. ——Ignoring evidence.

V. Invading jury province or submitting improper matters.

A. In General; Instructions as to Weight or Credibility.

§ 54. Discretion of court.
§ 55. Submitting matters that are proved or uncontested.
§ 56. Leaving questions of law to jury.
§ 57. On requisites and degree of proof.
§ 58. On weight and effect of evidence in general.
§ 59. On tendency or effect of specified evidence.
§ 60. ——Weight to be given admissions and declarations.
§ 61. ——Weight of expert or opinion evidence.
§ 62. On inferences or "presumptions" to be drawn from evidence.
§ 63. On disputed questions of fact.
§ 64. ——Charging on conflicts in evidence.
§ 65. Expressions favorable to one party's theory of case.
§ 66. On credibility of witnesses.
§ 67. On comparative weight or effect of testimony.
§ 68. Invidious and discrediting remarks concerning witnesses.
§ 69. Commenting upon claims and defenses.
§ 70. Submitting case on truth of plaintiff's testimony.
§ 71. Commenting on fact of former trials or testimony.

B. Assumption or Misstatement of Facts in Question.

§ 72. In general.
§ 73. Disputed facts or versions of fact.
§ 74. Facts admitted or uncontested.
§ 75. Facts unsupported by evidence.

C. Undue Prominence or Emphasis on Evidence or Witnesses.

§ 76. In general; singling out facts.
§ 77. Emphasizing theories or claims.
§ 78. Singling out particular witnesses.

VI. General and cautionary instructions.

§ 79. Instructions to veniremen.
§ 80. Definition of legal terms.
§ 81. On burden of proof.
§ 82. On sufficiency and degree of proof.
§ 83. ——Preponderance rule.
§ 84. ——Numerical preponderance of witnesses.
§ 85. On inference from failure to attend trial.
§ 86. On inference from failure to testify.
§ 87. On inference from failure to produce witnesses or evidence.
§ 88. On interest of parties.
§ 89. On credibility and impeachment of witnesses.

§ 90. ——Conviction of crime as affecting credibility.
§ 91. ——Effect of false testimony.
§ 92. Charging as to care in considering testimony.
§ 93. Consideration of evidence as a whole.
§ 94. Against giving evidence undue weight or importance.
§ 95. Restricting use of evidence inadmissible for some purposes.
§ 96. Charging upon want of evidence.
§ 97. Allowing jurymen to apply their general experience and knowledge.
§ 98. Correcting improper arguments.
§ 99. Expressions or admonitions as to sympathy.
§ 100. ——As to prejudice against corporations.
§ 101. Comments on justice or policy of law.
§ 102. Adverse comments as to conduct of litigants.
§ 103. On damages and measure of recovery.
§ 104. On right to costs.
§ 105. As to agreeing upon verdict.
§ 106. As to considering and answering special interrogatories.

VII. Delivery to jury, and additional instructions.

§ 107. In general; prefatory remarks and statements.
§ 108. Order in which instructions given.
§ 109. Additional instructions.
§ 110. ——Presence and consent of counsel.

VIII. Objections and exceptions.

§ 111. In general; time and manner of objecting.
§ 112. Objection to additional instructions.

I. OBJECT AND PURPOSE; PROVINCE OF COURT AND JURY.

§ 1. In general; purpose and necessity.

For necessity and sufficiency of instructions on the substantive law of particular topics or other instructions peculiar to them, see specific topics treating of the cause of action, remedy or fact to which the instruction pertains, e. g., Accord § 18; Adverse Possession § 55; Contracts. X, D; Damages, XII, B; Highways, XII, H, 5.

Submitting additional instructions, see post § 109.

Form and phrasing of charge, see post II.

Necessity that instructions be applicable to the case, see post IV.

Instructions in criminal cases, see Indictment, IX, E.

Claims and statements of law by counsel, see Argument of Counsel §§ 4, 10.

Errors in instructions harmless in themselves or to objector, see Harmless Error, II, C.

Invited or cured errors in instructions, see Harmless Error, III, C.

Power and propriety of directing verdict, see Directing Verdict, I.

New trial for errors in instructions, see New Trial, II.

Provisions as to instructions, see Jud. Act, chap. XVIII, § 58; Comp. L. 1915, § 12630.

¶ 1. The purpose of a charge to the jury is (1) to explain the issues; (2) to notice the claims of the parties and suggest, so far as necessary, the principles of evidence and their application; (3) to declare what rules of law will apply to any state of facts which may be found on the evidence.—Souvais v. Leavitt, 50 Mich. 108.

¶ 2. The object of a charge is not to teach law to the jurors, but to direct their conduct in the controversy they are called on to decide.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

§ 2. Duty to instruct and scope and nature of charge.

Necessity and sufficiency of requests for instructions, see post III.

Applicability and conformity to pleadings, evidence and issues, see post IV.

Admonitory instructions, see post VI.

Court required to submit proper requests, see post § 26.

Power of court to modify requested instructions, see post § 27.

Duty to state the issues, see post § 43.

Duty to instruct on theories and claims of parties, see post § 44 et seq.

Discretion of court as to calling attention to testimony, see post § 54.

Instructions explaining legal terms, see post § 80.
Charging upon burden and degree of proof, see post §§ 81-84.
Inference from failure to attend trial, see post § 85.
As to inference from failure to produce evidence or to testify, see post §§ 86, 87.
Charging upon credibility of witnesses, see post § 89.

¶ 3. The trial judge should present the substantial issues of the case to the jury and state the principles of law that govern the rights of the parties.—Barton v. Gray, 57 Mich. 622.

¶ 4. Where the trial court does not instruct the jury as to the issues before them, and does not properly state to them the law governing the case, the judgment will be reversed on writ of error.—Carney v. Ionia Transp. Co., 165 Mich. 620.

¶ 5. If the court instructs the jury upon all the essential features of the case, that is sufficient.—Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360.

¶ 6. Where instructions have been given on all the facts that arise under the testimony, defendant cannot object that the case was submitted without instruction as to what facts would warrant a verdict for him. —Eldredge v. Sherman, 79 Mich. 484.

¶ 7. Where there is a conflict of evidence, and the jury, by weighing it, are to find facts, it is the duty of the court in instructing the jury to propound the law and direct its application to the facts as they may be found.—Wisner v. Davenport, 5 Mich. 501.

¶ 8. The failure to instruct the jury in a civil case as to matters common to all cases is not, in general, error requiring reversal. So held where no explicit instruction was given that the verdict must be based "upon the testimony," or that the amount and value of property involved must be determined "from the evidence."—Isaacs v. McLean, 106 Mich. 79.

§ 3. Relative functions of judge and jury.

Questions of law and fact distinguished, and issues as one or the other, see generally Trial, VI; but see topics involving the particular issue for decisions as to whether it is for the court or jury, e. g., Agency §§ 11, 17, 42, 69; and corresponding portions of other specific topics.
What questions pertain to each, see Trial, VI; and see specific topics.
Instructions invading jury province, see post V.
Refusal of instructions invading jury province, see post § 82.
Direct instructions upon undisputed facts, see post § 55.
Instructions erroneous as leaving questions of law to jury, see post § 56.
Sufficiency of charge, construed as a whole, as leaving question of negligence to jury, see post § 19.
Province of jury to choose between diverse inferences on the proofs, see also Directing Verdict § 16.
Review of findings as affected by relative provinces of court and jury, see Appeal, XII, E, 2.
Weight and effect of evidence as jury question, see Trial, VI.
Credibility of particular witness as jury question, see Witnesses, VI.

¶ 9. The judge and jury are respectively independent in determining questions of law and fact; and neither can invade the other's province.—Mawich v. Elsey, 47 Mich. 10.

¶ 10. The case must be reversed where the judge interferes with the lawful province of the jury.—Sheahan v. Barry, 27 Mich. 217.

§ 4. Duty to heed and follow instructions.

Instructions invading jury province, see post V.
Instructions coercing jurymen, see post § 105.

¶ 11. The jury are bound to take the law from the court, and to find the facts from the evidence.—Kempsey v. McGinniss, 21 Mich. 123.

¶ 12. A jury cannot disregard the duty to receive the law from the court and return whatever verdict may seem to them right.—People v. Gardner, 143 Mich. 104.

¶ 13. One accused of violating an ordinance has no right to have the jury instructed that they might disobey the instructions of the court if they should choose to do so, because the jury must receive the law from the court, and it is their duty to follow instructions in that regard.—People v. Gardner, 143 Mich. 104.

II. FORM AND PHRASING.

A. ORAL OR WRITTEN.

§ 5. In general.

Effect of reading statutes to jury, see post § 12.
Necessity that requests for instructions be in writing, see post § 24.
Delivery of instructions to jury, see post VII.
Provisions as to writing and filing instructions, see Jud. Act, chap. XVIII, § 58; Comp. L. 1915, §§ 12630, 14573.

¶ 14. Comp. L. 1871, § 5034, providing a stenographer for Wayne county, is valid, and controls sections of the law concerning the charging of juries, so that the Wayne circuit judge has the same power that he had before the enactment of the last-mentioned sections

as to charging fully and orally.—Sheahan v. Barry, 27 Mich. 217.

¶ 15. Section 414, Comp. L. 1897, How. St., 2nd Ed., § 11926, relieves circuit courts having stenographers from the requirements of §§ 10243-10246, Comp. L. 1897, How. St., 2nd Ed., §§ 11837-11840, as to giving written instructions to juries.—Newton v. Consolidated Construction Co., 184 Mich. 63.

§ 6. Necessity of signing.

¶ 16. Want of signature is no objection to a charge. It can only be inquired into when embodied in a bill of exceptions, the signature to which sufficiently authenticates it.—Hunter v. Parsons, 22 Mich. 96.

¶ 17. The statute requiring instructions to be in writing (Laws 1869, Act No. 67) does not require that they be signed.—Hunter v. Parsons, 22 Mich. 96.

B. WORDING, TERMS AND MANNER OF STATEMENT.

§ 7. In general.

Scope and nature of instructions generally, see ante § 2.
Giving substance of requested charges, see post § 9.
Construction of charges, see post § 18 et seq.
Rule that instructions construed as a whole, see post § 19.
Necessity that requested charges be clear, concise and accurate, see post § 25.
Refusal of abstract, obscure and ambiguous requests, see post §§ 30, 31.
Necessity of requesting fuller or more explicit instructions, see post § 22.
Refusal of requested instruction where substance given in court's own language, see post § 39.
Remarks made on refusing requested instructions, see post § 41.
Remarks and statements made in giving instructions, see post § 107.
Following approved instructions on retrial, see Appeal § 556.

¶ 18. A charge should be as direct, distinct and explicit as the circumstances will permit and as far as practicable in popular language.—Aikin v. Weckerly, 19 Mich. 482.

¶ 19. Even though the language used in a lengthy charge is not absolutely accurate, and though the best method of expression is not chosen, yet if the language used is such as to warrant the assumption that it was correctly understood by the jury, it is enough.—Davidson v. Kolb, 95 Mich. 469.

¶ 20. Where the case is a close one from a legal viewpoint, the trial judge should state the law applicable to the case clearly and without ambiguity.—Chabert v. Russell, 109 Mich. 571.

§ 8. Manner, style and spirit of charge.

Prefatory remarks and statements, see post § 107.

§ 21. Where a charge does not mislead the jury as to their powers or duties, its style or spirit will not be reviewed as bearing with severity upon the party complaining of it.—Elliott v. Van Buren, 33 Mich. 49.

¶ 22. The trial judge has a large discretion in regard to the style of his charge so long as the judgment of the jury is in no degree subordinated to his opinion on the facts.—Mawich v. Elsey, 47 Mich. 10.

¶ 23. The manner or inflection of the circuit judge in addressing the jury, or the emphasis used, is not reviewable where the words employed are not prejudicial or misleading.—Gibbs v. Johnson, 63 Mich. 671.

¶ 24. An exception to a charge on the ground that the manner in which the judge submitted the case and his comments on the evidence gave undue prominence to whatever would tell in favor of plaintiffs in error, and thereby unfairly prejudiced their case, cannot have weight if the bias of the judge is not manifest in the charge so that there is reason to believe the jury were improperly influenced.—Merchants' Bank of Canada v. Ortmann, 48 Mich. 419.

§ 9. Connection, sequence and clarity of charges.

See also post ¶ 209.

¶ 25. The charge will be much less liable to misapprehension, and less difficult of application to the facts when submitted complete and entire, upon all points requiring notice, than when made to consist of a series of isolated propositions of opposing counsel.—Aikin v. Weckerly, 19 Mich. 482.

¶ 26. It is commendable for a court to cover the ground by a continuous and intelligible charge; and the multiplication of separate points and requests which the jury can only hear once, and must act upon from a single oral exposition, is apt to lead to confusion and uncertainty, and is not to be favored.—Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310.

¶ 27. Charges made up of selections from the requests of both parties, supplemented by general judicial observations, are disapproved as incoherent, obscure and sometimes ambiguous.—Marquette, H. & O. R. R. Co. v. Marcott, 41 Mich. 433.

¶ 28. Concise charges are not only commendable, but essential to a good understanding of the case by the jury, and it is a proper practice to extract from requests to charge such matters as should be explained to the jury, weaving them into a charge which, from its continuity and harmony, will be better un-

derstood than a succession of abstract propositions could be.—Kinney v. Ferguson, 101 Mich. 178.

¶ 29. The method of giving verbatim to the jury requests to charge is criticized; the safer method suggested being a connected and logical charge, in which so much of the various requests as can be properly and profitably used is included without reference to the fact that they are requests for either party.—La Barre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 30. In charging a jury it is preferable for the court to give the substance of the requested charges in a clear and well connected manner than to read each specific request.—Stouffer v. Fletcher, 146 Mich. 341.

¶ 31. A charge should be connectedly given embracing in their proper connection the requests that the court sees fit to give, and should not be made up of requests given, verbatim, or substantially so, and in disjointed sequence.—Derham v. Derham, 125 Mich. 109.

§ 10. Concreteness or general and abstract statements.

Refusal of abstract and irrelevant requests, see post § 31.

Necessity that charges be applicable to the case, see post IV.

¶ 32. An instruction that the jury should find which side is in the right is too general, as it allows them to enter the domain of morals, and measure the liability of the parties by the individual notions of the jurors as to whether the conduct of the parties was right or wrong.—Hyde v. Shank, 77 Mich. 517.

§ 11. Argumentative instructions.

¶ 33. An instruction is not argumentative because it presents the divergent theories of the plaintiff and defendant in an alternative form, leaving it to the jury to decide according to the facts found.—Bialy v. Krause, 142 Mich. 158.

¶ 34. In a personal injury case where the accident happened while alighting from a train an instruction that it was plaintiff's duty to be observant and to heed what was going on about her, to notice whether or not the train was stationary, and to observe when it started, and when alighting, it was her duty to protect herself and assist herself by the handrails running down the steps of the car, which were prepared for that purpose, and to be vigilant and see that no sudden movement would trip or throw her if she could prevent it; and that if plaintiff failed to use due and ordinary precaution that a prudent person would under such circumstance, and was injured in consequence thereof then she cannot recover, is argumentative.—O'Dea v. Michigan Cent. R. Co., 142 Mich. 265.

¶ 35. A charge stating the respective theories of the parties with regard to positions and distances and closing with a statement that it is undisputed that deceased was found under a car at a certain distance from a sidewalk and that he must have come there in some way and that it is for the jury to say which of the conflicting theories is the more probable, is not argumentative, the fact as stated being obviously true and there being no bias towards either theory apparent.—Davis v. Michigan Cent. R. Co., 147 Mich. 479.

¶ 36. In an action against a druggist for the death of a child alleged to be due to negligence in furnishing a poisonous drug instead of a harmless one in filling an order for drugs for internal use a requested instruction held properly refused as being argumentative.—Wood v. Standard Drug Co., 190 Mich. 654.

§ 12. Reading from or incorporating statutes, law reports and treatises.

¶ 37. It was held no violation of 1 Sess. L. 1869, p. 113, How. St. § 6481, requiring the whole charge to the jury to be in writing, when a judge read to the jury, without making it part of his written charge, a section of the general railroad law of the state. A proper reference to a general law protects a party as fully as if the statute had been copied into the charge.—Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

¶ 38. In an action against a liquor seller, by a woman aggrieved by his selling to her husband, it is not error for the court to read to the jury the statute prohibiting sale of liquor to an intoxicated person or to a habitual drunkard, such sale being a ground for exemplary damages.—Johnson v. Schultz, 74 Mich. 75.

¶ 39. A trial court has a right, when adopting the language of the supreme court, to add such consistent explanations as may be proper to adapt it to the facts of the case under consideration.—Freeman v. Weeks, 48 Mich. 255.

¶ 40. In charging a jury it is not error to read to them the language used by the supreme court in disposing of the same case on a former trial, if the language read merely lays down a rule of law as applicable to the one case as to the other.—Power v. Harlow, 57 Mich. 107.

¶ 41. It is error for the court, in an action for negligent injury, to read to the jury the full text of the report of an earlier case of a similar kind.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 42. Language used in the opinion of the supreme court in a precedent case is not

necessarily suitable for the phrasing of an instruction.—Bush v. Delano, 113 Mich. 321.

§ 13. Using illustrations, analogies or anecdotes.

¶ 43. A charge is not necessarily erroneous because it contains an inapposite illustration. —Dodge v. Brown, 22 Mich. 446.

¶ 44. Where a charge to a jury illustrates the case by an analogy, but so cautions the jury against applying it fully that they could not have been misled by it, there is no error. So held where the analogy was between a wife's authority to buy necessaries on her husband's credit, and the power to purchase supplies exercised by one who is hired to run a hotel.—Beecher v. Venn, 35 Mich. 466.

¶ 45. An instruction as to a method of obtaining the present worth of a sum of money payable in the future, given merely as an illustration and so understood, was not error when taken in connection with the whole charge.—Gullickson v. Gjorud, 82 Mich. 503.

¶ 46. Where a story told by the court in its charge to the jury was of doubtful propriety, but had no tendency to injure the party complaining, it was not considered ground for reversal.—Cross v. Lake Shore & M. S. R. Co., 69 Mich. 363.

§ 14. Apparent inadvertencies or errors of expression.

¶ 47. An evident inadvertence in a judge's charge is not ground of error if it could not have misled and was not noticed at the time. So held where he said that probable cause could not be inferred from malice, when he meant to say the want of it could not.—Labar v. Crane, 56 Mich. 585.

¶ 48. Mistake in the use of the word "exceed" in place of "exist" held not fatal in an instruction, where the meaning of the instruction is not rendered obscure.—Baker v. City of Detroit, 166 Mich. 597.

¶ 49. In an action to recover for the number and price of trees sold it was not error for the court to instruct that it devolved on the defendant to show that the trees were not healthy and "unless the evidence was strong on her side that they were unhealthy you will find that they were healthy"; where the court evidently meant to say "stronger" instead of "strong" and the jury would thus understand it, the effect being simply to impose upon the defendant the burden of proving the trees unhealthy.—Smith v. Pickands, 148 Mich. 558.

§ 15. Repetition of instructions or portions thereof.

Order of giving instructions, see post § 108.
Additional instructions repeating charges already given, see post § 109.

¶ 50. Where the charge has clearly and properly stated the effect of defendant's negligence, such statement need not be repeated in connection with every other portion of the charge upon which it has any bearing, unless it appears that the jury might be misled if it were not.—Anderson v. Walter, 34 Mich. 113.

¶ 51. The trial judge cannot be expected, in giving a charge, to reiterate every qualification and condition with every clause.—Watson v. Watson, 58 Mich. 507.

¶ 52. The repetition by the court, even for the purpose of emphasizing it, of a charge which contains a correct statement of the law, is not prejudicial error.—Davis v. Michigan Cent. R. Co., 147 Mich. 479.

¶ 53. It is not reversible error for the court to repeat in different language an instruction that has already been given.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

§ 16. Colloquy between judge and counsel as instruction.

¶ 54. In an action on a building contract, after the court had stated that the jury would be charged the next day, and after counsel had made the arguments to the jury, it was agreed that certain specifications should go to the jury, counsel for defendant stating that he should want instructions that the specifications did not constitute the whole contract, the court replying "Certainly this writing is not the complete contract. The jury will so understand it." Counsel also stated that he would ask an instruction that there was an implied provision that the work must be done in a workmanlike manner, the court replying, "The jury will so understand it." The next day the jury was sent out without instructions, the court declining to give the requests to charge. Held that the colloquy was not a sufficient compliance with Comp. L. 1897, §§ 10243-10246, which requires that the trial judge instruct the jury as to the law of the case.—Simons v. Haberkorn, 139 Mich. 130.

C. CONFLICTS AND AMBIGUITIES; CONSTRUCTION OF CHARGE AS A WHOLE.

§ 17. Ambiguous and contradictory instructions.

See also ante § 7 et seq.; post § 27.
Duty to make charges direct, distinct and explicit, see ante § 7 et seq.
Construction of charge as a whole, see post § 19.
Refusal of ambiguous and obscure requests, see post § 30.
Presumption on error that jury took erroneous view of ambiguous or conflicting instructions, see Appeal § 380.
Charge in breach of promise case, see Breach of Promise to Marry § 6.
Error or ambiguities in parts of charge as harmless, see Harmless Error § 50.

¶ 55. An ambiguous, inconsistent and misleading charge is erroneous.—Dodge v. Brown, 22 Mich. 446; Comstock v. Smith, 26 Mich. 306.

¶ 56. A charge which, as a whole, is inconsistent and impossible to be reconciled or understood by the jury is erroneous.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 57. A charge to the jury is not objectionable on the ground of ambiguity, if the words used in their natural meaning are not ambiguous, and only a forced construction would make them so.—Seeley v. Swift & Co., 151 Mich. 545.

¶ 58. Defendant vendor of a threshing machine seized the same under a clause in the mortgage authorizing vendor to take possession if it should deem itself insecure at any time. Plaintiff sued to recover in an action of trover. The court in one portion of the charge instructed the jury that the plaintiff could not recover if defendant acted in good faith. Later in the charge the jury was instructed that defendant must show by a fair preponderance of the evidence that it believed and had good reason to believe that its security was in danger of being impaired. Held, said instructions were contradictory and therefore constituted error.—Truman v. J. I. Case Threshing Mach. Co., 169 Mich. 153.

¶ 59. The objection that the charge of the trial court was contradictory fails where the apparent contradiction disappears upon examining the charge as a whole.—West v. Hudson, 171 Mich. 669.

¶ 60. The danger of a misapprehension from an inaccurate or ambiguous charge may be increased by what is said in giving it to the jury upon its request for further instructions after retirement and deliberation for a time.—Bouga v. Township of Weare, 109 Mich. 520.

¶ 61. A judge charged the jury that the existence of negligence was a question of fact for them to determine from the evidence, and that in the determination of it they were to apply to the facts the instructions they received from the court, but he added, "You will receive but little aid from the court in this line." Held, that the last clause unmistakably related to their deliberations on the facts and was not objectionable.—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322.

¶ 62. Having given a request that it is not a duty of a railroad company to keep station agents at flag stations for the protection of other employees, it was error to add that "this is true as an abstract proposition" and to charge further, in substance, that they must use some other means of guarding dangerous sidings; where there was no evidence that it was dangerous and the effect in the case was to convey the impression that the requested charge was inapplicable and that there was some breach of duty.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 62a. Defendant city constructed a storm sewer system and built a culvert for the stream into which it emptied. It also diverted water from a mill race into the stream. In a suit by plaintiff against defendant for causing an overflow of his land, during a storm, defendant asked an instruction that it be left to the jury to say whether the storm was extraordinary. Held, that it was not error for the court, in view of this instruction, to refuse to give another inconsistent instruction for defendant that, as a matter of law, the storm was extraordinary.—Richards v. City of Ann Arbor, 152 Mich. 15.

§ 18. Construction of charge.

Construction of charge in false imprisonment joined with malicious prosecution as to applicability of various portions, see False Imprisonment ¶ 160.

Construction of instructions as set forth in record on error, see Appeal § 334.

¶ 63. An instruction that defendant had no right to terminate a contract after he had notice that C. had purchased an interest "and" defendant had consented to that arrangement, if plaintiff and C. were in good faith preparing to carry it out, does not by use of the word "and" assume that the defendant had in fact consented.—Wreggitt v. Barnett, 99 Mich. 477.

§ 19. Construction as a whole.

Effect of apparent inadvertences and mistakes, see ante § 14.

Inconsistent and contradictory charges, see ante § 17.

Instruction as to method of obtaining present worth of money, see ante ¶ 45.

Error in modifying request cured by charge as a whole, see post § 28.

Requests coupling proper and improper instructions, see post § 36.

Instruction read as a whole in regard to presenting theories and claims, see also post § 44 et seq.

Instruction taken as a whole not erroneous as charging upon weight of evidence, see post § 58.

Instructions as to degree of proof, see post § 83.

General law as to harmless error in instructions, see Harmless Error § 125 et seq.

Construction as a whole of charge in action for broker's commission, see Brokers ¶ 241.

¶ 64. A charge should be taken altogether, without giving undue weight to any portion of it.—Eggleston v. Boardman, 37 Mich. 14; Coots v. Chamberlain, 39 Mich. 565; Anderson Carriage Co. v. Pungs, 153 Mich. 580; In re Rockett's Estate, 191 Mich. 499; Jacobs v.

Hagenbeck-Wallace Shows, 198 Mich. 73; Harrison v. Grier, 198 Mich. 672.

¶ 65. Where the whole charge is based on the theory that the question of negligence is for the jury, it is not error to omit to state that rule.—Joslin v. Le Baron, 44 Mich. 160.

¶ 66. An instruction must be considered as a whole, and the portion excepted to must be read and considered in connection with all other portions bearing on the subject.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 67. A judgment will not be reversed because the court, in giving a requested instruction, added thereto an explanation which was not very clear, where the charge as a whole presented the issues in such a way that the jury could not be misled.—Wilder v. Sanche, 120 Mich. 345.

¶ 68. A party requested a charge that the measure of damages was the cash value of the property in question. The court struck out the word "cash." Held not error where the record did not show that any two standards of value were placed before the jury.—Weimer v. Bunbury, 30 Mich. 201.

¶ 69. In a personal injury case, where plaintiff claimed damages for a rupture, and the defendant city claimed that the rupture was not caused by the accident but had existed since plaintiff's childhood, an instruction stating if plaintiff was somewhat ruptured before the accident, then the previous condition was to be taken into consideration in passing upon how much or how little his earnings would be diminished, was not prejudicial to the defendant when taken in connection with the charge, that plaintiff could not recover at all unless his evidence was believed, the obvious purpose of it being a caution against giving excessive damages.—Litten v. City of Detroit, 119 Mich. 495.

¶ 70. The court was requested to charge that plaintiff cannot recover for any aggravation of any disease or condition that existed prior to the day of the accident, inasmuch as the declaration does not count thereon. He assented to it, adding "I do not understand the testimony on the part of the plaintiff is that she was [not] suffering from any of the injuries complained of prior to that time, and that the injuries which she now suffers are the direct result of the accident." Held that the addition of the quoted words told the jury that such damages could not be recovered because not pleaded and also because it was not claimed in evidence; and accordingly the further addition, "Therefore there can be no question of aggravation to be presented to you" was a mere repetition and did not take wholly from the jury all aggravation of injury and assert that there was none but only disallowed recovery for it.—Remey v. Detroit United Ry., 141 Mich. 116.

¶ 71. Prejudicial error arising from the incorrect statement of a rule of damages in one portion of the charge to the jury is not cured by a correct statement in another portion of the charge of the rule involved.—Pearson v. Schoenburg, 167 Mich. 255.

¶ 72. An instruction that a party is not bound by the testimony of a witness called for cross-examination under Act 307, Public Acts 1909 (How. St., 2nd Ed., § 12865), without permitting the opposite party the benefit of portions favorable to him, is not erroneous, where the jury were further instructed that the defense should be determined from all the testimony left it for consideration.—City of Kalamazoo v. Standard Paper Co., 182 Mich. 476.

¶ 73. A charge implying that plaintiff in replevin was entitled to a verdict if a bill of sale to him was made for the purpose of "securing or paying honest indebtedness" cannot be misleading where the whole charge taken together shows that the word "securing" is used in the sense of "paying."—Partlow v. Swigart, 90 Mich. 61.

¶ 74. In an action upon notes given for corporate stock an instruction that it was not disputed that the same representations as to the financial condition of the corporation were made by the holder of the stock as were made by one actually selling the stock, and that such person was the agent of the owner held not prejudicial error in view of other portions of charge to the effect that the jury were the sole judges as to the facts, and the almost conclusive evidence substantiating the instruction.—Loud v. Solomon, 188 Mich. 7.

¶ 75. Where the testimony is brief and pointed and limited to the two parties as witnesses, an instruction that if the jury believes the testimony of the defendant, the plaintiff cannot recover, is not reversible error in view of the correctness of the remainder of the instructions.—Laviolette v. Alberts, 126 Mich. 96.

¶ 76. An instruction by the court in one portion of a charge that complainant is entitled to recover for all the labor and fuel expended by it during an interference by defendant with complainant's water power, when in fact such interference caused only a portion of such expenditure, does not constitute reversible error where other instructions and the charge as a whole state the true rule of damages.—Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78.

¶ 77. An instruction to the jury that "You have heard the arguments of counsel and I refer you to those for a statement of the respective parties" held, in connection with other portions of the charge, not to permit the jury to take counsel's statement as evidence.—Vultee v. Saginaw-Bay City Ry. Co., 186 Mich. 523.

¶ 78. Although an instruction in an ejectment case stating that it was for the jury to say whether the defendant should be disturbed in his possession and should surrender the strip in question or not, was, standing alone, subject to the objection that it indicated the court's view as to the merits, the objection was removed where, taken in connection with the rest of the charge and the evidence in the case, it was clear that the jury were not misled.—Henry v. Henry, 122 Mich. 6.

¶ 79. In an action where there was a claim of $500 loaned and admission of loans of $350 coupled with production of notes for that sum as evidence that it had been paid, and a new note given for $350 on which suit was brought, an instruction as to compromises of disputes could not have been prejudicial to defendant, where the jury were also charged that if it should be found that he gave notes to deceased for the $350 which he borrowed of her, and that he paid these notes, he would not be liable in the case.—Schulz v. Schulz, 113 Mich. 502.

¶ 80. An instruction in an action for the balance due on a contract was not injurious to the defendant, which stated that there could be no recoupment unless the recovery was on the quantum meruit; where the jury was also told that there could be no recovery unless the work had been fully performed and accepted, and where defendant's claim for damages for breach of an express warranty was also fairly submitted.—Mosaic Tile Co. v. Chiera, 133 Mich. 497.

¶ 81. In an action on a claim by the widow against her husband's estate, an instruction that if the jury find, after collecting all the evidence, that there is more of it tending to support the claim, they must find for the claimant, is not erroneous because all the testimony on certain questions was introduced by the claimant; where the instruction is construed in connection with the remainder of the charge in which the jury were told that their verdict should be for the claimant if there was more testimony, that is, a preponderance of testimony tending to establish the claim, if not their verdict should be for the defendant.—Taylor v. Taylor's Estate, 138 Mich. 658.

¶ 82. In an action involving the truthfulness of a statement made in application for life insurance, a charge that "You have heard the testimony of the physicians on that point. You have heard the testimony of Mr. Wilson (the plaintiff). You know all of the attendant circumstances, and it is for you gentlemen to say what the real facts were with reference to that matter. You have heard her statement as given in the application. If you find that she had consulted a physician," etc., is not when considered as a whole open to the objection that the jury might consider the application as evidence of its own truthfulness.—Wilson v. Royal Neighbors of America, 139 Mich. 423.

¶ 83. To charge that, if one accused of "fighting or quarreling" contrary to the provisions of an ordinance was engaged in fighting and quarreling with another, he would be guilty "without regard to who was the aggressor" was not error; where the remainder of the charge fully and fairly gave to consideration of the jury the right of self-defense and told them that if he was simply defending himself against that other he would not be guilty as charged.—Village of Vicksburg v. Briggs, 102 Mich. 551.

¶ 84. An instruction in an action in which defendant claimed that he dealt with plaintiff and a third person as partners, stating that one of the circumstances and facts of a partnership is the fact of general agency exercised by the parties in conducting their business, and that if they found that from the general agency exercised by such third party he was in fact a partner, etc., they should find for defendant, was not error when read in connection with the remainder of the charge in which a partnership was defined correctly.—Weeks v. Hutchinson, 135 Mich. 160.

¶ 85. Where the amount of commissions due from the defendant to the plaintiff is in dispute, and the court instructs that there is no material difference between the evidence on this point offered by the plaintiff and that offered by the defendant, when in fact there is a material variance, this is not reversible error, if another instruction sets out fully the defendant's claim.—Duford v. Parliament of the Prudent Patricians of Pompeii, 152 Mich. 151.

¶ 86. In an action for failure to deliver coal, in which defendant claimed a deduction of the balance due for coal delivered, it was not error to refuse a request directing the jury to deduct such amount, where the jury could not have failed to understand from what the court did say, that the deductions claimed were to be allowed to the defendant.—Benton Fuel Co. v. O. W. Shipman Co., 136 Mich. 523.

¶ 87. In an action for damages for fraud and misrepresentation in the sale of land, an instruction that sometimes it becomes impossible or impracticable to bring an action to rescind the contract because of fraud, because the property may have changed ownership, held not prejudicially erroneous, where, considered in light of the rest of the charge, it amounted only to a statement that plaintiffs were properly in court under the form of action selected by them.—Hutchinson v. Westbrook, 191 Mich. 484.

¶ 88. In an action of ejectment, in which the boundary line between two tracts of land was in dispute, the charge of the court deal-

ing with the manner of making government surveys and their conclusiveness, the establishment of boundary lines by adverse possession, and the burden of proof, held to be sufficient because correct when taken as a whole.—Wilcox v. Jenison, 198 Mich. 182.

§ 20. ——Predicating error on detached, isolated portions of charge.

¶ 89. Isolated parts of a charge good as a whole are not to be taken as error.—Kunst v. Ringold, 116 Mich. 88; Seeley v. Swift & Co., 151 Mich. 545; Rowe v. Bregenzer, 161 Mich. 684; Wegner v. Herkimer, 167 Mich. 587; Schneider v. C. H. Little Co., 200 Mich. 361.

¶ 90. Error will not lie upon detached sentences which, when construed with the rest of the charge, are not objectionable.—Greenlee v. Lowing, 35 Mich. 63; Brown v. Smedley, 136 Mich. 65; Baker v. Mohl, 191 Mich. 516; Hines v. Pictorial Review Co., 192 Mich. 256.

¶ 91. Error assigned in an instruction by bringing disconnected portions of it together and giving it a meaning not presented in its entirety is not a tenable contention.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 92. Where the charge of the court, taken as a whole, correctly states the law as applicable to the particular case, and clearly defines the issue, the fact that sentences are objectionable when considered independent of the context does not constitute error.—Provost v. Brueck, 110 Mich. 136.

¶ 93. Though isolated sentences in the charge to the jury may, when considered separately, be erroneous, such error is harmless where the charge as a whole shows that the issues were submitted fairly.—Smalley v. Detroit & M. Ry. Co., 131 Mich. 560.

¶ 94. A particular instruction will not be held error where a consideration of the charge as a whole shows that the jury could not have been misled.—Beatty v. City of Detroit, 137 Mich. 319.

¶ 95. Where the charge of the court, taken as a whole, correctly states the law as applicable to a particular case and clearly defines the issue, the fact that sentences are objectionable when considered independent of the context, does not constitute reversible error.—Bouma v. Dubois, 169 Mich. 422; Wilcox v. Jenison, 198 Mich. 182.

¶ 96. Where a portion of a charge is objectionable, but fairly presents the case when read in connection with the entire charge, no reversible error has been committed.—Frohlich v. Independent Glass Co., 173 Mich. 428.

¶ 97. A judgment will not be reversed because part of the charge was open to misinterpretation, where it is apparent that no one was misled thereby. So held of a charge respecting a deduction "from these losses of three-fourths of one per cent., according to the terms of the policy" of credit insurance, where the amount of sales was clearly meant as the basis of such percentage and not the amount of losses, which would have been error.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 98. The charge and refusal to charge, held not erroneous, notwithstanding a few sentences in the charge by themselves might be subject to criticism, where the charge was lengthy and when read in its entirety was a fair and impartial statement of the law applicable to the facts of the case.—Hall v. City of Flint, 195 Mich. 638.

III. REQUESTS AND MODIFICATIONS OR REFUSALS.

§ 21. Necessity for requests.

Denials and modifications of requests as harmless errors, see Harmless Error §§ 60, 61.

Sufficiency of request for directed verdict, see Directing Verdict § 28.

Presumption on error as to effect of oral charge not set forth, see Appeal § 381.

Provisions as to requests for instructions, see Jud. Act, Chap. XVIII, § 59; Comp. L. 1915, §§ 12631, 14574.

Power of court to instruct of its own motion, see Jud. Act, Chap. XVIII, § 58; Comp. L. 1915, §§ 12630, 14573.

¶ 99. Whether any specific instructions are requested or not the trial judge should charge the jury as to the principles of law governing the rights of the parties.—Barton v. Gray, 57 Mich. 622.

¶ 100. Unless specially requested it is not error for the trial court to omit to charge the jury upon a point to which attention is not called, although it is raised by the pleadings.—Copas v. Anglo-American Provision Co., 73 Mich. 541.

¶ 101. If a charge is deemed necessary to correct the effect of error in admitting evidence in addition to the striking out of it, the court should be moved by a request.—Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247.

¶ 102. Where the defendant presents no requests to charge, it is not error that the court did not specifically point out to the jury that he withdrew from their consideration evidence improperly admitted on a certain point, where the general trend of his charge accomplished that purpose.—Ward v. Cook, 158 Mich. 283.

¶ 103. The practice of giving the jury only those instructions which are requested is hazardous and cannot be commended, but in itself does not constitute reversible error. —Davis v. Michigan Cent. R. Co., 147 Mich. 479.

¶ 104. Where, in a suit to recover for professional services, plaintiffs relied either upon an express contract covering the entire services or upon an implied one of the same extent, and their testimony related to the value of the entire services, the charge of the court, following such theory and proofs, is not open to the objection that the trial judge did not, of his own motion, introduce a theory supported only by defendant's testimony, which was denied by plaintiffs, and which, if suggested, might have entitled plaintiffs to a verdict of $30, whereas their claim was for nearly $1,900.—Fraser v. Haggerty, 86 Mich. 521.

¶ 105. Where, in an action to recover for services rendered, payment of part of the account is admitted, the court's failure to mention the subject of payment in its charge is not error where its attention is not called to the matter, and where no request is made. —Crowell v. Truax, 94 Mich. 585.

¶ 106. In ejectment, it was not error to fail to charge that if plaintiff's grantor knew that defendant asserted a hostile claim for the statutory period, defendant was entitled to a verdict; where no such charge was requested.—Miller v. Shumway, 135 Mich. 654.

¶ 107. In an action for fraud where evidence of unperformed promises has been admitted, if defendant desires a specific instruction that the breach of such promise was not in itself evidence of the fraud alleged, he should make a request for such instructions.—McDonald v. Smith, 139 Mich. 211.

¶ 108. Where, after charging the jury in a suit by a broker for commissions for securing a loan, the court asks counsel if he has omitted anything and counsel sits silent, and there is evidence on the matter of damages, the failure to charge as to the measure of damages does not call for reversal of a judgment in plaintiff's favor.—West v. Hudson, 171 Mich. 669.

¶ 109. The failure of the trial court to present to the jury a defense of set-off is not error, where no request to do so was submitted by the defendant.—Karwick v. Pickands, 181 Mich. 169.

¶ 110. An instruction as to the measure of damages in an action for personal injuries, which substantially conforms to the pleading and proof, is sufficient in the absence of a request to instruct as to some special issue.—Walters v. Detroit United Ry., 183 Mich. 549.

§ 22. ——For additional, fuller or more specific charges.

¶ 111. A charge is not objectionable solely because it did not go farther and pass upon an additional point to which the judge's attention was not called, and upon which no request was preferred.—Rankin v. West, 25 Mich. 195.

¶ 112. A party desiring a more extended charge upon any subject should prefer a request therefor.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 113. The failure to give more specific instructions is not error, in absence of a request therefor.—Schneider v. C. H. Little Co., 200 Mich. 361.

¶ 114. Where all of the essential features of a case are covered by the instructions to the jury, it is sufficient. If counsel desire more explicit instructions, requests therefor should be presented.—Mahlat v. Codde, 106 Mich. 387; Davis v. Michigan Cent. R. Co., 147 Mich. 479.

¶ 115. Error cannot be assigned upon an exception to the sufficiency of a charge to cover the substantial issues of the case upon particular points of law if the charge as given did in fact cover all branches of injury under the issues made by the pleadings, and if no special request was made for more specific instructions.—Barton v. Gray, 57 Mich. 622.

¶ 116. It is the duty of counsel to proffer desired fuller or more specific instructions, especially where the court asks counsel if there are any changes they desire to be made, or anything further that they desire instructions to be given on.—Hartwig v. Kell, 199 Mich. 603.

¶ 117. The failure of the trial judge to define according to its legal meaning a phrase in an agreement, and his charging the jury in the language of the agreement cannot be regarded as error where his attention was not called by counsel to the subject, and where a more specific instruction was not asked for.—Turner v. Muskegon Machine & Foundry Co., 97 Mich. 166.

¶ 118. The court was not in error in refusing to give instructions requested by counsel for defendant, in an action for the violation of a contract of employment; where the charge given, according to the evident understanding of the court, contained the substance of counsel's request; and where such charge presented fairly the question involved; since such counsel should have corrected by proper requests any evident mis-

apprehension of his position on the part of the court.—Proctor v. Hobart M. Cable Co., 145 Mich. 503.

¶ 119. Instructions in an action for assault and battery and ravishment are not erroneous because not elaborated where they are correct though favorable to one party and where no request for elaboration was made, especially where attention was called to the subject by requests by the opposite party before the charge.—Totten v. Totten, 172 Mich. 565.

¶ 120. In an action to recover damages for breach of a marriage promise, aggravated by a claimed seduction, where the theories of the parties are simple and are stated in their essentials by the court in its charge, it is the duty of a party desiring a more explicit statement of his claims to present requests to the court.—Bischoff v. Harris, 198 Mich. 59.

¶ 121. Where the court, in an action involving the validity of a chattel mortgage given by a corporation to its vice president and its secretary, charged that in determining the question of fraud, the jury "should consider the relation of the parties," it cannot be urged that the charge was not sufficiently explicit on the point in the absence of any request to charge more definitely and explicitly.—Crossette v. Jordan, 132 Mich. 78.

§ 23. Time to make requests.

Order in which instructions given, see post § 108.

¶ 122. Until defendant has announced that he rests his case, he cannot insist upon the court's instructing the jury.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210; Denman v. Johnston, 85 Mich. 387; Hinchman v. Weeks, 85 Mich. 535; Clow v. Plummer, 85 Mich. 550; Kelso v. Woodruff, 88 Mich. 299.

¶ 123. Counsel should submit their requests to charge in time to allow them to be examined by the judge; but if the charge as made omits anything essential the judge should allow proper requests to be submitted at any time before the jury retires.—Crippen v. Hope, 38 Mich. 344.

¶ 124. In a civil case one cannot complain of the court's failure to give instructions that counsel did not suggest until after verdict.—Record Pub. Co. v. Merwin, 115 Mich. 10.

¶ 125. It is not prejudicial error to refuse to instruct the jury that the burden of proof is on the defendant to show settlement, when asked for at a time when they have been called into court to find out whether they are likely to agree and where a previous instruction had covered the point.—Stevens v. Beardsley, 134 Mich. 506.

§ 24. Form of request; oral or written.

Form of instructions, see ante II.

¶ 126. Although it is doubtful practice for a trial court to give oral requests to charge, such practice does not constitute reversible error where the law is correctly stated.—Anthony v. Cass County Home Tel. Co., 165 Mich. 388.

§ 25. ——Length, clearness and accuracy.

Wording and phrasing of instructions, see ante § 7 et seq.

Giving substance of requests in clear, concise language, see ante § 9.

Refusal of lengthy, obscure and ambiguous requests, see post § 30 et seq.

¶ 127. The practice of preferring long requests to charge that involve elaborate arguments not calculated to keep the supposed points distinct and intelligible is criticized.—Hulin v. People, 31 Mich. 323.

¶ 128. Requests to charge covering 17 pages of printed record criticized as too long and likely to cause confusion.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 129. Where a party requests a multitude of charges, of so complex a nature as to make it impracticable for the trial judge to analyze and sift them, the court may refuse them, and proceed to instruct in its own way.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 130. A requested instruction which is very long, which is practically a statement of counsel's argument, and which contains many statements of disputed facts, is properly refused by the court.—Wendt v. Village of Richmond, 164 Mich. 173.

§ 26. Duty of court to give proper requests.

Duty of court to instruct, see also ante § 2.

Giving equivalent requests in language of court, see post § 39.

Duty to instruct upon theories and claims of parties, see post § 44 et seq.

Discretion of court as to instructions upon weight or credibility, see post § 54.

As to burden and degree of proof, see post §§ 81, 82.

¶ 131. Counsel requesting instructions have a right to a clear formulation of every important view of the law either in the form in which they drew it up or in some equally proper form.—Campau v. Dubois, 39 Mich. 274.

¶ 132. It is error to refuse to give requests that correctly state the law applicable to the facts, unless such requests are covered by the general charge in a manner not so disconnected as to impair their force.—Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257.

¶ 133. A witness having testified to a conversation with plaintiff, wherein the latter made statements inconsistent with the rights he set up in his suit, and which, if true, precluded his recovery on his own theory, and this testimony being corroborated by other evidence, the refusal to charge, as requested, that if such a conversation as testified to was held the plaintiff could not recover, is held error, in the absence of any equivalent charge.—Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

¶ 134. An instruction, which by repeating the language of an inadmissible request, leaves the impression that such request was adopted by the court is prejudicial.—Sweeney v. Devens, 72 Mich. 301.

¶ 135. A party has a right to have the law of his case presented to the jury in its plainest, simplest form; and if it is properly embodied in that form in requests to charge, their refusal is error unless the substance of such requests is as well given by the court in the general charge.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 136. The refusal to give a request to charge, where there is evidence in the case to support it, is erroneous, unless it is fairly covered by the general charge.—Carrel v. Kalamazoo Cold Storage Co., 112 Mich. 34.

¶ 137. Requested charges correctly stating the law should be given or their substance incorporated in the charge when not already covered by the general charge.—Gurden v. Stevens, 146 Mich. 489.

¶ 138. In action on a policy it is error to refuse to charge that a particular item is not covered by the policy, such being the law, though the charge has repeatedly told the jury that items of that class were not covered.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

§ 27. Modification of requests.

Giving substance of requests in connected logical form, see ante § 9.

Modification harmless where instruction correct when construed as a whole, see ante § 19.

Requested instruction given in court's own language, see post § 89.

Modification conveying an impression as to court's opinion of evidence, see post ¶ 399.

Modification of request to charge upon degree of proof, see post § 83.

Modification of requested instruction as to effect of false testimony, see post § 91.

¶ 139. A request to charge embracing a double proposition stated distinctively must be correct throughout, or it may be refused as a whole; and a modification of it that is supported by the evidence as to one branch or element of such proposition is not erroneous though as to the other it be not supported by any evidence.—Sword v. Keith, 31 Mich. 247.

¶ 140. It is erroneous for the court to give a requested instruction in a manner so modified as to obscure its vital point.—Parrish v. Bradley, 73 Mich. 610.

¶ 141. Where a request to charge bearing upon an important feature of the case at issue correctly states the law, it is error for the court, in instructing the jury, to add to the statement words which render it of doubtful meaning.—Chabert v. Russell, 109 Mich. 571.

¶ 142. Where the alteration of a request to charge might have confused the jury if made with their knowledge, it was not treated as error where the request, as modified and given, was not erroneous, and there was nothing to show that the jury knew that the request had been modified.—Weimer v. Bunbury, 30 Mich. 201.

¶ 143. Where a request for an instruction began "there is evidence tending to show," the substitution by the court of the words "Does the evidence tend to show" could not be complained of.—In re King's Estate, 94 Mich. 411.

¶ 144. An instruction in a will contest stating that if the person who drew the will testified truthfully the will must stand, was properly modified by telling the jury to take all the testimony in the case which they believed credible and then say whether such person testified truthfully.—Spencer v. Terry's Estate, 133 Mich. 39.

¶ 145. A requested instruction in an action for breach of a contract of purchase, charging the jury to consider the appearance of witnesses, the situation of the parties, the condition of the markets at the time of the making of the contract, and its breach, the subsequent action of the parties and the written documents in the case, and also charging the jury to "bear in mind that written documents are more reliable than human recollections," is properly modified by omitting the last clause as to the written documents, it appearing that the contract did not rest in written documents. The claims of the parties being in sharp conflict, and the jury being advised to consider all the evidence, the court did not err in declining to say that some of the evidence was more reliable than other evidence.—Blitz v. Roach, 121 Mich. 135.

¶ 146. Giving a request that if the jury found that the contract sued on was made on Sunday it is void, and adding a charge, with illustrations, that if one party to such a con-

tract performed his part of it on week days and the other accepted the benefits of such performance he must pay for them, is not error.—Bollin v. Hooper, 127 Mich. 287.

§ 28. ——Erroneous modification cured by charge as a whole.

Construction of charge as a whole, see ante § 19.

¶ 147. Where a charge, considered as a whole, cures an apparent error committed by the court in modifying a request for an instruction, the judgment will not be reversed for such error.—Grand Rapids & I. R. Co. v. Cameron, 45 Mich. 451.

¶ 148. The modification of proper requested instructions on negligence and contributory negligence in an action for death of a pedestrian by an automobile is not error where the court in its general charge instructs the jury as favorably towards defendant as he is entitled to have them instructed.—Wilson v. Johnson, 195 Mich. 94.

¶ 149. In a suit to recover freight charges a request was made for an instruction to the jury that there must be direct proof of negligence, or want of care in the transportation, to warrant a recoupment. Held, that the modification of this instruction by dropping the word "direct" was no error, where the questions of negligence and burden of proof were otherwise correctly presented.—American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

§ 29. Grounds and reasons for refusal.

Refusal of argumentative requests, see also ante § 11.
Refusal of belated requests, see ante § 23.
Requests to charge upon weight or effect of evidence, see post § 58 et seq.
Requests requiring inferences to be drawn from evidence, see also post § 62.
Positive instructions upon matters as to which evidence is conflicting, see post § 63.
Instructions giving undue prominence to evidence or witnesses, see post § 76.
Erroneous requests as to burden and degree of proof, see post §§ 81, 82.

¶ 150. A requested instruction that does not state correctly the facts, which it assumes, is properly refused.—Conely v. Wood, 73 Mich. 203.

¶ 151. An instruction is properly refused where it contains improper matter, and where the general charge covers all that is proper to go to the jury.—Ferris v. McQueen, 94 Mich. 367.

¶ 152. It is not error for the trial court to refuse to give requested instructions where he properly charges on the point involved and where the requested instructions omit necessary qualifications included in the said charge given by the court.—Van Leuvan v. Ann Arbor R. Co., 167 Mich. 355.

¶ 153. A request for a charge that the presumption is very strong, where something remains to be done to determine the sum to be paid, that title does not pass, is properly rejected if the thing remaining to be done is not also properly embodied in it.—Wilcox v. Young, 66 Mich. 687.

¶ 154. Where the wife of the defendant had been a witness and there was testimony to show that she had made certain statements regarding the collision such testimony is competent to show that these statements were inconsistent with her testimony at the trial, and it was not error to refuse an instruction to disregard all evidence in the case tending to show what she had said about the collision in the absence of her husband, such a request being too broad.—Herbeck v. Germain, 144 Mich. 157.

§ 30. ——Ambiguous, obscure or misleading requests.

Necessity for clearness, conciseness and accuracy in instructions, see ante § 7 et seq.
Conflicting, misleading and ambiguous instructions, see ante § 17.
Necessity that requests be concise, clear and accurate, see ante § 25.

¶ 155. It was held not to be error to refuse a request for a charge which may have been meant to be hypothetical, but which the court understood to be positive.—Dodge v. Brown, 22 Mich. 446.

¶ 156. The refusal to give a requested charge which is so framed as to be misleading is not error.—McKercher v. Curtis, 35 Mich. 478.

¶ 157. The rejection of a request to charge that is so obscure as not readily to have been understood by the jury is not error.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 158. Requests technically proper and correct in the abstract, if likely to puzzle and mislead the jury, are properly refused if the charge as given covers the points.—Kehrig v. Peters, 41 Mich. 475.

¶ 159. Ambiguous requests to charge, if liable to mislead, are properly rejected.—Holland v. Rea, 48 Mich. 218.

§ 31. ——Abstract, irrelevant and inapplicable requests.

Necessity that instructions be concrete, see ante § 10.
Necessity that instructions be applicable to the case, see post IV.

¶ 160. A request to charge is properly refused if there is no evidence to support it, even though it is abstractly correct.—Seitz v. Miles, 16 Mich. 456; In re Smith's Appeal,

52 Mich. 415; Rasch v. Bissell, 52 Mich. 455; Weaver v. Bechtel, 53 Mich. 516; Van Hoesen v. Cameron, 54 Mich. 609; Lane v. Pere Marquette Boom Co., 62 Mich. 63; Wilson v. Bowen, 64 Mich. 133; Gould v. Sanders, 69 Mich. 5; McNetton v. Herb, 158 Mich. 525; Karwick v. Pickands, 181 Mich. 169.

¶ 161. The court cannot be required to charge upon abstract propositions of law not having a bearing upon the evidence submitted.—Doyle v. Stevens, 4 Mich. 87.

¶ 162. Refusal of an instruction is not error where it is asked without reference to any particular circumstances and there is no testimony on either side of any such state of things as it contemplates.—Van Deusen v. Cathcart, 43 Mich. 258.

¶ 163. An instruction not pertinent to the facts of the case as developed by the testimony on either side is properly refused.—Wilcox v. Young, 66 Mich. 687.

¶ 164. Requested instructions that are inapplicable to the case should not be given.—Gould v. Sanders, 69 Mich. 5; Feiertag v. Feiertag, 73 Mich. 297.

¶ 165. Refusal of an instruction in a case of personal injury caused by collision between a train and a team, to the effect that the company was not negligent as to speed, as trains were not limited in the rate of speed they might run in the country and across public highways where travel was limited, although stating a correct proposition of law, held not error, as it was not applicable to the facts.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 166. In ejectment where there is no claim by the plaintiff based on adverse possession and no evidence introduced, it is not erroneous to refuse to instruct "that there is no evidence that the plaintiff has title by adverse possession."—Dawson v. Falls City Boat Club, 125 Mich. 433.

¶ 167. Refusal to instruct that both parties must have been fairly dealt with by a common agent is not error where there is no evidence of unfair action by the agent.—Slingerland v. Kayser, 127 Mich. 7.

¶ 168. It is not error to refuse to instruct in a passenger's action for personal injuries against a street railway company that there was no evidence of incompetency of the street car conductor where there was evidence tending to show incompetency and it is urged on appeal for the first time that the declaration was not based on the fault of the conductor.—Leach v. Detroit Elec. Ry., 129 Mich. 286.

¶ 169. It is not error to refuse a requested instruction that parties dealing with manufacturing corporations upon the strength of their reports filed with the Secretary of State, have a right to rely upon such reports, where there was no evidence to indicate that the parties had any knowledge of, or relied upon, such reports.—Crossette v. Jordan, 132 Mich. 78.

¶ 170. It is not error to refuse requests merely stating abstract propositions of law, without anything to indicate to the jury their application to the case.—Mosaic Tile Co. v. Chiera, 133 Mich. 497.

¶ 171. It is dangerous to give unqualified requests where the evidence shows that they should be qualified.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 172. In a personal injury case where there was some evidence to show that the plaintiff had recovered her health entirely the court properly refused a request to instruct that she was suffering from neurasthenia.—Herbeck v. Germain, 144 Mich. 157.

¶ 173. Where defendant requests instructions upon statements which misrepresent what the plaintiff claims, the instructions are properly denied.—Beaurele v. Michigan Cent. R. Co., 152 Mich. 345.

¶ 174. Is it not error to decline to give instructions upon abstract questions which can in no way aid the jury in coming to a conclusion as to the fact.—Fors v. Fors, 159 Mich. 156.

¶ 175. An instruction to disregard the financial condition of plaintiff or of the defendants, in an action for personal injuries, is properly refused where not based upon any evidence.—Bilakos v. Kelley, 200 Mich. 125.

§ 32. ——Requests invading jury province.

Right to instruct upon the weight and effect of evidence, see post § 58.

Instructions invading province of jury, see post V.

¶ 176. A request to charge which requires the court to pass upon the facts of the case as presented in the evidence is properly refused, as being an invasion of the province of the jury not warranted by the law.—Jones v. Michigan Cent. R. Co., 59 Mich. 437.

¶ 177. Requests for instructions asking the court for conclusions of fact, or to give its view of the weight to be given certain portions of the testimony, are properly refused.—Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564.

¶ 178. A request that ignores the possibility of the correctness of the testimony of the opposing party is properly rejected.—Wilcox v. Young, 66 Mich. 687.

¶ 179. A refusal to charge that there was no evidence of notice is not error where the

testimony of a certain witness fairly tended to prove it, even though such testimony was shaken by cross-examination. It is for the jury and not the court to give the proper effect to all the testimony taken together.—Hayes v. Homer, 36 Mich. 374.

¶ 180. In an action on a claim for services by a nephew against the estate of his uncle, the court properly refused an instruction that the services have not been shown to have been rendered under an agreement for remuneration where the claimant testified that there was such an understanding with the deceased.—Van Slambrook v. Little's Estate, 127 Mich. 61.

¶ 181. Refusal to define a gift, which the charge assumed was made if the testimony was believed, is not error where the whole question was one of credibility with no question that there was a gift if the facts were as testified.—Parke v. Nixon, 141 Mich. 267.

¶ 182. Where the evidence as to a breach of contract is conflicting, instructions requiring the court to find as a matter of law that the contract had been broken by one party, are properly refused.—G. S. Blakeslee & Co. v. Reinhold Mfg. Co., 153 Mich. 230.

§ 33. ——Requests on the facts.

¶ 183. The rejection of requests to charge which simply embody propositions of fact, and convey no instruction in point of law, or which are not applicable to the case, is not error.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 184. Instructions upon the evidence involving no question of law, but relating only to the weight and credibility of the proofs, should not be asked.—Watson v. Watson, 53 Mich. 168.

§ 34. ——Requests ignoring evidence.

See also ante ¶¶ 154, 178.
Instructions ignoring evidence, see post § 53.
Necessity that instructions be applicable to and conform to evidence, see post § 49 et seq.
Instructions erroneous as ignoring evidence, see post § 53.

¶ 185. Instructions based upon a partial view of the evidence should be refused, as the jury must decide from all the facts.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408; 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 186. A request asking the court to pass upon a part of the facts which should not be considered except in connection with the rest of the testimony upon the same subject is properly rejected.—Kieldsen v. Wilson, 77 Mich. 45.

¶ 187. Requests for instructions that certain evidence is undisputed are properly refused when there is in fact a dispute as to the facts.—Seitz v. Starks, 144 Mich. 448.

§ 35. ——Requests assuming facts, claims or theories.

Necessity of instructing upon theories and claims, see post § 44.
Necessity that instructions be confined to matters in evidence, see post § 50.
Instructions erroneous when based on matters not in evidence, see post § 50.
Necessity that instructions conform to theories, claims and issues, see post IV.
Refusal of requested instruction in assault and battery, see post ¶ 298.
Instructions assuming or misstating facts in question, see post § 72.

¶ 188. Requests to instruct which assume facts not established by the evidence, are properly refused.—Hunter v. Village of Durand, 137 Mich. 53.

¶ 189. A request on the subject of estoppel is properly refused, where there is no evidence that the acts urged as estoppel were acted on by the requesting party's predecessor through whom title is claimed.—Parke v. Nixon, 141 Mich. 267.

¶ 190. When a charge requested assumes a certain state of facts to be held as existing, it should seldom be given and never if there is any room for a different finding by the jury.—Lewis v. Rice, 61 Mich. 97.

¶ 191. A request to charge, which implies a claim by the opposite party which had not in fact been made by him is properly refused.—Schoenberg v. Voigt, 36 Mich. 310.

§ 36. ——Requests coupling proper and improper instructions.

Rule that instructions construed as a whole, see ante § 19.

¶ 192. Where a request to charge contains two independent and abstract propositions, one of which it is proper to give and the other not, the proper course is not to refuse it as a whole, but to refuse the erroneous proposition and grant the correct one.—Sword v. Keith, 31 Mich. 247.

¶ 193. Where a proper request to charge is not separate, but is coupled with another that is erroneous, the refusal of the whole is not error.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

¶ 194. The refusal of a request to charge, of which a portion states a rule improperly, is not error.—Courtemanche v. Supreme Court I. O. F., 136 Mich. 30.

¶ 195. Where a proper instruction is requested, but it is coupled with an improper one, it is correct for the court to refuse both.—Williams v. City of Lansing, 152 Mich. 169.

¶ 196. A requested instruction containing proper matter may rightfully be refused by the court if it also contains erroneous mat-

ter.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 197. An instruction otherwise correct as to the duty of defendant railroad at an unsettled place where it had no reason to expect the presence of children on the track was properly refused, where it coupled a fact of which there was no evidence, to wit, that defendant was but recently organized and but recently in possession of the road.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390.

¶ 198. A request to charge that failure of a landlord to obtain a permit for the making of alterations on a building as required by an ordinance "is no evidence of negligence," even if not erroneous in law, was properly refused where it was made too broad by adding, "The question * * * is whether there was in fact negligence on the part of" the landlord, thus excluding his responsibility for the negligence of those whom he suffered to do the work.—Blickley v. Luce's Estate, 148 Mich. 233.

¶ 199. A request to charge which begins with a recital of facts as undisputed and closes with several propositions which the court is expected to charge "upon these undisputed facts" must be considered a single request; and if any part of the statement of facts is incorrect the whole request must fail, and the judge is right in refusing to give it.—Bedford v. Penny, 58 Mich. 424.

§ 37. Requested instructions covered by those given.

See also ante ¶ 98.

Refusal of instructions already given, see post § 40.

Requested instruction as to burden of proof covered by previous instruction, see ante ¶ 125.

Improper refusal of request to charge as to what items covered by insurance policy, see ante ¶ 138.

Duty of court to give proper requests, see ante § 26.

¶ 200. There is no error in refusing specific instructions asked, if the charge given correctly and clearly covers them, or all of them that are proper.—Leonard v. Pope, 27 Mich. 145; Daniels v. Clegg, 28 Mich. 32; Hoyt v. Jeffers, 30 Mich. 181; Sword v. Keith, 31 Mich. 247; Lott v. Sweet, 33 Mich. 308; Wright v. Irwin, 35 Mich. 347; Hurd v. Newton, 36 Mich. 35; Van Den Brooks v. Correon, 48 Mich. 283; Power v. Harlow, 57 Mich. 107; Sloman v. Goebel Brewing Co., 118 Mich. 442; Renaud v. City of Bay City, 124 Mich. 29; Lincoln v. Felt, 132 Mich. 49; Sweet v. Western Union Tel. Co., 139 Mich. 322; City of Battle Creek v. Haak, 139 Mich. 514; Simon v. Detroit Ry., 196 Mich. 586.

¶ 201. There is no error in refusing to charge on specific points that are practically covered by other instructions.—Joslin v. Le Baron, 44 Mich. 160; Keables v. Christie, 47 Mich. 594.

¶ 202. Where the jury's attention is strictly confined to questions depending wholly on the facts alleged in a particular count of the declaration, the error of refusing to charge that there can be no recovery except under that count is cured.—Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

¶ 203. Refusal of an instruction is not erroneous where the question is sufficiently covered by another instruction.—Dawson v. Falls City Boat Club, 125 Mich. 433.

¶ 204. It is not error to refuse requests for instructions where the subject-matter is fully covered in substance by the charge given.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 205. Where, in an action for negligently allowing fire to spread, the jury is instructed to consider only the appliances kept in a mill to prevent fires, the omission to give a special instruction not to consider irrelevant testimony as to use of liquor by engineer and fireman of mill is not error.—Cowley v. Colwell, 91 Mich. 537.

¶ 206. A judgment will not be reversed because of the refusal of the circuit judge to give all of the instructions requested by plaintiff in error, if those given fully presented his theory of the case, and covered the entire controversy.—Harris v. Stewart, 112 Mich. 82.

¶ 207. In an action to recover for the wrongful flooding of plaintiff's land, the giving of an instruction which covered the entire ground and stated the law correctly, made the giving or discussion of defendant's refused requests unnecessary.—Finkbinder v. Ernst, 135 Mich. 226.

¶ 208. The failure to give a request stating defendant's theory was not injurious where the instruction given presented to the jury the essential point of defendant's theory of the case.—Milliken v. City of St. Clair, 136 Mich. 250.

¶ 209. It is not error to refuse requested charges where the substance of the instructions requested is correctly stated in the court's charge as given, and this despite the fact of a general want of clearness and certainty of expression in said charge of the court.—Board Water Com'rs City of Detroit v. Butler Bros. Const. Co., 168 Mich. 137.

¶ 210. A failure to charge on making alterations in a building without filing plans or getting a permit required by ordinance, as evidence of negligence, is not harmful to

defendant charged with the negligence, where the charge as a whole repeatedly stated what facts would constitute negligence without mentioning among such facts the failure to obtain a permit or to file plans.—Blickley v. Luce's Estate, 148 Mich. 233.

¶ 211. Where the substance of several requests to charge is contained in the charge as given, there is no error.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 212. In an action by a shipper operating a factory to recover demurrage charges paid under protest on a claim that delay was due to the failure of defendant to "spot" cars at the plaintiff's plant and withdraw loaded ones, there was no error in refusing to instruct the jury that the switching service on the spur running to plaintiff's plant was "plant switching" which defendant was not bound to do where the court instructed the jury that no delay arising by a failure to switch cars after they were placed in the spur should be allowed for.—Mt. Clemens Sugar Co. v. Grand Trunk Ry. Co., 200 Mich. 33.

§ 38. ——Covered by general charge.

See also ante ¶¶ 151, 152.

¶ 213. Requests to charge as to matters fully covered by the general charge are properly refused.—Shearer v. Middleton, 88 Mich. 621; International Fair & Expo. Ass'n v. Walker, 97 Mich. 159; Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607; Westra v. Westra's Estate, 101 Mich. 526; Darling v. Thompson, 108 Mich. 215; Canfield v. Jackson, 112 Mich. 120; Brundaga v. Shelly, 113 Mich. 20; Pittsburgh & Conneaut Dock Co. v. Detroit Transp. Co., 122 Mich. 445; Comstock v. Township of Georgetown, 137 Mich. 541; Smith v. Nixon, 145 Mich. 593; In re Morse's Estate, 146 Mich. 463; Parkey v. Galloway, 147 Mich. 693; Schweyer v. Jones, 152 Mich. 241; Schattler v. Daily Herald Co., 162 Mich. 115; Chapman v. Strong, 162 Mich. 623; Bouma v. Dubois, 169 Mich. 422; Houser v. Carmody, 173 Mich. 121; Conroy v. Haffner, 182 Mich. 289; Feist v. Root, 189 Mich. 595; Laskowski v. People's Ice Co., 190 Mich. 331; Tiley v. Detroit United Ry., 190 Mich. 7; Wood v. Standard Drug Co., 190 Mich. 654; Miller v. Du Val, 191 Mich. 386; Baker v. Mohl, 191 Mich. 516; Parnell v. Pungs, 190 Mich. 638; Thompson v. W. W. Kimball Co., 190 Mich. 579; Harmon v. Parker, 193 Mich. 542; Pool v. Township of Montague, 194 Mich. 476; Amley v. Saginaw Milling Co., 195 Mich. 189; Kasprzak v. Chapman, 197 Mich. 552; Anderson v. Kendrick, 199 Mich. 240; In re Hewitt's Estate, Id.; Burtis v. Davison, 199 Mich. 14; Whittemore v. Walter, 193 Mich. 365.

¶ 214. It is not error to refuse a specific instruction where the contention of the parties is fully explained in a general charge.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 215. Where the court in its general charge covers a request except as to an item which is not disputed, the request is substantially covered.—Crane Lumber Co. v. Otter Creek Lumber Co., 79 Mich. 307.

¶ 216. It is not error to refuse a request covered generally by the charge, especially where the record is silent as to a contention that would have made the request pertinent.—Hann v. National Union, 97 Mich. 513.

¶ 217. Refusal of a request for an instruction as to set-off which is fully covered by the general charge given, is not error.—Bates v. Kuney's Estate, 124 Mich. 596.

¶ 218. A full and general charge of exceptional clearness cures the refusal to give a specific instruction in an action for personal injuries.—Haines v. Lake Shore & M. S. R. Co., 129 Mich. 475.

¶ 219. While a party is ordinarily entitled to have his proper requests given as proposed by him, or nearly so, yet if they are substantially given in the general charge, though in somewhat different language, error cannot be claimed.—Stevens v. Pendleton, 94 Mich. 405; Ellis v. Whitehead, 95 Mich. 105; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

¶ 220. To refuse to give special instructions on subjects which have been sufficiently covered by the general charge is not reversible error.—Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226.

§ 39. ——Equivalent instructions in language of court.

¶ 221. The rejection of requests to charge is not error where the court in a connected charge of its own covers the whole case and lays down the law correctly, and responds to all such requests as are relevant or are based on any evidence.—Fowler v. Hoffman, 31 Mich. 215; Fraser v. Jennison, 42 Mich. 206.

¶ 222. It is not error to substitute for express requests to charge, equivalent instructions in the language of the court, if the ground is fully and correctly covered. But counsel have a right to a clear formulation of every important view of the law either as they drew it up or in some equally proper form.—Campau v. Dubois, 39 Mich. 274.

¶ 223. The refusal of a charge is not error where it is substantially given in an instruction of greater scope and more favorable to the plaintiff in error.—Clark v. Rice, 46 Mich. 308.

¶ 224. Requests to charge are properly refused if the judge, instead of giving the

request, fully and correctly instructs the jury as to the law applicable to the case.—Pound v. Port H. & S. W. R. Co., 54 Mich. 13.

¶ 225. It is not error to refuse to give an instruction in the language of the request if it is substantially given in the charge and in such a manner that the jury could not be misled by the refusal.—Kendrick v. Towle, 60 Mich. 363.

¶ 226. Error may not be imputed to a trial judge for instructing a jury in his own words rather than those of a request, when the substance is the same.—Kendrick v. Towle, 60 Mich. 363.

¶ 227. Specific charges need not be given in the exact form asked, if all that is proper and pertinent is contained in the charge actually given.—Lewis v. Rice, 61 Mich. 97.

¶ 228. It is proper to refuse a request to charge which differs from the charge actually given only in being more verbose and less clear.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 229. It is not necessary to give instructions in the very language of a request for them, even though it can be done; and if the oral charge by the court is correct and applicable to the case the requests may be refused.—Westra v. Estate of Westra, 101 Mich. 526.

¶ 230. Although a party is entitled to have specific charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury, from the evidence, might legitimately find, and which have not been covered by other instructions, he is not entitled to have requests given in the precise language in which they are framed, if the points they raise are sufficiently covered by the instructions actually given.—Alton v. Meeuwenberg, 108 Mich. 629.

¶ 231. Refusal to charge is cured by giving another request that substantially covers the refused one.—Beecher v. Ferris, 112 Mich. 584.

¶ 232. Reversible error cannot be predicated upon the refusal of the trial court to give requested instructions where the substance of such requested instructions was given in the charge.—Dyer v. Peoples Ice Co., 188 Mich. 203.

§ 40. Requesting instructions already given.

See also post ¶ 236.

¶ 233. The practice of asking numerous slightly varying instructions in an abstract form, or substantially the same instruction in various forms, condemned.—Daniels v. Clegg, 28 Mich. 32; Michigan Cent. R. R. Co. v. Coleman, 28 Mich. 440.

¶ 234. Instructions covered by those already given are properly refused.—Plowaty v. Sheldon, 167 Mich. 218.

§ 41. Ruling or decision on request.

Effect of refusal of instruction in ejectment on necessity of plaintiff's proof of title where given in substance though not in form requested, see Ejectment ¶ 198.

¶ 235. General requests to charge cannot be used to cover some pretended omission that is not specifically pointed out. And where the questions of fact have been properly submitted to the jury in a general charge to which no exception was taken, and general requests were made to charge that plaintiff must prove every material allegation, and that the burden of proof was on him, etc., the judge's remark "that these requests were law, but that they had no application to the case that he could perceive," was held not to be error, where there was no real conflict in the evidence.—Herbstreit v. Beckwith, 35 Mich. 93.

¶ 236. After giving an instruction, the court read a request which covered the precise point in different language, and said: "I think I will decline it. It is good law, but I do not think it necessary for that language." Held, equivalent to saying that he did not deem it necessary to repeat an instruction already given.—Schulz v. Schulz, 113 Mich. 502.

¶ 237. A statement by the judge that he was requested to give certain instructions, but that they were inapplicable and a further explanation of why they were not controlling cannot be considered as to the giving of the instructions.—Wheeler v. Detroit Electric Ry., 128 Mich. 656.

¶ 238. In an action for false representations as to the value of certain corporate stock, plaintiff relied upon a letter stating that the corporation was paying net 12 per cent on the capital, and submitted a request to charge, relating to the receipts and disbursements of the corporation at the time the letter was written, which drew as a conclusion from the accounts as stated the falsity of the representations. The circuit judge, in refusing the request, remarked that to give it would be to usurp the province of the jury, and that he could not say affirmatively that the figures as set forth therein were correct. The jury was then carefully instructed that the whole question of the truth or falsity of the letter was for its determination, and that, if it should find that the letter was substantially true, there could be no recovery. Held, that, in view of the whole charge, the remarks of the court in refusing

the request were not open to the criticism that they allowed the jury to infer that, if the figures in question were found to be accurate, the conclusion set forth in the instruction must follow.—Coombs v. Radford, 110 Mich. 192.

¶ 239. It is not held error to remark on the nature of an estoppel, in reply to a request, the court at the same time stating that it was unnecessary to consider that.—Dodge v. Brown, 22 Mich. 446.

IV. APPLICABILITY AND CONFORMITY TO PLEADINGS, EVIDENCE AND ISSUES.

§ 42. In general.

Necessity of avoiding abstract charges, see ante § 10.
Necessity and sufficiency of requests for charges, see ante § 21 et seq.
Refusal of requests misstating facts and issues, see ante § 29 et seq.
Refusal of requested instructions that are inapplicable to the case, see ante § 31.
Charges assuming or misstating facts, see post § 72.
Conformity to law of the case as announced on error, see Appeal § 467.
Applicability of instructions in trover, see Conversion §§ 41-43.
Applicablity of instructions on damages to issues and evidence, see also Damages § 382.
Necessity for instructions to conform to evidence and issues in ejectment, see also Ejectment ¶ 199.

§ 240. Irrelevant questions should not be submitted to the jury.—Lange v. Perley, 47 Mich. 352.

¶ 241. Instructions to the jury outside of the issues made by the pleadings are improper.—Denman v. Johnston, 85 Mich. 387.

¶ 242. Where, in a suit to recover for services rendered and expenses incurred in negotiating a loan and perfecting the applicant's title, each party relies upon the existence of an express contract, and the sole question of fact is as to its terms, it is not error for the court to refuse to submit to the jury the question of plaintiff's rights under an implied contract.—Swarthout v. Lucas, 101 Mich. 609.

¶ 243. Although an oral charge might have been criticized as referring to matters not in the case, yet where it was a simple issue and the court submitted the issue involved clearly, it will not warrant a reversal.—Reiser v. Portere, 106 Mich. 102.

¶ 244. In an action where title to certain mining property is in issue, it is not misleading to instruct the jury that the fact that the title was in the name of one person was a circumstance to be considered, but not controlling, "for we know that frequently titles to mining property are taken by one person and held by him in trust for the others," where it appeared in the record that others were interested in the property in question, though the title was in one only.—Shouldice v. McLeod's Estate, 130 Mich. 444.

¶ 245. It is not error to refuse to charge that no recovery can be had on a certain count to which a demurrer had been sustained, where there was no occasion for reference to the several counts and the issue was clearly stated to the jury without such reference.—City of Battle Creek v. Haak, 139 Mich. 514.

¶ 246. Where one of the issues of fact in a case is the consent or nonconsent of a stockholder to an agreement made by the other stockholders in a corporation, and there is testimony tending to support both sides of the issue, an instruction on that subject should call attention to both classes of testimony.—Wilbur v. Stoepel, 82 Mich. 344.

¶ 247. A jury is not to be instructed to find what the undisputed facts show when there are other facts to be considered in connection with them.—Morris v. Osterhout, 55 Mich. 262.

¶ 248. Instructions phrased, "I charge you, if you should find from all the evidence in the case, and the circumstances surrounding the same," etc., are objectionable as suggesting that surrounding circumstances in addition to the evidence might be considered.—Derham v. Derham, 125 Mich. 109.

¶ 249. An instruction that the sole question for the jury to determine was the truth of plaintiff's story and that if they were not satisfied that it was substantially correct there was no other testimony in the case upon which a verdict could be based in his favor, was improper, as involving the dangerous consequences of a difference of opinion regarding such testimony; the proper method is to point out what was necessary to be proven to justify a verdict.—Hastings v. Boland, 136 Mich. 240.

¶ 250. It is not necessarily error that a charge is made to cover a whole declaration without discriminating between its averments.—Fowler v. Gilbert, 38 Mich. 292.

¶ 251. In an action on an account it was proper for the court to instruct the jury that there was no dispute as to the amount earned on certain contracts but there was a dispute as to whether it had been paid, although there was in evidence a receipted statement upon which payment was admitted, including these items in dispute.—Snyder v. Patton & Gibson Co., 143 Mich. 350.

§ 43. Applicability to cause of action and issues.

See also ante § 42.

Instructions erroneous as ignoring or assuming issues, see post § 48.

¶ 252. It is error to submit to a jury a question based on a cause of action not counted on; as where action was brought for diverting a stream of water, and the question was whether defendant had not diminished its flow by using it for his own farming purposes.—Pettibone v. Smith, 37 Mich. 579.

¶ 253. In an action for personal injuries to a brakeman declared to have been caused by his getting his foot caught between a bolt projecting through the rail and a spike driven in the tie, it is erroneous to instruct that he may recover if the injury was caused by a coupler being out of repair.—Culver v. South Haven & E. R. Co., 138 Mich. 443.

¶ 254. Where the evidence tends to show a promise by way of guaranty, to make good the obligation of others, it is error to submit the case to the jury as one of an absolute and original promise to pay.—Hall v. Woodin, 35 Mich. 67.

¶ 255. Where in an action for wages the ownership of the mill in which plaintiff was employed was not in question, it is proper to refuse an instruction that the jury should consider all the evidence touching the ownership of the mill.—Bonner v. Runals, 76 Mich. 136.

¶ 256. The lessee of a farm made a settlement with his lessor in which he conveyed to him his undivided interest in certain personal property. The lessor immediately sold the personal property to the lessee's wife, giving her also a lease of the farm; and the husband gave him back a mortgage upon his own interest in the crops which, under the first lease, he and the lessor were to divide equally. Creditors of the husband levied upon the crops grown while the wife held the lease, and upon some of the personal property transferred to her, and she brought replevin against the sheriff, who claimed that the transfers of personal property were void as against creditors. But the validity of the mortgage was not questioned, though in submitting the case to the jury it was left for that body to pass upon, and their verdict was for the defendant. Held error.—Richardson v. Coddington, 45 Mich. 338.

¶ 257. Where a man brings replevin in his own name and as owner for a pony sold by his minor daughter, and does not sue in her behalf as guardian or next friend, it is error to treat the case, in charging the jury, as one of a sale by an infant, conveying no title.—Ash v. Mathes, 52 Mich. 615.

§ 44. Diverse theories, hypotheses and claims.

Argumentativeness of charge stating diverse theories, see ante ¶ 35.

Necessity of requesting charges presenting party's theory, see ante § 21.

Duty of court to give proper requests, see ante § 26.

Refusal of abstract or inapplicable requests as to theories or claims, see ante § 31.

Instructions favorable to one party's theories or claims, see post § 65.

Invading jury province by emphasizing theories or claims, see post § 77.

Province of judge and jury as to theories of expert witnesses, see post ¶ 377.

Submitting question of license or sale where transaction a license as a matter of law, see post ¶ 346.

¶ 258. Each party is entitled to have a charge applicable to his theory of the case if there is evidence supporting it, and to have the evidence submitted to the jury on that theory.—Comstock v. Norton, 36 Mich. 277; Fletcher v. Bradford, 45 Mich. 349; Winchester v. King, 46 Mich. 102; Ludlow v. Pearl's Estate, 55 Mich. 312; Wildey v. Crane, 69 Mich. 17.

¶ 259. A party is entitled to have specific charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury might legitimately find from the evidence, and which have not been covered by other instructions.—Sword v. Keith, 31 Mich. 247.

¶ 260. If a party's theory of the case is supported by testimony he is entitled to have it submitted to the jury with proper instructions in relation to the law should the testimony preponderate in favor of such theory.—Dikeman v. Arnold, 71 Mich. 656.

¶ 261. Where there is testimony tending to support the theory upon which a party has tried his case, it is error to refuse to instruct the jury upon such theory, unless the instruction asked for is covered by the general charge.—O'Callaghan v. Boeing, 72 Mich. 669; Cooper v. Mulder, 74 Mich. 374.

¶ 262. Where there is evidence tending to support a party's claim the case should be submitted on his theory as well as upon the theory of his opponent.—Wildey v. Crane, 69 Mich. 17; Miller v. Miller, 97 Mich. 151.

¶ 263. Where there is evidence tending to support a party's claim, the case should be submitted upon his theory as well as upon that of his opponent.—American Cushman Telephone Co. v. Noble, 98 Mich. 67.

¶ 264. Where, in an action against a street railway company, plaintiff testifies that the injury complained of was received while she was alighting from one of the defendant's cars, by stepping upon a ridge of earth which defendant had negligently suffered to remain

in close proximity to the track, and defendant contends, and introduces evidence tending to show that the accident was caused by some one stepping upon plaintiff's dress as she was in the act of alighting from the car, thereby throwing her to the ground, it is error to refuse to instruct the jury, at defendant's request, that if it finds that the contention of defendant is correct plaintiff cannot recover; and the error is not cured by a general instruction that if the jury finds that the injury was caused by accident or misadventure, without fault of either party, there can be no recovery.—Poole v. Consolidated St. R. Co., 100 Mich. 379.

¶ 265. Where there was a conflict of testimony as to whether an assignment to a creditor to satisfy himself and pay over the surplus included or did not include an old debt then partly represented by a note, and the assignee testified that the note was to be renewed if possible, otherwise was to be paid, that new notes were given, that thereafter the bank refused to renew them; it was error misleading to the jury for the court to charge on the duty of the assignee to wait until maturity "if he could have renewed that paper * * * easier" in that way, the result being to convey to the jury the idea that the assignee was bound to await maturity, though his theory was that he was entitled to apply the money realized on the order assigned to the payment of that note. —Valin v. McKerreghan, 104 Mich. 213.

¶ 266. It is proper for the court to tell the jury what the theory of each party is, and that his evidence tends to support it.—Rogers v. Ferris, 107 Mich. 126.

¶ 267. It is not error for the court to state the theories or claims of the respective parties, leaving it to the jury to say whether the claims were proven by evidence adduced. —Beecher v. Ferris, 124 Mich. 9.

¶ 268. A party is entitled to a specific charge to the jury, hypothetically stated, of his theory of the case when it is supported by evidence, even though the court may have correctly charged upon the general proposition of law applicable to the case.—Slater v. Walter, 148 Mich. 650.

¶ 269. Plaintiff sued for money due him under a contract for towing logs. Defendant claimed a recoupment for a certain lot of logs lost by the breaking of plaintiff's boom. The court instructed the jury that plaintiff would be excused for the loss if the boom broke in a great cyclone, or the like, when plaintiff had set up no such excuse. Held, the instruction was erroneous.—McLean v. Sandusky Lumber & Box Co., 160 Mich. 324.

¶ 270. Each party to an action has the right to have the case submitted to the jury on his theory, and a correct charge which submits these conflicting theories to the jury should be approved.—Baker v. Kamantowsky, 188 Mich. 569.

¶ 271. Where the court, after finishing his charge to the jury, asks counsel if there is anything he has overlooked, and there are only two theories of the case, plaintiff's and defendant's, and plaintiff's theory has been presented to the jury, and defendant's counsel orally requests that his theory of the case be presented to the jury, the court should either at once instruct the jury as to defendant's theory or give counsel time to present a written request, if that is desired.—Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

¶ 272. While a party is entitled to an instruction as to his theory of the case, still a requested instruction which simply calls the attention of the jury to certain parts of the evidence which tend to support his theory and comments on them is properly refused.—Wood v. Standard Drug Co., 190 Mich. 654.

¶ 273. A charge that "If you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out his case" and a similar statement with reference to defendant's side, does not constitute reversible error where the issue is squarely raised and each side of it supported by its witnesses.—Wilder v. Sanche, 120 Mich. 345.

¶ 274. An instruction that "if you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case," is prejudicial and erroneous, where many of the facts testified to by plaintiff might be true, and yet no liability exist.—Henderson v. Citizens' St. R. Co., 116 Mich. 368.

¶ 275. An instruction to disregard a presented theory of a party in effect strikes the evidence presented on such theory from the record.—Kahn v. Minthorn, 178 Mich. 312.

§ 45. ——Theories or claims not asserted.

¶ 276. An instruction based upon a theory not asserted by either party, and not supported by any evidence, is erroneous.—Iler v. Baker, 82 Mich. 226.

¶ 277. It is error for the court to submit a case to the jury upon a theory entirely different from that claimed in the declaration and upon which the case has been tried.—Reed v. Gould, 93 Mich. 359.

¶ 278. A cause should not be submitted to a jury upon a theory not germane to the pleadings, or merely on account of certain equitable considerations which the trial may have disclosed.—Reed v. Gould, 93 Mich. 359.

¶ 279. Instructions to the jury which submit to their consideration a hypothesis different from that maintained by either side to wit, the invalidity of a contract under the

statute of frauds where one side claimed an original promise and the other denied any promise at all, and which is not supported by the evidence are misleading and erroneous. —Comstock v. Norton, 36 Mich. 277.

§ 46. ——Evidence to support theories.

See also post §§ 49, 75.

¶ 280. The charge cannot allow the jury to consider a theory that is unsupported by testimony.—Comstock v. Norton, 36 Mich. 278; Seligman v. Ten Eyck's Estate, 60 Mich. 267; Iler v. Baker, 82 Mich. 226; Schneider v. C. H. Little Co., 200 Mich. 361.

¶ 281. Judgment must be reversed for the error of the judge in submitting the case to the jury upon a theory which the evidence does not justify.—Nelson v. Dutton, 51 Mich. 416.

¶ 282. There is no error in refusing to submit a party's theory of the case to the jury where the court holds, as a matter of law, that such party's theory is untenable.—Banks v. Strong, 197 Mich. 544.

¶ 283. In the absence of evidence tending to show that a bill of sale, under which plaintiff in replevin claimed the property, was taken as security, and not as an absolute transfer of the property, in payment of a debt due the vendee, as claimed by the plaintiff, a request to charge based upon that theory may properly be refused.—Partlow v. Swigart, 90 Mich. 61.

§ 47. ——Ignoring or assuming theories and claims.

See also ante ¶ 257, post ¶ 448.

Necessity of requesting instructions presenting theories, claims and defenses, see ante §§ 21, 22.

Assuming truth of uncontested facts, see post §§ 55, 74.

Refusal of requests assuming claims or theories, see ante § 35.

¶ 284. In charging the jury in an action for fatal negligence, it is improper for the judge to abandon the grounds relied on in the declaration and direct their attention to other considerations as tending to support the action.—Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 488.

¶ 285. An instruction that if a given state of facts is found by the jury plaintiff is entitled to a verdict is erroneous if it ignores defendant's theory, which is supported by his testimony and which is a complete defense if accepted by the jury.—Dikeman v. Arnold, 71 Mich. 656.

¶ 286. Where suit is brought for the value of goods delivered under a contract, a charge which ignores the plaintiff's showing that he had fully performed his obligations, except in certain respects assented to by defendants, and which assumes that he had not made a full performance, is misleading and erroneous.—McKay v. Evans, 48 Mich. 597.

¶ 287. Instructions that in effect treat the case as one to be disposed of by the court are properly refused where there is some evidence to go to the jury in support of the opposite party's theory, which, if sustained, entitles him to a recovery.—Towle v. Dunham, 84 Mich. 268.

¶ 288. An action for lumber sold was defended upon the ground that plaintiff and another, as copartners, had agreed to furnish the lumber and build a house for defendant for a gross sum, which had been paid. Held, that it was proper to refuse an instruction that plaintiff was entitled to recover if defendant bargained for the lumber, and if it was used in his house, and had not been paid for, as the request eliminated defendant's theory.—Reiser v. Portere, 106 Mich. 102.

¶ 289. A charge cannot be said to have excluded defendant's theory where seven of his nine requests were given (error not being assigned upon the refusal to give the other two), and where one of those given was that if the jury believed defendant's testimony and that of his witnesses verdict must be for him.—Totten v. Burhans, 103 Mich. 6.

¶ 290. The refusal of the court to present defendant's theory of the case after he has finished his charge in which he has presented plaintiff's theory and has asked counsel if there is anything that he has overlooked and is then requested by defendant's counsel to present defendant's theory, is error, especially when the court, in reply to counsel, states to the jury that he has charged them fully on the law on the case.—Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

¶ 291. In an action for personal injuries sustained by the plaintiff's being thrown off the defendant's car, it is reversible error for the court in his charge to state that the defendant did not contest the nature and seriousness of the injuries where the defendant introduced evidence to show plaintiff's subsequent conduct inconsistent with his claim of injury.—Butler v. Detroit, Y. & A. A. Ry., 188 Mich. 206.

¶ 292. In a suit against a street-railway company for injuries sustained by reason of the defective condition of the flooring of the car, where plaintiff testified that the floor was broken and rotten, an instruction that "it is not claimed by plaintiff or any of her witnesses that the floor was broken" is error, although her cross-examination tended to shake her own testimony on this point, and none of the five witnesses who testified saw any broken floor.—Plefka v. Detroit United Ry., 155 Mich. 53.

¶ 293. The statement of plaintiff's claim and his testimony, in the submission of the

case to the jury, without stating defendant's claim in connection therewith, was not error where the court subsequently referred to defendant's claims.—Chase v. Ainsworth, 135 Mich. 119.

¶ 294. It is not prejudicial error for a judge to state to the jury the claims of one party, if there is testimony tending to support such claims.—Schweyer v. Jones, 152 Mich. 241.

¶ 295. It is not error for the court to state to the jury, in his charge, the claim of the plaintiff, when supported by the evidence, notwithstanding that it is disputed.—Ranta v. Newport Min. Co., 180 Mich. 459.

§ 48. Ignoring or assuming part of issues.

Refusal of requests ignoring evidence, see ante § 34.
Necessity that instructions conform to issues, see ante § 43.
Invasion of jury province by assumption of facts, see post V, B.

¶ 296. Error cannot be predicated upon a statement to the jury that the only issue in the case was one of defective machinery, where a reading of the entire charge makes it clear that the jury could not have understood that they should disregard any of the claims made by defendant.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 297. The charge of the court in an action for assault and battery and malicious prosecution, that the action was founded upon certain occurrences taking place at or about the time alleged in plaintiff's declaration, which had been detailed to the jury on the one hand by the plaintiff, and on the other hand by defendant and certain witnesses, and that plaintiff's right to recover depended upon whether plaintiff's version of that transaction was true, or that of defendant and his witnesses, was sustained; since the only occurrences testified to by these witnesses were connected with the assault and battery, and the jury had no right to understand the court to be referring to anything concerning the malicious prosecution, and plaintiff's testimony relative thereto.—Peterson v. Toner, 80 Mich. 350.

¶ 298. A request to charge the jury that plaintiff is entitled to damages for assault and battery and imprisonment, and that, it being presumed that such assault and battery were unlawful, the burden of proof was upon defendant to justify such acts, was properly refused, in an action for assault and battery, false imprisonment and malicious prosecution, since such request was predicated upon an admission by the defendant of assault and battery and imprisonment, not justified by the record.—Lansky v. Prettyman, 140 Mich. 40.

§ 49. Applicability and conformity to evidence.

Necessity of requesting charge correcting error in admitting evidence, see ante § 21.
Necessity that requests conform to issues and evidence, see ante § 29 et seq.
Refusal of abstract and irrelevant requests, see ante § 31.
Refusal of requests which ignore evidence, see ante § 34.
Evidence to support theories and claims, see ante § 46.
Invasion of jury province by singling out facts, see post § 76.
Charging upon failure of proof, see post § 96.
Restricting evidence to purpose for which admitted, see post § 95.
Charges permitting jurymen to apply their general experience and knowledge, see post § 97.
Cautionary instructions against statements of counsel, see post § 98.

¶ 299. A hypothetical charge, which is entirely unsupported by any evidence in the case, is error.—Hewitt v. Begole, 22 Mich. 31; Josselyn v. Bishop, 25 Mich. 397; Chadwick v. Butler, 28 Mich. 349; Moynahan v. Connor, 30 Mich. 136.

¶ 300. Charges unwarranted by or in conflict with the testimony are erroneous.—Dodge v. Brown, 22 Mich. 446; Leslie v. Smith, 32 Mich. 64; Hunt v. Strew, 33 Mich. 85; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 301. A charge that has no testimony to support the theory on which it is based is error.—Folkerts v. Standish, 55 Mich. 463.

¶ 302. An instruction not warranted by the evidence is erroneous.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306; Wright v. Senn's Estate, 85 Mich. 191; Hauser v. Goebel Brewing Co., 199 Mich. 168.

¶ 303. A question of fact is not to be submitted to a jury if there is no evidence bearing on it.—Byles v. Township of Golden, 52 Mich. 612.

¶ 304. It is error to charge the rule of application of payments and credits as determinative of the title to chattels, where on the evidence the question is whether according to terms of a contract they had been paid for and passed, and the contract reserved title and left open the manner of payment, and where the accounts were mere accounts of advances made under the contract.—Hood v. Olin, 68 Mich. 165.

¶ 305. A charge as to the effect of a contract is erroneous where there is no evidence of such contract.—Locke v. Priestly Express Wagon & Sleigh Co., 71 Mich. 263.

¶ 306. Where the liability of a defendant depends upon possession, and there is no evi-

dence of any such possession as will justify a recovery, it is error for the court to leave the question of possession to the jury.—Fisher v. Thirkell, 21 Mich. 1.

¶ 307. A case was submitted on the testimony of the parties to the transaction involved, one testifying in person, while the testimony of the other, as given upon a former trial, was read in his absence. These parties were wife and husband. The judge charged the jury that they might take into account the appearance of the witnesses and their habits and character, and he called attention to the wife's testimony as to her husband's habits of drinking and gambling. The record on error purported to contain all the testimony, but disclosed none on this point. Held, that the charge was prejudicial and erroneous.—Bulen v. Granger, 63 Mich. 311.

¶ 308. Where the testimony upon one of the questions in a case varies materially, an instruction that it does not vary much is misleading.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 309. An instruction that the jury may consider, as bearing upon the credibility of a witness, the fact that "something has been said about his having been interfered with in some manner by the police for alleged ill-treatment of his wife," is error requiring reversal where there is no evidence upon which to base the remark.—Conkey v. Carpenter, 106 Mich. 1.

¶ 310. In an action to recover the value of goods fraudulently purchased it is error to instruct the jury in regard to the defendant's exemptions where there is no evidence whatever with reference to that question.—Fruit Dispatch Co. v. Russo, 125 Mich. 306.

¶ 311. An instruction in an action on a promissory note that if a certain contract was made it would constitute a set-off, is error where there is no evidence upon which to base such instruction.—June v. Labadie, 132 Mich. 135.

¶ 312. A charge that "defendant admits" certain matters is justified where supported by the testimony of his witnesses though defendant himself was not present at the trial. —Morin v. Robarge, 132 Mich. 337.

¶ 313. Instructions as to the intent of a grantor as to the delivery of a deed should not be given in an action of ejectment, where the person relying on the conveyance fails to establish a delivery.—Broffee v. LeFils, 183 Mich. 100.

§ 50. Charging upon matters not in evidence.

Refusal of requests not supported by evidence, see ante § 31.

Charge construed as not to authorize consideration of surrounding circumstances, see ante ¶ 248.

Submitting to jury matters that are proved or uncontested, see post § 55.

Charges assuming facts not supported by evidence, see post § 72.

Charge not erroneous as permitting jury to consider probabilities not founded on the evidence, see post ¶ 536.

¶ 314. The jury must not be instructed upon a point concerning which no evidence has been introduced.—Hudnut v. Gardner, 59 Mich. 341.

¶ 315. It is improper for the court to make before the jury a suggestion or conjecture based upon something of which there is no evidence in the case.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 316. Instructions based upon declarations by plaintiff of which no evidence was given on the trial are properly refused.—Farrand v. Aldrich, 85 Mich. 593.

¶ 317. An instruction that the jury may find a claimed fact, of which no evidence is produced from which it can legally be inferred, is erroneous.—Bonner v. Grand Trunk Western Ry. Co., 191 Mich. 313.

¶ 318. The court should not submit to the jury a matter which is unsupported by any evidence.—Fourth Nat. Bank v. Olney, 63 Mich. 58.

¶ 319. An instruction is erroneous which leaves the jury to determine whether a joint defendant had "approved or defended" a trespass if there was no testimony to that effect and defendants denied its commission.—Pigott v. Lilly, 55 Mich. 150.

¶ 320. In an action by a factory employee for damages for personal injuries sustained as a result of his slipping against a swinging table used to carry poles against a saw, which passed through a slit in the table, and disengaging a worn notched lever fitting in the back of the table and holding it away from the saw when not in use, and falling on the saw, an instruction to the effect that the jury must determine whether it was a reasonably safe machine and would stand the jar ordinarily put upon it when in use, and if so, defendant had fulfilled his duty, but that, if plaintiff, when he slipped, extraordinarily jarred the machine beyond what it would receive in ordinary use, there could be no recovery, held erroneous where there is no evidence that the force applied when plaintiff struck the table was unusual.—Johnston v. Elm Cooperage Co., 188 Mich. 117.

¶ 321. In an action to recover on notes given for the purchase price of an automatic pop corn machine, an instruction on damages that if the machine was not as represented defendant could recover the amount paid, held to be erroneous where there was

no evidence of rescission of the contract, and the only evidence of defendant's damages which he sought to recoup was that the machine was worthless and he had set it aside.—Holcomb & Hoke Mfg. Co. v. Cataldo, 199 Mich. 265.

¶ 322. In an action for damages by negligence a charge permitting the jury to consider the question whether plaintiff did not contribute thereto is error where there is no proof that he did not exercise due care.—Brower v. Edson, 47 Mich. 91.

¶ 323. Where there was no evidence to call for it, it was improper to charge that if a vendor accepts, negotiates and cashes a check which purports on its face to be in full payment for the merchandise sold, he, in effect, receipts in full for the price.—Peter v. Thickstun, 51 Mich. 589.

¶ 324. Where no guaranty is counted on and there is no evidence of one it is error to charge that a third person's statement that a note offered by a purchaser is as good as money or as good as gold is not a guaranty of its collection; and if the vendor finds it worthless, he is not bound to take measures to enforce it against the maker before proceeding against the person who answered for it.—Taylor v. Soper, 53 Mich. 96.

¶ 325. In libel for imputing to plaintiff sheriff intentional neglect to prevent a Sunday ball game in violation of law after he had been informed that it was planned and publicly announced, a charge on the duty of the sheriff in case of "a mere rumor" of an intended offense is inapplicable to the evidence.—Scougale v. Sweet, 124 Mich. 311.

§ 51. ——On immaterial evidence.

¶ 326. Where immaterial evidence has been admitted without objection, neither party can claim to have the jury instructed to regard it for any purpose.—Elliott v. Van Buren, 33 Mich. 49.

§ 52. ——Testimony excluded or stricken out.

Necessity of requesting charges against consideration of withdrawn or excluded evidence, see ante § 21.

¶ 327. It is error to give an instruction, where its only basis is stricken testimony.—Township School Dist. of Wakefield v. MacRae, 198 Mich. 693.

¶ 328. The fact that evidence has been excluded does not of itself render erroneous a charge submitting to the jury the question calling for such evidence; subsequent evidence may have called for such a charge, and, if not, exception should be taken to the charge.—Bolton v. Riddle, 35 Mich. 13.

§ 53. ——Ignoring evidence.

See also ante ¶ 247.

Refusal of requests ignoring evidence, see ante § 34.

¶ 329. For the trial judge, in an action for a personal injury, to instruct the jury practically to the effect that plaintiff has not sustained serious injury, his testimony to the contrary notwithstanding, is error requiring reversal.—Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325.

¶ 330. In a father's action for damages caused by selling liquors to his minor son, it is error, where there is ample testimony, aside from that of the son, to support the declaration, to charge that if the jury discredited the son verdict must be for defendant.—Sterling v. Callahan, 94 Mich. 536.

¶ 331. Where an instruction refers to the evidence on a disputed point, it should carefully state all the evidence on both sides, and a request calling attention to only a part of the evidence is faulty, and may be refused.—MacKinnon Boiler & Machine Co. v. Central Michigan Land Co., 156 Mich. 11.

V. INVADING JURY PROVINCE OR SUBMITTING IMPROPER MATTERS.

A. IN GENERAL; INSTRUCTIONS AS TO WEIGHT OR CREDIBILITY.

Refusal of requests invading province of jury, see ante § 32.

Relative functions of judge and jury, see ante § 3 and Trial, VI.

Duty to instruct only as to law of the case, see Comp. L. 1915, § 14573.

§ 54. Discretion of court.

Discretion in respect to style of charge, see ante § 8.

¶ 332. A court is not obliged to so charge a jury as to confine them to the consideration of the testimony of one witness rather than of another.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

¶ 333. It is within the discretion of the circuit judge to refer in his charge to the testimony, so long as he does not expressly or impliedly voice his opinion upon questions of fact, or give undue prominence to any fact or circumstance.—Hanaw v. Jackson Patriot Co., 98 Mich. 506.

¶ 334. Where the proof of loss states that one cause of the death of the insured was a self-inflicted wound, it is not error to refuse to instruct that the verdict must be for the company unless the jury finds such statement untrue, and since to do so might be to call undue attention to the statement, the matter rests in the discretion of the court.—Ferris v. Loyal Americans of the Republic, 152 Mich. 314.

¶ 335. Although it is not error to call attention to the testimony of a particular witness, and to give instructions framed in such

language as to be in all other respects unobjectionable, neither party has the right to insist that this course be taken.—Heddle v. City Electric R. Co., 112 Mich. 547.

§ 55. Submitting matters that are proved or uncontested.

Relative functions of judge and jury, see ante § 2.

¶ 336. When a fact is admitted, or if it is disputed and there is no conflict of evidence, the question is one of law, upon which direct instruction ought to be given.—Wisner v. Davenport, 5 Mich. 501.

¶ 337. Where all the evidence on both sides tends clearly to prove a fact, such fact may, and generally should be, assumed as proved; in such case a charge to the jury intimating that it is competent for them to find either way is error.—Druse v. Wheeler, 26 Mich. 189.

¶ 338. Uncontested facts should not be treated as open questions in requesting charges and giving instructions.—Medina Tp. v. Perkins, 48 Mich. 67.

¶ 339. It is erroneous to direct the attention of the jury to undisputed facts as if they were doubtful.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 340. It is error to submit as open questions to the jury matters that are not disputed or upon which the testimony is not conflicting.—Lange v. Perley, 47 Mich. 352; Corbett v. Spencer, 63 Mich. 731.

¶ 341. Where the facts are unquestioned from which a rule of law is to be deduced, the judge cannot leave it to the jury to deduce the rule, but must do it himself, and give them positive instructions upon the facts.—Stearns v. Vincent, 50 Mich. 209.

¶ 342. Where the testimony as to a fact is not disputed, the jury should be instructed to find it accordingly.—Dondero v. Frumveller, 61 Mich. 440.

¶ 343. A court cannot properly submit to a jury facts on which the testimony is all one way.—Hunt v. Supreme Council of the Order of Chosen Friends, 64 Mich. 671.

¶ 344. Where the testimony on both sides agrees in establishing a right in a party to sell property in dispute, it should not be left to the jury as an open question.—Gavigan v. Evans, 45 Mich. 597.

¶ 345. When the date of a transaction is positively fixed by the evidence of one who was a party to it, the jury cannot be permitted to guess or surmise or conjecture that the transaction took place at another time from the testimony of one who was present, but who cannot tell when it occurred.—Wierengo v. American Fire Ins. Co., 98 Mich. 621.

§ 56. Leaving questions of law to jury.

Leaving to jury questions and issues unsupported by evidence, see ante § 49.

Submitting matters as to which no dispute exists, see ante § 55.

¶ 346. A charge leaving the jury to find either a license or a sale from a transaction which in law can only be regarded as a license is error.—Greeley v. Stilson, 27 Mich. 153.

¶ 347. A charge which leaves it to the jury's knowledge of such contracts to "do what is right" substantially makes the jury judges of the law as well as the facts is erroneous.—George W. Roby Lumber Co. v. Gray, 73 Mich. 356.

¶ 348. The trial court should point out specifically, and direct the jury to disregard, evidence which it concludes has been admitted erroneously; and a general instruction to disregard such of the evidence as the jury finds to be "rubbish," having no bearing upon the issue, is error since it leaves to the jury the question of what evidence was competent and what not competent.—Colby v. Portman, 115 Mich. 95.

¶ 349. The city of Saginaw was incorporated with territory which constituted about one-fourth of school district No. 1 of the township of Saginaw. The officers of the district being within the city thereafter assumed to be officers of school district No. 1 of the city of Saginaw, and brought suit in that name to recover moneys levied and collected for said school district No. 1 of the township of Saginaw, claiming an identity of corporate existence. Held, that it was error to submit to the jury the question of identity, it being a question not of fact but of law.—Township of Saginaw v. Saginaw School Dist. No. 1, 9 Mich. 541.

¶ 350. There was nothing improper in the court instructing the jury that they were to determine whether the books kept by plaintiff were kept in a proper condition, where, in assumpsit by a surviving partner for services rendered by the firm, such books had been introduced in evidence by plaintiff.—O'Connell v. Schwanabeck, 76 Mich. 517.

§ 57. On requisites and degree of proof.

Instructions on weight and effect of evidence, see post § 58.

Instructions as to burden of proof, see post § 81.

Necessity of charging as to sufficiency and degree of proof, see post § 82 et seq.

¶ 351. It is error for the trial court to charge the jury, respecting testimony which showed that plaintiff did not exercise ordinary care, that such "testimony must be such as to drive you to that conclusion—to prevent your arriving at any other conclusion."—Mynning v. Detroit, Lansing & N. R. Co., 67 Mich. 677.

§ 58. On weight and effect of evidence in general.

See also ante ¶ 143.
Discretion of court, see ante § 54.
Tendency and effect of specified evidence, see post § 59.
Instructions indicating court's opinion as to disputed facts, see also post § 64.
Charging upon comparative weight or effect of evidence, see post § 67.
Charges assuming facts in question, see post § 72 et seq.
Charges giving undue prominence to evidence or witnesses, see post § 76.
Cautionary instructions against giving evidence undue weight, see post § 94.
Charging upon sufficiency of evidence, see post § 82.
Consideration of evidence as a whole, see post § 93.
Charging upon failure of proof, see post § 96.
Charges permitting personal knowledge and experience of jurymen to have weight as evidence, see post § 97.
Charges correcting improper statements of counsel as to the evidence, see post § 98.
Cautioning jury as to sympathy, see post § 99.
Instructions tending to coerce jurymen, see post § 105.
General law as to weight and sufficiency of evidence, see Evidence, X.
Peremptory or binding charge for one party, see Directing Verdict, I.
Presumption on error that proofs warranted charge or refusal, see Appeal §§ 376, 377.

¶ 352. A trial judge may instruct the jury as to the weight that belongs to different classes of evidence, but not as to that of specific testimony or particular witnesses. Nor can he state whether evidence is sufficient to prove a fact, except where he merely gives a rule of law that fixes what is required.—Spalding v. Lowe, 56 Mich. 366.

¶ 353. It is error to instruct the jury as to what the evidence of a witness amounts to; it is their business to determine its effect.—Baird v. Randall, 58 Mich. 175.

¶ 354. Requests for instructions asking the court for conclusions of fact, or to give its view of the weight to be given certain portions of the testimony, are properly refused.—Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564.

¶ 355. It is proper to refuse a request for an instruction as to what the evidence shows; that would invade the jury's province.—Hill v. Graham, 72 Mich. 659.

¶ 356. It is error for the court, in charging the jury in a case involving the proper performance of services by an attorney, to express the opinion that the jury is not warranted by the testimony in saying that plaintiff was in no way negligent in such performance.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 357. Where certain facts, if established, would entitle plaintiff to recover, an instruction, that if the jury find the testimony of such facts to be true plaintiff can recover, is not erroneous as determining the sufficiency of the evidence.—Partridge v. Sterling, 79 Mich. 302.

¶ 358. It is not proper to instruct the jury as to the weight to be given to particular testimony, or to the testimony of a particular witness.—Fraser v. Haggerty, 86 Mich. 521.

¶ 359. It is error to give instructions which substantially tell the jury what is the weight and effect of the evidence, since this should be left to the jury.—King v. Ann Arbor R. Co., 137 Mich. 487.

¶ 360. In an attorney's action for compensation, it is error, as tending to prejudice defendant's rights, for the court in speaking of plaintiff's duty to defendant to say to the jury "now, an attorney is obliged to do the very best he can. In this case here it has been done. I don't think you are warranted by the testimony in saying that plaintiff was in any way negligent."—Babbitt v. Bumpus, 73 Mich. 331.

¶ 361. In an action for personal injuries, it is not an invasion of the province of the jury for the court to say to the jury "there is no great physical injury proved here to this man at all," where it is clear from the whole charge that the judge referred to the external evidence of injury and that the jury would so understand it.—Sterling v. City of Detroit, 134 Mich. 22.

¶ 362. Charge set forth and held, under the circumstances, not to take the case from the jury by the statement that there was sufficient proof before them to establish the title to the property in the plaintiff.—Raynor v. Norton, 31 Mich. 210.

¶ 363. The jury must not be instructed to follow the findings of the supreme court as precedents in questions of fact, even in cases precisely analogous.—Richards v. Fuller, 38 Mich. 653; Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

§ 59. On tendency or effect of specified evidence.

See also post § 76, ¶ 544.

Refusal of improper instructions as to tendency and effect of evidence, see ante § 32.

Charging upon inferences to be drawn from evidence, see post § 62.

¶ 364. A court is not to instruct the jury as to what certain statements tend to prove, or as to the weight they should give to particular testimony.—Blackwood v. Brown, 32 Mich. 104.

¶ 365. Where it is a material question whether a party had notice of a certain fact, it is not proper, in a contest upon the facts, for the court to charge that there was no evidence tending to show such notice, unless in a case free from doubt.—Hayes v. Homer, 36 Mich. 374.

¶ 366. Testimony is admitted as tending to establish a case or a defense, and it is therefore no error to charge the jury that it tends to do so.—Campau v. Langley, 39 Mich. 451.

¶ 367. A trial judge should advise the jury as to the bearing of the evidence upon any point in the case which may in any view be controlling.—De Mill v. Moffat, 45 Mich. 410.

¶ 368. It is proper for the court to state to the jury for what purpose certain testimony was received, but it is not proper to say to them, after the evidence is in, what the testimony tends to prove, without submitting to them at the same time the question of its credibility.—Davis v. Gerber, 69 Mich. 246.

¶ 369. When the testimony upon a particular point is conflicting, the trial judge cannot give his opinion as to what it tends to prove; that is exclusively for the jury.—Wessels v. Beeman, 87 Mich. 481.

¶ 370. In replevin of property which plaintiff claimed title to, pursuant to an exchange, where there was dispute as to whether a change of property had been effected, the statement in the charge that if the jury found that certain things were done, the doing thereof constituted "strong evidence" that there was an exchange of title, was not error, where under the evidence it would have been proper to charge that, if the defendant turned the property over to plaintiff with the intent to pass the title, the title did pass.—Pratt v. Wickham, 133 Mich. 356.

§ 60. ——Weight to be given admissions and declarations.

Charge that "defendant admits" certain matters justified by testimony, see ante ¶ 312.

Assuming the truth of facts admitted or uncontested, see post § 74.

Admissions and declarations as evidence, see Evidence, VII.

¶ 371. Where a wife's right to property is derived under a contract with her husband, and the contract is contested on the ground of fraud, any acts or declarations of his tending to show the fraudulent nature of the contract, and brought to the wife's knowledge, are evidence against her; hence a charge that what he said was of no consequence as affecting her rights was properly refused unless qualified.—Wright v. Towle, 67 Mich. 255.

¶ 372. It is not error to instruct the jury, in an action for personal injuries alleged to have been caused by stepping into a hole in the sidewalk, that evidence of statements made by plaintiff relating to the place, occasion and extent of his injury should be carefully scrutinized because of the fact that it is easy to be mistaken as to words and statements of another which are repeated a long time afterward; but such instruction should be given with care lest it reflect an opinion or lead to denying such testimony its proper weight.—Hart v. Village of New Haven, 130 Mich. 181.

¶ 373. Where, in an action for a personal injury, defendants introduce evidence tending to show a compromise of plaintiff's claim and an admission of blame, which plaintiff denies, and plaintiff's counsel, in his argument to the jury, claims that the interview had with defendants about the matter was evidence that defendants had perpetrated the wrong complained of, it is error for the court to refuse to instruct the jury, at defendants' request, that such proposed compromise should not be considered by them as an acknowledgment of any liability on the part of defendants.—Pelton v. Schmidt, 104 Mich. 345.

§ 61. ——Weight of expert or opinion evidence.

General law as to expert or opinion evidence, see Evidence, VI.

¶ 374. The testimony of experts is to be judged like that of any other witnesses, and is for the jury to weigh; hence it was proper to refuse a request to charge that it was uncertain and unreliable.—Rivard v. Rivard, 109 Mich. 98.

¶ 375. It is proper for the trial court to instruct that the testimony of expert witnesses should be given the same consideration, everything else being equal, as that of any other witness.—Anthony v. Cass County Home Tel. Co., 165 Mich. 388.

¶ 376. The opinions of a number of business men as to whether the handwriting of

a note had been so altered as to raise the amount was allowed to go to the jury with the remark by the trial judge that if such evidence had been objected to he would have excluded it; that the jury might consider it, but that the witnesses had no better means of knowing when the disputed letter and figures were written than themselves. The record did not show that the witnesses were any better qualified than the jury to judge on mere inspection that an alteration had been made. Held, that there was no error in the instruction.—Ives v. Leonard, 50 Mich. 296.

¶ 377. It is the province of the jury to determine which theory of opposing expert witnesses is the true one.—Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

¶ 378. An instruction that the jury is not bound to accept as true the opinions of experts upon a particular point when opposed to the testimony of witnesses claiming to have actual knowledge of the facts, held proper, where, in an action for personal injuries alleged to have been caused by a fall upon a defective sidewalk, several physicians testified that the disability existed previous to the accident, and that the only effect thereof was an aggravation of the former condition, while plaintiff and other witnesses gave plain and unequivocal testimony to the contrary.—Olson v. Village of Manistique, 110 Mich. 656.

¶ 379. An instruction that opinion testimony is not testimony as to facts is not prejudicial error where the court instructs the jury that it is to give to it such weight as it thinks it is reasonably entitled to, and is to accept the opinion seeming to be the more reasonable.—Hull v. Detroit United Ry., 158 Mich. 682.

¶ 380. In an action to recover compensation for legal services, where all the evidence as to value was given by experts called by plaintiff, an instruction, that the jury in such a case "has to depend in a measure" on such testimony, but allowing the jury to use the testimony so given as the basis of a verdict, if they are satisfied with it, was sufficient without expressly charging that it was not to be taken as "binding" as to the amount of plaintiff's compensation.—Turnbull v. Richardson, 69 Mich. 400.

§ 62. On inferences or "presumptions" to be drawn from evidence.

Giving undue prominence or emphasis to evidence, see post § 76.

Inferences from failure to attend trial, testify or produce evidence, see post §§ 85, 86, 87.

¶ 381. A court cannot charge as a question of law upon inferences to be drawn from physical symptoms. If they are intelligible without medical testimony, they are for the jury and not for the court to interpret.—Sheahan v. Barry, 27 Mich. 217.

¶ 382. It is proper to charge that it may be inferred that a fence was moved at the instance of a party where the evidence is that in her presence and without her dissent her husband stated that he caused it to be moved.—Sanscrainte v. Torongo, 87 Mich. 69.

¶ 383. In an action against a druggist for the death of a child alleged to be due to negligence in furnishing a poisonous drug, instead of a harmless one, in filling an order for drugs for internal use, a requested instruction held properly refused because instructing the jury as to what inferences of fact they were to draw from the evidence.—Wood v. Standard Drug Co., 190 Mich. 654.

¶ 384. A request to charge, directing the jury that a presumption arising from a certain state of facts is "very strong," is properly refused as encroaching upon the province of the jury.—Wilcox v. Young, 66 Mich. 687.

¶ 385. It is not error in a legal sense for a court to point out important testimony to a jury so as to lead it to an understanding of its bearings, and in doing so comments upon the testimony may be necessary; but the jury should not be instructed as to the inferences of fact that they are to draw from the evidence.—Richards v. Fuller, 38 Mich. 653.

¶ 386. Where it was in issue whether a sale of wheat was according to a certain sample designated as 3, and such sale was not by "inspection grade," it was error to charge that a quotation 10 cents below the market by telegram must conclusively be presumed to refer to a grade lower than the market grade corresponding to the price; since the sample might have been of poorer quality.—Pitt v. Emmons, 92 Mich. 542.

§ 63. On disputed questions of fact.

Refusal of requests improperly assuming facts to be undisputed, see ante ¶ 187.

Charges assuming facts in question, see post § 72 et seq.

¶ 387. The court cannot charge the jury to find the issue in a particular manner when there is any evidence to prove the contrary. Clark v. McGraw, 14 Mich. 139.

¶ 388. When the evidence conflicts it is error in the court to decide the point in conflict and take it from the jury.—Brooke v. Grand Trunk R. Co., 15 Mich. 332.

¶ 389. The court cannot take away from the jury the decision of any question of fact.

—Sheahan v. Barry, 27 Mich. 217; Bedford v. Penny, 58 Mich. 424.

¶ 390. It is error for the court to state as a fact to the jury, in ruling upon evidence, that which is matter for the jury to pass upon.—Turner v. Phœnix Ins. Co. of Hartford, 55 Mich. 236.

¶ 391. It is not the court's province to decide disputed facts, or to draw inferences from such facts as are sworn to on either side.—Williams v. Shelden, 61 Mich. 311.

¶ 392. Requested instructions as to the payment of a note to a third person at the holder's direction operating to cancel it were properly refused, where the entire controversy as to payment was for the jury, who were fully informed as to the effect of the evidence, which was conflicting as to any such directions having been given.—Barnett v. Saloman, 118 Mich. 460.

¶ 393. In assumpsit for the balance due, testimony of the defendant that the account was settled between the parties by setting off an item of rent due him is sufficiently contradicted by plaintiff's testimony and defendant's admission of indebtedness and his declaration that he would charge no rent, so as to make it erroneous to compel the jury to credit the defendant's testimony alone.—Linsell v. Linsell, 138 Mich. 64.

§ 64. ——Charging on conflicts in evidence.

See also ante ¶ 308.

Instructions upon weight of evidence, see also ante § 58 et seq.

¶ 394. Where the testimony as to a given fact is direct and positive on both sides and plainly irreconcilable, it is for the jury to determine which is right, and an instruction that "it indicates an entire misapprehension between the parties" as to the disputed question is erroneous.—Maltby v. Plummer, 71 Mich. 578.

¶ 395. For the trial judge to use in his charge to the jury language naturally tending to influence them against the allowance of plaintiff's claim, is error requiring reversal, if it is possible for the jury to suppose such language was used to show that it is doubtful whether the arrangement plaintiff claims was ever made.—Raymond v. Woolfenden's Estate, 99 Mich. 165.

¶ 396. The use by the trial judge in his charge of language that may lead the jury to infer he has little confidence in plaintiff's testimony is error where the instruction implies a duty on the jury's part to yield its judgment to that of the court.—Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325.

¶ 397. An instruction which gives the jury distinctly to understand that the trial judge has a decided opinion that plaintiff is entitled to recover is objectionable.—Valin v. McKerreghan, 104 Mich. 213.

¶ 398. The better practice is for the court to frame instructions in such manner as not to imply a fixed opinion of its own upon the question either of the truthfulness of challenged statements by a witness or of the credit to be given to other parts of the testimony.—Heddle v. City Electric R. Co., 112 Mich. 547.

¶ 399. For the trial judge so to modify requests to charge bearing upon a controlling issue as to give the jury an impression of his personal opinion upon the subject is error requiring reversal.—Preston Nat. Bank v. Michigan Mut. Fire Ins. Co., 115 Mich. 511.

¶ 400. An instruction in trover for the conversion of shares of stock, which clearly indicated to the jury the court's opinion of some of the important controverted facts, was prejudicial and therefore reversible error.—Hine v. Commercial Bank of Bay City, 119 Mich. 448.

¶ 401. In instructing the jury, the court is not required to point out the fact that two witnesses testified contrary to the plaintiff upon a certain matter, commenting upon conflict of evidence being the province of counsel.—Walter v. Mutual City & Village Fire Ins. Co., 120 Mich. 85.

¶ 402. In the contest of a will for mental incapacity of the testatrix, it is erroneous to array the witnesses against each other in the charge to the jury where the greater part of the testimony might have been reconciled as relating to the testatrix's mental condition at different times.—Spencer v. Terry's Estate, 127 Mich. 420.

§ 65. Expressions favorable to one party's theory of case.

Necessity that instructions conform to theories and claims, see ante § 44.

Emphasizing theories and claims, see also post § 77.

Statements disclosing sympathy of judge, see post § 99.

¶ 403. The judge cannot say that the theory of one party is more plausible than that of the other.—Ludlow v. Pearl's Estate, 55 Mich. 312.

§ 66. On credibility of witnesses.

See also post § 89.

Refusal of requests invading jury province as to credibility, see ante § 32.

Charging as to weight of expert or opinion evidence, see ante § 61.

Charges reflecting upon witnesses, see post § 68.

Commenting upon inconsistency between present and former testimony, see post § 71.

Instructions singling out particular witnesses, see post § 78.
Instructing jury as to interest, bias and impeachment of witness, see post § 89.
Credibility of persons convicted of crime, see post § 90.
Credibility of witness who has sworn falsely, see post § 91.
Credibility of witnesses for jury, see Witnesses, VI.

¶ 404. It is not an error that will require the reversal of a judgment for a circuit judge to indicate his views as to the credibility of a witness, if he expressly directs the jury to decide for themselves without reference to his views.—Sheahan v. Barry, 27 Mich. 217.

¶ 405. Where a public officer is witness in a case in which his own conduct is involved, it is improper in charging the jury to call attention to his high character, as tending in itself to establish his credibility.—Wisner v. Bardwell, 38 Mich. 278.

¶ 406. Where plaintiff's side of a case is supported by one witness, while defendant's side is supported by several witnesses, it is error for the court to prejudice the latter by dwelling repeatedly on the cases where one witness is contradicted by more than one and yet is to be believed.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 407. The presumption is that men are truthful, and the fact that one's character in that regard has never been discussed is cogent evidence of good reputation. It is error, therefore, to instruct the jury, in a case where a witness is sought to be impeached, that a person who testifies that he has never heard the witness's reputation for truth and veracity questioned at all is not entitled to the same consideration as one who testifies that he has heard it questioned and discussed among the neighbors of the witness.—Conkey v. Carpenter, 106 Mich. 1.

¶ 408. It is error to instruct the jury, "I charge you as a matter of law that you may believe the testimony of any witness or disregard the testimony of any witness"; since they are not justified in disregarding the testimony of an uncontradicted witness unless there is something apparent upon the record to cast discredit upon his testimony.—Preuschoff v. B. Stroh Brewing Co., 132 Mich. 107.

¶ 409. An instruction telling the jury that they "are to believe as jurors what you believe as men, and there is no rule of law that requires you to believe as jurors what you would not believe as men" was not erroneous in view of the preceding instruction as to the manner of weighing the testimony of witnesses.—Dodge v. Reynolds, 135 Mich. 692.

¶ 410. It is error in a personal injury action to instruct the jury that they must believe one side or the other "right through" where the jury might have found with the plaintiff upon the incidents of the accident and yet disbelieved his testimony as to the extent of the injuries.—Butler v. Detroit, Y. & A. A. Ry., 138 Mich. 206.

¶ 411. A trial court should avoid calling attention specifically to the truth or falsity of certain evidence.—Seitz v. Starks, 144 Mich. 448.

¶ 412. An instruction in a civil action for rape, that an alibi is the best of defenses, but "it is your duty to examine such evidence carefully in determining its truth or falsity," was not objectionable as improperly suggesting a doubt of the credibilty of defendant's witnesses.—Harris v. Neal, 153 Mich. 57.

¶ 413. The credibility of testimony, even though substantially uncontradicted, is for the jury; and instructions that assume a conclusion which cannot be reached without discrediting testimony should be refused.—Dibble v. Northern Assur. Co., 70 Mich. 1.

¶ 414. An instruction in a case appealed from the justice court in which the court expressed his personal views as to the right of statutory appeal, although asking the jury to disregard testimony relative to proceedings in the justice court, but further stating that they had a right to take into consideration any claim made there of testimony given differing from that given in the circuit court in order to determine the reliance to be placed upon the testimony of the witnesses, held erroneous and prejudicial.—Salmer v. Hicks, 188 Mich. 391.

§ 67. On comparative weight or effect of testimony.

See also ante § 64.
Comparative weight of expert and opinion evidence, see also ante § 61.
Instructions unduly emphasizing evidence, see post § 76.
Instructions giving undue prominence to theories and claims, see post § 77.
Charges as to numerical preponderance of witnesses, see post § 84.

¶ 415. The weight to be given to testimony is for the jury, and it is the jury's province to determine whether that of one witness overbalances that of another.—Kelly v. Emery, 75 Mich. 147.

¶ 416. An instruction which, after referring to the testimony of two witnesses upon a given point, informs the jury that the testimony of one of them "very materially modifies that of the other," is ground for reversal.—Kelly v. Emery, 75 Mich. 147.

¶ 417. While it is not prejudicial error for the court in his charge to state that he has known two witnesses to outswear ten because of their better knowledge of the facts, it is prejudicial to follow this by stating that

the plaintiff in an action for personal injuries could best describe his injuries.—Butler v. Detroit, Y. & A. A. Ry., 138 Mich. 206.

§ 68. Invidious and discrediting remarks concerning witnesses.

Discrediting remarks concerning witnesses, see post § 78.
Instructions singling out particular witnesses, see post § 78.

¶ 418. A trial judge has no right so to instruct the jury as to their being at liberty to disbelieve witnesses as to manifestly reflect upon a particular witness.—Wheeler v. Wallace, 53 Mich. 355.

¶ 419. In a case involving an alleged but denied double payment to a witness for work, it is prejudicial error for the court in its charge to the jury to express doubt as to the honesty of the witness in receiving such double pay by the words, "what you may think of B. for receiving * * * double payment for his labor is another question."—Maltby v. Plummer, 71 Mich. 578.

¶ 420. In a civil action for assault and battery it is error for the court to comment unfavorably upon any testimony tending to prove any of the circumstances leading up to the assault.—Pokriefka v. Mackurat, 91 Mich. 399.

¶ 421. It is improper for the trial court to refer to a witness's testimony in scathing terms, and any criticism calculated to impress the jury with the court's views of the facts should be avoided.—Sterling v. Callahan, 94 Mich. 536.

¶ 422. An instruction that "there is evidence also,—whatever you may think of the evidence," stating it, does not discredit the witness whose testimony is thus referred to. —Davidson v. Kolb, 95 Mich. 469.

¶ 423. The use of language in a charge, from which the jury may infer a clear intimation of the judge's disbelief of certain testimony, is objectionable.—Letts v. Letts, 91 Mich. 596.

¶ 424. In an action against a city for an injury from a defective manhole in a street, plaintiff testified on cross-examination that he was under the influence of liquor at the time of the accident, and it was also claimed by defendant that his testimony tended to show that he paid no attention to where he was going, and did not use due care, and that this was attributable in part to his intoxicated condition. Held, that an instruction that the testimony of plaintiff himself was that he was not under the influence of liquor was directly opposed to his own testimony, and, being on a material point, it could not be said that such a statement of the testimony, coming from the court, was not calculated to mislead the jury in prejudice of defendant's case.—Lincoln v. City of Detroit, 101 Mich. 245.

¶ 425. An instruction on damages was calculated to mislead the jury into thinking that the court had little confidence in the plaintiff's testimony, where after stating antithetically the claims of the parties and the evidence it characterized the case as "not a very serious case," and told the jury that a verdict in any "substantial" amount would not be allowed to stand because the case "will not justify it."—Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325.

¶ 426. As the credibility of witnesses is for the jury, it was improper for the court to indicate to the jury by comments upon the testimony of a witness what he thought of such testimony.—Williams v. City of West Bay City, 119 Mich. 395.

¶ 427. In a proceeding to forfeit the charter of a plank-road company, where many farmers have testified for relator, and some farmers as well as plank-road men have testified for the defendant, it is improper in the charge to describe the witnesses for relator as "farmers" and those for defendant as "the road's witnesses," but reversal will not be granted on this ground where a consideration of the whole record indicates that the error was not prejudicial.—People ex rel. Esper v. Detroit & S. Plank-Road Co., 131 Mich. 30.

¶ 428. Comments in the charge to the jury in a personal injury case against a city, strongly implying inconsistency of the testimony of city officers for the city that the walk in question was perfectly safe, with their conduct in keeping on repairing and almost immediately rebuilding the walk, are erroneous.—Renaud v. City of Bay City, 124 Mich. 29.

§ 69. Commenting upon claims and defenses.

Charges emphasizing theories and claims, see post § 77.

¶ 429. Where the court intimates to the jury in his charge that a certain defense has not been strongly urged, and upon defendant's counsel immediately correcting him, the court leaves the question of such defense to the jury, reversal will not be given on the ground that the court improperly influenced the jury.—Robertson v. Kennedy, 152 Mich. 553.

§ 70. Submitting case on truth of plaintiff's testimony.

Charges singling out particular witnesses, see post § 78.

¶ 430. A jury are properly instructed to find for plaintiff if his claim is supported by undisputed testimony which they believe.—Rasch v. Bissell, 52 Mich. 455.

¶ 431. In an action for an assault and ravishment of the plaintiff, an instruction that, if the jury believed plaintiff's statements after considering defendant's denial and all other evidence, verdict should be for plaintiff, is not objectionable as taking from the jury the consideration of all other questions except the truth of plaintiff's statements; especially where the court, in immediate connection with such instruction, called attention to the entire evidence, telling the jury to judge of the reasonableness of plaintiff's story and defining rape.—Schenk v. Dunkelow, 70 Mich. 89.

¶ 432. Where, in answer to a question by a juryman as to whether or not the evidence was clear enough to decide that defendant's motorman was in fault, the court replied that there was testimony from which the jury might find that the motorman was negligent, but that such finding depended upon whose evidence they believed, the charge is not objectionable on the ground that the jury was told to render a verdict for plaintiff if they believed his witnesses, and for the defendant if they did not.—Harker v. Detroit United Ry., 150 Mich. 697.

§ 71. Commenting on fact of former trials or testimony.

Credibility of witness testifying to matters not testified to on former trial, see post ¶ 550.

¶ 433. In a personal injury action it is erroneous for the court in its charge to state that the case has been tried twice before and on account of some unfortunate remark or ruling must be tried again as the jury possibly knew that the plaintiff had recovered a verdict on prior trials and might be led to believe that he was prevented from recovering on account of some unimportant incident.—Butler v. Detroit, Y. & A. A. Ry., 138 Mich. 206.

¶ 434. A positive charge based upon inconsistencies between the testimony of the proponent of a will, and his testimony at a former trial is properly refused where the inconsistencies are such as to be a question for the jury and to affect the credibility of the witness only.—Lincoln v. Felt, 132 Mich. 49.

B. ASSUMPTION OR MISSTATEMENT OF FACTS IN QUESTION.

§ 72. In general.

Instruction construed as not assuming consent of defendant to change in contract, see ante ¶ 63.

Refusal of requests assuming facts, see ante § 35.

Charges ignoring or assuming theories, claims and issues, see ante §§ 47, 48.

Necessity that instructions conform to evidence, see ante § 49.

Charge assuming or suggesting existence of contract, see Contracts § 354.

¶ 435. An instruction is erroneous if it contains an assumption of fact that is not supported by the evidence.—Koehler v. Buhl, 94 Mich. 496.

¶ 436. An instruction assuming the existence of facts that are for the jury to find from the evidence is properly refused.—Mallory v. Farmers' Ins. Co., 90 Mich. 112; Wilcox v. Young, 66 Mich. 687.

¶ 437. An instruction that it is claimed that certain testimony is confirmed by the evidence of a designated person, "and by the fact of the finding of the bolt there," which testimony the jury may consider, is not open to the objection that it assumes the finding of the bolt to be an established fact.—Tunnicliffe v. Bay Cities Consol. R. Co., 107 Mich. 261.

¶ 438. In an action on a promissory note against the maker and an indorser, an instruction to the jury which assumes that they are sued as joint makers is erroneous where there is nothing in the record to indicate that they were sued as joint makers.—June v. Labadie, 132 Mich. 135.

¶ 439. Where testimony as to the amount of time a woman had boarded with the claimant was placed in the aggregate at 18 months and the witness was speaking of four years and a fraction as the time during which the intervals of boarding occurred, it was error for the court to assume that seven months of the time was prior to a date when the woman was put under guardianship, there being no testimony as to how much of the 18 months was before and how much after that time.—McGee v. McDonald's Estate, 66 Mich. 628.

¶ 440. A request to charge that a demand was necessary before plaintiff in replevin could recover is properly refused where such necessity defends on the existence of facts which it is the province of the jury to determine in the case.—Hood v. Olin, 68 Mich. 165.

¶ 441. Where in a personal injury case the issue was not one of the legal obligations of the defendant railroad company to maintain the bridge at the crossing where the accident occurred but one of fact whether or not it did maintain a crossing at that point, the court erred when on its own motion it gave an instruction to the jury which assumed the company's obligation to maintain the bridge.—Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315.

¶ 442. A charge of the court, erroneously assuming that a conversation between the plaintiff and one of the defendants (in which he made statements as to the financial condition of himself and the other defendant, a corporation, of which he was an officer), was had before certain coal was furnished, was misleading to the jury and prejudicial in an action for the price of such coal, claimed to

have been furnished to defendants, but by them claimed to have been furnished to third persons from whom they had rented a factory; where the record shows that such conversation did not occur until after the claimed indebtedness was incurred and the coal delivered.—Cone v. American Elec. Fuse Co., 145 Mich. 536.

§ 73. Disputed facts or versions of fact.

See also post ¶ 459.

Positive instructions upon matters in dispute, see ante § 63.

Submitting case on truth of plaintiff's testimony, see ante § 70.

¶ 443. It is error for the charge to assume that to be a fact which is contested and about which the testimony is conflicting.—Weyburn v. Kipp's Estate, 63 Mich. 79; Hughes v. Detroit, G. H. & M. R. Co., 65 Mich. 10; Kieldsen v. Wilson, 77 Mich. 45; Nichols v. Chicago & W. M. R. Co., 125 Mich. 394; Parke v. Nixon, 141 Mich. 267.

¶ 444. An instruction by which the jury is given to understand that a disputed question of fact has been established by the proofs is misleading.—Beaubien v. Kellogg, 69 Mich. 333.

¶ 445. Where the testimony of different witnesses as to an agreement varied so much as to prove three distinct contracts, a charge to the jury which assumed that all the evidence tended to prove the same contract was erroneous.—Chadwick v. Butler, 28 Mich. 349.

¶ 446. A request which assumes that a transfer by an insolvent was fraudulent, when there is evidence from which the jury might make a different finding, should not be given.—Gordon v. Alexander, 122 Mich. 107.

¶ 447. Requests to charge by a defendant, predicated upon isolated portions of the testimony in support of his theory of the case, and assuming the truth of controverted facts, are properly refused.—Foley v. Riverside Storage & Cartage Co., 85 Mich. 7.

¶ 448. Where plaintiff's claim as sworn to by him is in dispute as to certain enumerated items, it is error for the court to give an instruction to find for him in a specified sum without calling attention to the disputed items of the claim and of defendant's counterclaim.—McIntosh v. McIntosh, 79 Mich. 198.

¶ 449. It is error to instruct the jury that one of two versions of a transaction is proved where the testimony is conflicting regarding the same.—Webster v. Fowler, 89 Mich. 303.

¶ 450. An instruction assuming the fact of the conversion of personalty is properly refused where there is some evidence that the property was sold with the consent of the party now seeking to recover its value.—Prentiss v. Ross's Estate, 96 Mich. 83.

¶ 451. An instruction is erroneous where it assumes a disputed fact as established, inasmuch as this is a question for the jury and not for the court to determine.—Clarke v. Case, 144 Mich. 148.

¶ 452. In an action by the purchaser of an automobile against the seller for damages for alleged breach of contract in failing to deliver to plaintiff a new automobile in place of another one which was delivered to the seller, where the evidence was conflicting whether the car was returned to and received by defendant as his own property, and instruction which treated the return and acceptance of the car as an established fact, held erroneous as invading the province of the jury by assuming controverted facts.—Rimmele v. Huebner, 190 Mich. 247.

¶ 453. In an action to recover damages for trespass in cutting timber on land held that an instruction which stated that it was undisputed that a certain amount of timber had been cut was erroneous where such instruction was based upon the estimates of witnesses as to the quantity, and there was other evidence tending to contradict the conclusions and estimates of the witnesses.—Connor v. McRae, 198 Mich. 682.

§ 74. Facts admitted or uncontested.

Necessity of direct instruction upon undisputed facts, see ante § 55.

Charging as to weight to be given admissions and declarations, see ante § 60.

¶ 454. Rulings or instructions that are based on facts or propositions conceded on the trial cannot be complained of if correct in themselves.—Kramer v. Gustin, 53 Mich. 291.

¶ 455. Where the testimony as to a certain point is undisputed, such point should not be submitted to the jury.—Gillett v. Knowles, 97 Mich. 77; Hunt v. Supreme Council of Chosen Friends, 64 Mich. 671; O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

¶ 456. It is not error for the charge to state as true a fact that was undisputed or admitted on the trial.—Wright v. Towle, 67 Mich. 255; Mooney v. York Iron Co., 82 Mich. 263.

¶ 457. When but one inference can be drawn from conceded facts the court may properly instruct the jury as to the legal effect thereof.—Harlow v. Jaseph, 183 Mich. 500.

¶ 458. In instructing the jury, the court may properly assume a fact as admitted where it has been treated as such throughout the trial.—Burt v. Long, 106 Mich. 210.

¶ 459. In an action on a fire insurance policy where the plaintiff had testified that

he had paid all his assessments as demanded by the company and did not intend to withdraw, but the secretary of the company had testified that he had been ordered to take his name from the books as he desired to withdraw, it is error to instruct the jury that the testimony was undisputed.—Schroeder v. Farmers' Mut. Fire Ins. Co., 87 Mich. 310.

¶ 460. Where the uncontradicted testimony shows the payment by plaintiff of a certain sum of money for defendant's benefit at his request, it is not error for the court to state such fact to the jury.—McDonnell v. Ford, 87 Mich. 198.

¶ 461. Where upon the testimony in a case the amount of the recovery, if plaintiff is entitled to recover at all, is a sum certain, it is not error for the court so to instruct the jury.—Ockenfells v. Moeller, 79 Mich. 314.

¶ 462. The vendor of logs having testified that it was agreed upon between the parties that a person named should scale them, and the vendee having stated in his evidence that he knew such person was scaling them and was satisfied with his doing so, the trial judge in his charge spoke of the person named as the person "agreed upon" to do the scaling. Held no error, notwithstanding the vendees had denied any distinct agreement respecting the scaling.—Mason v. Phelps, 48 Mich. 126.

¶ 463. Where, in a suit to recover for labor for which plaintiff claimed he was to receive $12 per month, defendant in his plea sets out the contract as a positive one to pay that price, and subsequently tenders plaintiff payment at that rate, the jury is properly instructed that that was the rate agreed upon, regardless of any claim that the bargain was conditioned upon plaintiff's ability to earn that amount.—Welch v. Olmstead, 90 Mich. 492.

¶ 464. Where a plaintiff so presents his claim for $7,000 in a suit for money loaned that the jury must award him that sum if they believe in the truth of his claim, an instruction to the jury to that effect is not erroneous on the ground that the amount of the verdict was forecast by the court.—Bennett v. Maurice, 162 Mich. 254.

¶ 465. It seems that, where the testimony of a witness as to a certain fact is uncontradicted, and his credit is attacked solely upon the ground that he did not testify to such fact upon a former trial, and that in the meantime he had been discharged from the employ of the party injuriously affected by his testimony, it is not substantial error for the court to treat such fact as established.—Tunnicliffe v. Bay Cities Consol. R. Co., 107 Mich. 261.

¶ 466. It is only in a case where the testimony of a witness is not only unopposed by direct evidence, but where it is not in conflict with the just and proper inferences to be drawn from other facts proved in the case, that it is proper for the court, in giving his instructions, to treat the evidence as wholly undisputed.—Schulz v. Schulz, 113 Mich. 502.

¶ 467. In a suit by plaintiff vendee to recover damages for false representation made by defendant vendor of land, there was evidence that plaintiff had paid three hundred dollars in cash and given to defendant a three hundred dollar mortgage. Defendant in his testimony stated that plaintiff did not owe him anything then, but that he guessed he could foreclose the mortgage, and also that the mortgage had not been discharged or the notes canceled. Held, the trial court properly assumed in charging the jury on the question of damages that the notes and mortgage stood as a subsisting claim against the plaintiff and the land.—Yanelli v. Littlejohn, 172 Mich. 91.

¶ 468. It is not error for the court to state to the jury as a matter of law that a demand for property was made by the plaintiff upon the defendant, where the fact of such demand is undisputed.—Opsomere v. Opsomere, 167 Mich. 636.

¶ 469. In an action for salary by an insurance agent, in which the question whether plaintiff had accounted for application fees was in issue, a statement by the court in answer to a juror's question whether there was any evidence to show that plaintiff had received, as application fees, more than he had accounted for—that that was a question for the jury to settle—that plaintiff said he took none and received no money except that testified to—was not injurious to defendant, when there was no testimony upon the subject other than that referred to by the court, or if there had been, defendant did not call attention to it.—Lee v. Huron Indemnity Union, 135 Mich. 291.

§ 75. Facts unsupported by evidence.

¶ 470. It is error for the court to state to the jury as a fact a claim of one of the parties which finds no support in the evidence.—Hart v. Firzlaff, 67 Mich. 514.

¶ 471. A charge is erroneous in assuming facts that are not in the record, or in allowing the jury to assume them.—Hood v. Olin, 68 Mich. 165.

¶ 472. In an action on a note, an instruction submitting to the jury the question as to whether the note was given on a land contract and was without consideration for the reason that the contract was abandoned because of the existence of a lease of which plaintiff had no knowledge, was error, where there was nothing to indicate that the contract was abandoned on account of the lease.—English v. Yore, 119 Mich. 444.

¶ 473. An instruction which assumes that plaintiff might have been guilty of perjury in

a former suit, there being no testimony in the record tending to show such fact, and which instructs that this may be considered on the question of credibility, is prejudicial. —Place v. Place, 139 Mich. 509.

¶ 474. In an action for personal injuries against an electric railway company, it is error to instruct that if the jury believe any of the witnesses testified under a fear of losing employment, or a desire to avoid censure, or a desire to please, they should consider that fact in determining the weight of the testimony, where there is nothing in the evidence to indicate any such motives.—Gregory v. Detroit United Ry., 138 Mich. 368.

C. UNDUE PROMINENCE OR EMPHASIS ON EVIDENCE OR WITNESSES.

§ 76. In general; singling out facts.

See also ante § 59.
By manner and style of submitting charge, see ante § 8.
Modification of request singling out evidence, see ante ¶ 145.
Necessity that instructions conform to evidence, see ante § 49.
Discretion of the court, see ante § 54.
Instructions as to weight to be given specific testimony or particular witnesses, see also ante § 58.
Charging upon weight of expert or opinion evidence, see ante § 61.
Instructing as to inferences to be drawn from evidence, see ante § 62.
Charging upon comparative weight of evidence, see ante § 67.

¶ 475. A charge ought not to give undue prominence to parts of the testimony.—People v. Colerick, 67 Mich. 362.

¶ 476. It is error for the court so to charge as to give a construction to important testimony, or undue and prejudicial prominence to testimony of a doubtful character.—Webster v. Sibley, 72 Mich. 630.

¶ 477. In action for negligently furnishing a defective hoist which broke injurying plaintiff, where the existence of the relation of master and servant between plaintiff and defendant was not necessary to the recovery by plaintiff, the repeated charge that such relation did not exist was misleading.—Piette v. Bavarian Brewing Co., 91 Mich. 605.

¶ 478. It is held not reversible error in an action for personal injuries for the court to present the facts bearing upon contributory negligence with considerable emphasis where it cannot be said that the jury did not clearly understand that they were to pass upon that question.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

¶ 479. The court should not in its instructions single out and dwell separately on disconnected portions of circumstantial evidence. —Krolik v. Lang, 187 Mich. 286.

¶ 480. The court should not instruct the jury as to the inferences to be drawn from and the weight to be given to disconnected portions of circumstantial evidence considered separate and apart from other testimony, in deciding controlling issues.—Krolik v. Lang, 187 Mich. 286.

¶ 481. It is proper to direct the jury's attention to important evidence in such terms as to explain the case and aid them to give their attention to essential points, if it is done without misleading them or withdrawing their attention from other important evidence. But when the question is one of fact, and is therefore for the jury alone, it is not error to refuse instructions singling out particular facts and expressing the opinion that if they should be proved they would decide the issue.—Beurmann v. Van Buren, 44 Mich. 496.

¶ 482. Where, in an action for an injury caused by a defective bridge, the testimony was conflicting as to whether, for a long time prior to the accident, the bridge had been out of repair at the place where the accident occurred, and there had been some repairs which it was claimed left the bridge in good condition, it was proper for the court to direct the jury's attention to the precise place in controversy, and to the disputed question whether it had been repaired at that place as bearing on notice of the defect.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 483. In an action of assumpsit to recover an unpaid balance on shoes, where the defense was that the shoes were of an inferior quality, where one witness had testified as to the worth of the shoes had they been of good workmanship and their actual worth, but there was other testimony showing the worth of the shoes, a charge as to the measure of damages based upon the testimony of the sole witness gives too much emphasis to his testimony and is therefore erroneous.—J. Richardson & Co. v. Noble, 143 Mich. 546.

¶ 484. Defendant and his father were interested in a certain corporation. Plaintiff's testator was in the personal employ of defendant's father as a bookkeeper. While so employed he kept the books of said corporation which was insolvent. In a suit against defendant to recover for services in keeping the corporation books, there was no evidence of any express contract between defendant and the testator. After performing these services for some five or six years, the testator sent a bill therefor to defendant who returned the same with the remark that the bill was erroneous in that the testator did not charge for drawing his breath and other services, and requested the testator to correct and return same. In a suit to recover for these services the trial court instructed that the only evidence of any hiring must be implied, if at all, from the letter written by defendant returning the bill, and that no im-

plication of a contract arose from the mere rendition of the services to the corporation of which defendant was an officer or from the fact that the corporation was bankrupt and the testator had not been paid by it. He explained the failure of defendant to testify on the ground that his evidence would be barred by the statute and commented to the jury on the failure of the plaintiff to produce at the trial the bill rendered and returned to the testator, but remarked that the jury were to consider as well the explanation of such course offered by plaintiff. He instructed that they must take into account the fact that after the rendition of the bill no further demand was made until some two years after, that no suit was brought in the lifetime of the testator, together with plaintiff's explanation thereof; and that if it was within the purview of the contract with the defendant's father to keep the books, the verdict must be for defendant. He erroneously stated to the jury that defendant's father held more stock in the corporation in question than defendant. The evidence was undisputed that the father had bought the stock in the corporation and given the defendant the shares which the latter held. Held, that the instructions of the court did not constitute reversible error in that they indicated the court's opinion as to the facts by emphasizing certain testimony or calling attention to the lack of it, by interpreting same or indicating the weight to be given to specific testimony.—McCain v. Smith, 172 Mich. 1.

§ 77. Emphasizing theories or claims.

Necessity that instructions present theories and claims, see ante § 44.
Charges favorable to one party's theories, see also ante § 65.
Charges intimating insufficiency of defense, see ante ¶ 429.

¶ 485. When the court attempts to state to the jury the substance of a witness's testimony, it should state that which supports the theories of both parties, and not give undue prominence to that favorable to one party only.—Banner v. Schlessinger, 109 Mich. 262.

¶ 486. Charge as to the making of a certain alleged contract between plaintiff and defendant held cautionary, only, and not calculated to exalt the contentions of either party or be prejudicial to plaintiff.—Paul v. De Carrie, 196 Mich. 434.

¶ 487. The court, on the question of whether a holder of a check took in good faith, will not give an instruction to the jury to consider certain circumstances in evidence tending to show bad faith when to do so would improperly emphasize that portion of the evidence to the jury.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

§ 78. Singling out particular witnesses.

Error in singling out witnesses nonprejudicial where instruction good as a whole, see ante § 19.
Submitting case on truth of plaintiff's testimony, see ante § 70.
Discretion of court, see ante § 54.
Refusal to single out particular witness where point covered by general charge, see post ¶ 495.
Injurious or discrediting remarks concerning witnesses, see ante § 68.
Instructions as to care in considering testimony, see post § 92.

¶ 488. The court did not err in refusing to instruct the jury that the testimony of a certain witness should be looked upon with suspicion, since the practice of singling out the testimony of one witness and laying special stress on it is not approved.—Philpott v. Kirkpatrick, 171 Mich. 495.

¶ 489. It is not proper for the trial judge to call the attention of the jury to particular testimony in such a way as to throw discredit upon it, or to lead the jury to believe that the judge discredits the witnesses or their testimony.—Wilson v. Hotchkiss's Estate, 81 Mich. 172.

¶ 490. It is improper to place a particular witness in undue prominence by charging the jury to find according to its belief in his evidence, if such charge tends to ignore other testimony; nor has the trial judge a right so to instruct the jury as manifestly to reflect upon a particular witness.—Fraser v. Haggerty, 86 Mich. 521.

¶ 491. It is within the discretion of the trial court to refuse instructions emphasizing the importance of the testimony of particular witnesses.—O'Dell v. Goff, 153 Mich. 643.

¶ 492. Though courts are properly reluctant to call attention to the testimony of particular witnesses, some instruction upon the weight of evidence is proper where the only witness who was present at the time of the transaction and testified as to what took place was contradicted, if at all, by testimony of doubtful admissibility much of which was hearsay.—Card v. Fowler, 120 Mich. 646.

¶ 493. It is not good practice to select the testimony of one of several witnesses and instruct the jury that they cannot render a verdict upon that testimony alone.—Dawson v. Falls City Boat Club, 125 Mich. 433.

¶ 494. In an action by a highway commissioner to recover damages for an encroachment on a public highway it was not error for the court to instruct the jury that the evidence of the highway commissioner should

be considered as that of any other witness.—Parkey v. Galloway, 147 Mich. 693.

¶ 495. It is not error for the court to refuse to single out a particular witness where such point has been fully covered in a general charge on the credibility of witnesses.—Silverstone v. London Assurance Corporation, 187 Mich. 333.

¶ 496. The court's refusal on request to put the case to the jury on the testimony of a single witness, or to instruct them that if they believe such a witness their verdict should be for a particular party, is not error.—Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506.

¶ 497. It is improper to put a particular witness into undue prominence by charging the jury to find according to their belief in his evidence, if such a charge tends to ignore important facts in the case.—Chase v. Buhl Iron Works, 55 Mich. 139.

¶ 498. An instruction that the testimony of a certain witness constituted in most part the evidence of a parol declaration of trust, "and it is from his evidence and all the surrounding circumstances that you must find, if you find, a declaration of trust," is erroneous as inviting the jury to think that other circumstances in the case supported his testimony, the contrary being the real evidentiary tendency of all the proven circumstances.—Botsford v. Bradfield, 141 Mich. 370.

¶ 499. In an action of trover for cattle distrained, the contention that the trial court gave undue prominence to the testimony of defendant's wife, who had shut up the cattle, and did not call attention to the fact that the testimony of an employee of plaintiff, who disputed her, was corroborated by other witnesses, held untenable, where, although the court in one part of its charge did state the claim of defendant as testified to by his wife and the claim of plaintiff as testified to by plaintiff's employee and said, "There is the testimony of the two," he later in the charge mentioned the conflict between the two witnesses, and called attention to the fact that testimony had been given by both parties tending to corroborate the testimony of each, as the charge, when considered in its entirety, was sufficient.—Spiegel v. Straw, 196 Mich. 581.

¶ 500. An instruction that "if you believe the testimony of" a named witness "to be true, and that fraud was actually perpetrated" upon plaintiff, "then it is your duty to render a verdict in favor of the city," is not open to the objection that it permits the jury to find a verdict upon the testimony of the named witness alone.—City of Battle Creek v. Haak, 139 Mich. 514.

VI. GENERAL AND CAUTIONARY INSTRUCTIONS.

Cautioning jury as to application of illustrations used in the charge, see ante § 13.
Duty of jury to follow instructions, see ante § 4.

§ 79. Instructions to veniremen.

¶ 501. It is proper for the court to caution the jurors at the beginning of the term against talking with any person about any case that is to be tried and against listening to conversations of others with regard thereto.—People v. Taylor, 93 Mich. 638.

§ 80. Definition of legal terms.

Necessity of requesting more specific instruction where desired, see ante § 22.
Comments on justice of the law in question, see post § 101.

¶ 502. "Reasonably mature" in a charge on the mentality and development of a nine-year-old girl to appreciate the dangers to be expected when riding a bicycle across a street car track is not such a term as needs to be defined.—Hine v. Bay Cities Consol. R. Co., 115 Mich. 204.

§ 81. On burden of proof.

See also ante ¶ 49; post § 82.
Construction of charge as a whole, see ante ¶ 88.
Modification of requested instruction as to burden of proving negligence, see ante § 28.
Time to request instruction as to burden of proof, see ante ¶ 125.
Instruction upon burden of proof in assault and battery erroneous as assuming issues, see ante ¶ 298.
General law as to burden of proof, see Evidence, II.
As to shifting of burden as to alteration, see Alteration of Instruments ¶ 55.

¶ 503. A charge which throws upon defendant the burden of proving that he did not make the contract sued on is erroneous.—Wildey v. Crane, 69 Mich. 17.

¶ 504. As jurors generally understand that the burden of proof is upon plaintiff in all cases, a request, where the burden shifts to the defendant, that they be instructed accordingly, should be granted.—Stevens v. Pendleton, 94 Mich. 405.

¶ 505. In an action for injury to a person crossing a defective bridge with a team it was error to charge that the fright of a team was no defense unless the jury found it was caused by something other than the defect, for that places the burden upon the defense of proving that it was something else: while in fact it was the plaintiff's duty to establish his own case and show the af-

firmative fact, if it existed, that the defect caused the fright.—Merkle v. Township of Bennington, 58 Mich. 156.

¶ 506. Where in an action for wages the court charged that plaintiff must show his right to recover by a fair preponderance of evidence—to show the work he did and what it was worth, and what understanding defendant had of the matter, and that defendant received the benefit of it—it is not error to refuse an instruction that plaintiff has the burden of establishing everything necessary to a recovery.—Bonner v. Runals, 76 Mich. 136.

¶ 507. Unless the attention of the court is called to it, judgment should not be reversed because the judge failed to instruct the jury where the burden rests.—Beath v. Chapoton, 124 Mich. 508.

¶ 508. It places an undue burden upon the plaintiff and is error to charge the jury that the law presumes that persons conduct their dealings honestly and that where a transaction will admit "either" of an honest or a dishonest construction it is the duty of the jury to accept the former, even though it be claimed that the use of "either" was a typographical error and "equally" was the word intended.—Detroit Elec. Light & Power Co. v. Applebaum, 132 Mich. 555.

¶ 509. A request to instruct that "the presumption of law is that the letter was received by the plaintiff, and the burden is upon him to show that he did not receive the letter," is properly refused where it did not also give the jury to understand that the presumption that the letter was received depends upon defendant's establishing by a preponderance of proof that they sent the letter.—Brown v. Harris, 139 Mich. 372.

¶ 510. In an action of trover to recover the value of certain live stock and farming implements seized and sold under attachment where it was alleged that the property sold had been fraudulently transferred it was not error for the court to fail to charge on the burden of proof in case the transfer had been made without consideration in the absence of a request covering the situation.—Major v. Brewster, 148 Mich. 623.

¶ 511. Where a presumption exists that rent has been paid by a plaintiff mortgagee in possession of premises, who sues in assumpsit on the debt, and the court erroneously instructs that the burden is on defendant to show that the rent remains unpaid, such error will not call for reversal where it clearly appears from other instructions that defendant has only the burden of rebutting such presumption and not the burden of showing the rent to be unpaid.—Trudeau v. Boivin, 164 Mich. 665.

¶ 512. A charge that "By the burden of proof as a legal term we understand that the party asserting a claim, the claimants in this case, must produce to the jury testimony of that weight, character and sufficiency which overcomes in the mind of each juryman any testimony opposed to it," held not reversibly erroneous, in an action against a decedent's estate.—Hampton v. Van Nest's Estate, 196 Mich. 404.

§ 82. On sufficiency and degree of proof.

See also ante ¶¶ 72, 81, 351.

Necessity of requesting desired instructions, see ante § 21.

Modification of requests to charge upon degree of proof of negligence, see ante ¶ 149.

Necessity of positive instructions upon undisputed or admitted facts, see ante §§ 55, 74.

Instructions as to degree of proof as invading jury province, see ante § 57.

Instructions as to the weight of expert or opinion evidence, see ante § 61.

Instructions upon inferences to be drawn from evidence as invading jury province, see ante § 62.

Charging upon failure of proof, see post § 96.

Effect of one part of charge on proof of fraud to correct other part which requires too much proof, see Fraud ¶ 539.

¶ 513. It is error for a court to charge a jury so as to mislead them into the belief that more stringent proof is necessary than the law requires.—Watkins v. Wallace, 19 Mich. 57.

¶ 514. It is error for the trial court to charge the jury, respecting testimony which defendant claimed showed conclusively that plaintiff did not exercise ordinary care, that such "testimony must be such as to drive you to that conclusion—to prevent your arriving at any other conclusion."—Mynning v. Detroit, Lansing & N. R. Co., 67 Mich. 677.

¶ 515. Where a civil case turns upon a charge of criminal misconduct it is not proper for the court to charge the jury that they must be "well" satisfied of the truth of the charge. A preponderance of evidence is enough; but this must overcome the presumption of innocence.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 516. Where a court instructs the jury that the plaintiff has the burden of proving his case by a preponderance of evidence, and expressly tells the jury that it has to judge of the facts, instructions telling the jury that it must be "convinced" to entitle plain-

tiff to recover are not necessarily misleading.—Davidson v. Kolb, 95 Mich. 469.

¶ 517. In an action to recover compensation due under a subcontract, requested instructions are properly refused which require the jury to be satisfied beyond a reasonable doubt.—Carpenter v. Lennane, 166 Mich. 610.

¶ 518. An instruction that plaintiff "must establish by a fair preponderance of the evidence to your satisfaction not only the negligence of the defendant" but plaintiff's freedom from contributory negligence held not erroneous because of the phrase "to your satisfaction."—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 518a. It is not error to instruct a jury in an action against a saloonkeeper and his surety by a minor child for an assault by her parent while intoxicated, that the plaintiff must establish her case by a fair preponderance of the evidence, although the testimony in her behalf was not directly contradicted.—Yonkus v. McKay, 186 Mich. 203.

§ 83. ——Preponderance rule.

General law as to preponderance of Evidence, see Evidence, X.

¶ 519. An instruction as to the establishment of a case by a fair preponderance of the evidence, held sufficient.—Murdock v. Roe, 186 Mich. 233.

¶ 520. In a civil action a request to charge that the jury is "not authorized to find, except upon clear and convincing proof," etc., is properly changed by the court so as to read "except upon a fair preponderance of proof."—Evans v. Montgomery, 95 Mich. 497.

¶ 521. It is error for the trial judge to use such qualifying words and phrases, in explaining the rule as to the preponderance of evidence, as are calculated to convey the idea that the jury must feel absolutely certain as to the facts before finding for the plaintiff.—Hoffman v. Loud, 111 Mich. 156.

¶ 522. It is not prejudicial error in a civil case to instruct that the plaintiff must satisfy the jury by a clear preponderance of the evidence where other instructions omit the word clear and it appears that the instructions taken as a whole are calculated to impress the jury with a view that only a preponderance is requisite.—Zimmerman v. Whiteley, 134 Mich. 39.

¶ 523. An instruction that the plaintiff "must have a clear preponderance of evidence" was held not prejudicial in the light of further explanation by the court, clearing away the ambiguity and pointing out that an even balance would require verdict for defendant.—Hale v. Knapp, 134 Mich. 622.

¶ 524. In a personal injury suit by a newsboy against a street railroad where it is claimed that he boarded the car to sell a newspaper to a passenger and he was compelled to jump from the running board because ordered and threatened by the conductor, it is error to refuse a request to charge that the preponderance of evidence was upon the plaintiff where no mention thereof was made to this question in the general charge.—Miller v. Detroit United Ry., 144 Mich. 1.

¶ 525. It is error to instruct the jury "that the number of witnesses has nothing to do with the case in the determination of the question of preponderance of evidence."—Dupuis v. Saginaw Valley Traction Co., 146 Mich. 151.

¶ 526. An instruction that the preponderance of evidence is not determined by the number of witnesses, is not erroneous.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 527. In an action against a township for personal injuries resulting from defendant's failure to maintain a bridge in proper repair, the proofs as to how the injury occurred not conforming to the declaration in certain details, the court instructed the jury in part that plaintiff must be held in his proofs to something approximating the statements in his declaration. Held, this was not improper, since it was followed by a statement that plaintiff must produce a preponderance of testimony sustaining his theory of the manner in which he was injured, and that any radical departure therefrom would preclude a recovery.—Hunter v. Township of Dwight, 157 Mich. 634.

¶ 528. An instruction that plaintiff in assumpsit "must prove to the jury those things which he claims against defendant by what is called preponderance of evidence, and unless he has done that he cannot recover," is proper.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 529. In an action on fire insurance policies where the defense was wilful burning by the insured, an instruction that "unless the defendant has produced proof that clearly convinces you that the plaintiff purposely caused the fire for the purpose of collecting the insurance in question, this defense has not been established," is erroneous in requiring a greater weight of proof than the ordinary preponderance of evidence.—Silverstone v. London Assur. Corporation, 176 Mich. 525.

¶ 530. While an instruction to a jury that a case must be established by a "fair preponderance" of evidence is not reversible error, it is more prudent for the trial court not to require a greater weight of proof than the ordinary preponderance of evidence.—Van Slyke v. Rooks, 181 Mich. 88.

¶ 531. In an action by a servant against his master for damages for personal injuries an instruction on preponderance of evidence to the effect that the jury should base their verdict upon the testimony they believed to be true even though it is opposed by a greater volume of testimony which they do not believe to be true, held proper.—Barkow v. Donovan Wire & Iron Co., 190 Mich. 563.

¶ 532. In an action by the administrator of the payee of promissory notes against a husband and wife as makers of such notes, in which the defense was that no consideration passed to the wife and that an agreement was made between decedent and the wife for cancellation of the notes by furnishing decedent with board and room and care, and that such notes were paid by the fulfillment of such agreement, an instruction on the preponderance of evidence that there would not have to be very much evidence to satisfy the requirement for preponderance and that if it appeared from any evidence that the wife had received the full consideration, she would be liable, held not reversibly erroneous where the evidence was sufficient to go to the jury as to the receipt by the wife of consideration for such note.—Pomeroy v. Everett, 195 Mich. 147.

¶ 533. In an action for personal injuries the refusal of instructions on preponderance of evidence on behalf of defendant is not error where the court advises the jury that, before one can recover under a claim of negligence, he must show and establish by proofs in the case the negligence of the person charged, and that it was left for the jury to determine whether or not plaintiff had shown by the "fair preponderance" of evidence that in what he did at the time of the accident he exercised that degree of care and caution that an ordinarily prudent person would under like circumstances.—McNeal v. Detroit United Ry., 198 Mich. 108.

§ 84. ——Numerical preponderance of witnesses.

See also ante ¶¶ 401, 406.

¶ 534. Where an equal number of witnesses are called on both sides in a civil case an instruction that the jury must not count witnesses is not reversibly erroneous.—Bewernitz v. Detroit, J. & C. Ry., 195 Mich. 528.

¶ 535. The preponderance of evidence of partnership is for the jury; and although it is testified to by two witnesses and denied by one, it is not error to submit the question without calling attention to such numerical preponderance.—McIntosh v. McIntosh, 79 Mich. 198.

¶ 536. A charge, defining preponderance of evidence as meaning "simply that evidence which outweighs that which is offered to oppose it," and that it does not mean that a greater number of witnesses shall be produced on one side, but that on the whole evidence the jury shall believe the greater probability to be on the one side than the other, does not mislead the jury into considering probabilities not founded on the evidence.—Strand v. Chicago & W. M. R. Co., 67 Mich. 380.

§ 85. On inference from failure to attend trial.

Inferences to be drawn from evidence, see ante § 62.

¶ 537. In an action by an assignee of a claim who has no knowledge of the facts in issue, and whose presence at the trial is immaterial, he being fully represented by attorneys in the conduct of such trial, an instruction that the jury may consider his absence during the trial is erroneous.—Hitchcock v. Davis, 87 Mich. 629.

§ 86. On inference from failure to testify.

Inferences to be drawn from evidence, see ante § 62.

Comments upon conduct of litigant taking advantage of privilege, see post § 102.

General law of presumptions, see Evidence, II.

¶ 538. The presence of a defendant at the trial of a suit involving his alleged fraudulent representations as to his financial condition, which charge he was at liberty to refute by his own testimony if untrue, and did not do so, is a fact patent to the jury, and an instruction by the court that plaintiffs were entitled to this circumstance in their favor is not erroneous.—Mooney v. Davis, 75 Mich. 188.

¶ 539. In a will contest, a requested instruction that no unfavorable inferences should be drawn from the failure of the husband of proponent to testify held properly refused, where the husband was charged as being a party in influencing the testatrix in making a new will in favor of his wife, and he was present at many of the conversations with deceased, knew all about her condition, got possession of her personal effects, and was present during the trial of the case.—Anderson v. Kendrick, 199 Mich. 240, In re Hewitt's Estate, Id.

¶ 540. It is not strictly accurate to charge the jury that they might give "such weight as you see fit" to defendant's failure to take

the stand in his own behalf, but in connection with a charge placing the burden upon plaintiff of establishing "the claim he asserts by a fair preponderance of the evidence," such statement could not mislead the jury.—McDonald v. Smith, 139 Mich. 211.

¶ 541. A charge permitted the jury to draw unfavorable inferences against the defendant for failing to testify as a witness in explanation of material transactions, if they believed them to be within his knowledge; held unobjectionable.—Blackwood v. Brown, 29 Mich. 483.

§ 87. On inference from failure to produce witnesses or evidence.

Inferences to be drawn from evidence, see ante § 62.
General law as to presumptions, see Evidence, II.

¶ 542. In an action for personal injuries, a defendant is entitled to have a jury instructed that the failure to call the physician who had examined the plaintiff may be given such weight as they see fit.—Vergin v. City of Saginaw, 125 Mich. 499.

¶ 543. The failure of the plaintiff to produce an available material witness warrants an instruction that such fact may be considered by the jury as a presumption that his testimony would be unfavorable to the plaintiff.—Dowagiac Mfg. Co. v. Schneider, 181 Mich. 538.

¶ 544. In an action to recover damages for personal injuries, where plaintiff was attended after the accident by two physicians, one of whom was his family physician, who was not called by plaintiff to testify, nor his deposition taken, he being absent from the city at the time of trial, an instruction that the jury might consider whether or not plaintiff knew such physician was going to be absent and that a presumption would arise from the unexplained absence of the testimony of such physician that if produced it would be adverse and the jury might so consider it, held proper.—Griggs v. Saginaw & F. Ry. Co., 100 Mich. 258.

¶ 545. It is not prejudicial error to instruct in regard to the failure to produce a material witness as follows: "and I say to you that unless you find as a fact in this case that the defendant had some reason for not procuring the witness, and even if they had, that the plaintiff has just as much right to call him as the defense, and you shall not infer anything against the defense in this case, by reason of their omission to call him as a witness. He is not a party to the case and the plaintiff had the same right to call him as the defendant."—Noble v. Bessemer Steamship Co., 127 Mich. 108.

§ 88. On interest of parties.

¶ 546. The trial court should avoid calling attention to the interest of parties on one side.—Seitz v. Starks, 144 Mich. 448.

¶ 547. A charge which allows the jury to infer unwarrantably that plaintiff is interested in negotiations of a third party concerning the subject of the suit savoring of trickery is error.—Ross v. Houghton, 54 Mich. 337.

§ 89. On credibility and impeachment of witnesses.

See also ante § 66.
Charges reflecting upon or discrediting witnesses, see ante § 68.
Instructions singling out particular witnesses, see ante § 78.
Correcting improper statements of counsel as to credibility of witnesses, see post ¶ 593.
Restricting impeaching testimony to purpose for which admitted, see post ¶ 576.
Cautioning against prejudice against corporations, see post § 100.
General law as to credibility, impeachment and corroboration of witnesses, see Witnesses, VI.

¶ 548. In an action for personal injuries an instruction that the jury should consider the interest, bias and prejudice of the witnesses, held as applicable in a case where witnesses for a defendant railroad company have testified as in any other.—Foley v. Detroit & M. Ry. Co., 193 Mich. 233.

¶ 549. Where a party has sought to impeach a witness by exhibiting on cross-examination the improbabilities of his story, or by conduct inconsistent therewith, or by showing statements made by him inconsistent with his testimony, as well as by direct testimony affecting his reputation for veracity, it is error to instruct the jury that if, after considering the testimony of the impeaching witnesses, and of those brought to contradict them, they do not believe that the general reputation of the witness in the community is that of an untruthful man, they should dismiss the whole subject from their minds. The credit to be given to a witness depends upon a consideration of the entire testimony on that subject.—Michigan Pipe Co. v. North British & Mercantile Ins. Co., 97 Mich. 493.

¶ 550. The fact that a witness testifies to matters to which he did not testify when sworn upon a former trial of the case does not call for an instruction cautioning the jury as to his credibility, where he explains that he was not questioned regarding such matters upon the previous trial.—Reiser v. Portere, 106 Mich. 102.

¶ 551. An instruction that in weighing the testimony of witnesses their interest might be considered, coupled with caution against drawing an unfair inference based upon the fact that the witnesses were in defendant's

employ, does not invade the province of the jury.—Lovely v. Grand Rapids & I. Ry. Co., 137 Mich. 653.

¶ 552. In suit upon an attorney's claim assigned to plaintiff by the attorney's administratrix, a son-in-law of the attorney took a very prominent part, and testified that he had agreed to assist plaintiff in collecting the claim; though on cross-examination he denied that he or his wife had any interest in the suit. Held, that an instruction that it was for the jury to say whether he had any interest in the claim, or why, if he had no interest, he should take such a prominent part in the proceedings, was not erroneous.—Hitchcock v. Davis, 87 Mich. 629.

¶ 553. Where a witness's interest has been referred to by counsel in his argument to the jury, it is not error for the court to instruct the jury that if the interest or employment of such witness has impaired or biased his judgment, that fact may be considered in weighing his testimony.—McDonell v. Rifle Boom Co., 71 Mich. 61.

¶ 554. A court has no right to instruct a jury, or suggest to them, that servants or agents of a party, who are called as witnesses, have any such interest as affects their testimony.—Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51.

¶ 555. Where counsel in arguing the case to the jury has commented upon the interest of witnesses, it is not error for the court to instruct the jury that if the interest or employment of a witness has biased his judgment they may consider that fact in weighing his testimony.—McDonell v. Rifle Boom Co., 71 Mich. 61.

§ 90. ——Conviction of crime as affecting credibility.

¶ 556. Where a witness is shown to have been convicted of crime, it is proper for the court to instruct the jury that they may take that fact into consideration in determining his credibility.—Conkey v. Carpenter, 106 Mich. 1.

§ 91. ——Effect of false testimony.

¶ 557. An instruction that if the jury find that a party has wilfully sworn falsely as to a material fact, and they should be of opinion that such wilful false swearing rendered him incredible in the whole, they would have a right to disregard his entire testimony, is not erroneous.—O'Rourke v. O'Rourke, 43 Mich. 58.

¶ 558. A charge to the effect that if a witness swears to a matter that is wilfully false the jury need not believe anything he says is not error.—Hillman v. Schwenk, 68 Mich. 293.

¶ 559. It is proper to instruct the jury that if a party has testified falsely as to a material fact her testimony may be disregarded entirely, and that it "might" be the jury's duty to disregard it unless supported by other testimony as correct; the jury not being compelled to disregard such testimony.—Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77; Hillman v. Schwenk, 68 Mich. 293.

¶ 560. An instruction that, if the jury find that any witness has testified falsely as to any material fact in the case, it is at liberty to reject all of his testimony, sufficiently states the law upon the subject, and it is not error to refuse to give a request applying such rule to a particular witness, and challenging the attention of the jury to particular portions of his testimony, which the request assumes as false.—Fraser v. Haggerty, 86 Mich. 521.

¶ 561. A request for an instruction that, if the jury should believe that plaintiff testified falsely on any material point, they might consider that fact in weighing the rest of his testimony, is covered by a general instruction to the effect that, if any of the witnesses testified falsely in any particular, the jury should consider that fact, and weigh the testimony as to that as they would any other fact in the case.—Whitaker v. Engle, 111 Mich. 205.

¶ 562. Defendant is not entitled, as an absolute right, to an instruction that, if the jury finds that plaintiff has knowingly misrepresented and exaggerated the extent of the injuries for which she sues, it may disregard her testimony on the manner of the accident; especially where testimony is fully corroborated as to the manner of it.—Heddle v. City Electric R. Co., 112 Mich. 547.

¶ 563. It is the jury's province to determine ultimately the credit to be given to a witness who has knowingly falsified or exaggerated as to certain facts. Whether the entire testimony of the witness is to be excluded depends upon the consideration of other questions, among which is that of whether the testimony is or is not corroborated by other witnesses.—Heddle v. City Electric R. Co., 112 Mich. 547.

¶ 564. A requested instruction that "If you believe that in any part of his testimony any witness has sworn falsely or erroneously, you are entitled to disregard all his evidence," is properly refused since it leaves out the question of materiality and includes "erroneously" which is not the law.—Gerardo v. Brush, 120 Mich. 405.

¶ 565. An instruction as to disregarding plaintiff's testimony if in any matter he has testified falsely and which is silent on the question of corroboration, is faulty in that it disregards the fact that, to have such effect, the testimony must be material and also intentionally or wilfully false and the further fact that if it is corroborated on material points such fact should be considered.—Gerardo v. Brush, 120 Mich. 405.

¶ 566. One who sued in justice's court upon a claim which he swore to be $65, swore to it on appeal as for $103.79. The court refused to charge that the variation should weigh with the jury against the good faith of the claim; but he said that plaintiff explained it as a mistake due to his not having his account books with him. There was no such explanation in the plaintiff's sworn testimony. Held, material error.—Sinclair v. Hathaway, 57 Mich. 60.

¶ 567. An instruction requested by plaintiff that if defendant testified falsely in material particulars the jury might disregard her testimony entirely is properly modified by omitting the particulars.—Fraser v. Haggerty, 86 Mich. 521.

¶ 568. Where a defendant requests a charge that if the jury find a witness is telling an untruth about any point, they may disregard his entire testimony, the court properly qualified this by adding "except it be corroborated by other testimony."—Malinowski v. Detroit United Ry. Co., 154 Mich. 104.

¶ 569. A requested instruction to direct the jury to disregard the entire testimony of a witness if found to have sworn falsely in any part is properly refused, in that it omits to charge that the witness must have intentionally so falsified.—Rawlings v. Clyde Plank & Macadamized Road Co., 158 Mich. 143.

¶ 570. A requested instruction is proper which states that where a witness knowingly testifies falsely on a material matter, his entire evidence may be disregarded unless corroborated.—Ketchum v. Fillingham, 162 Mich. 704.

§ 92. Charging as to care in considering testimony.

¶ 571. Where witnesses disagree it is proper to caution the jury concerning the care to be used in considering the testimony. —Johnson v. McKee, 27 Mich. 471.

¶ 572. Cautions to the jury against the testimony of witnesses should be carefully guarded.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

§ 93. Consideration of evidence as a whole.

¶ 573. Where there was a conflict of testimony as to whether an agent had power to contract, or whether the other party had reason to rely on such power, it was proper to call the attention of the jury to any of the bearings of the case as throwing light on the probabilities.—Corbin v. Sage, 44 Mich. 142.

§ 94. Against giving evidence undue weight or importance.

Charges upon weight and effect of evidence as invading jury province, see ante § 58.

¶ 574. Instructions to the jury are not to to be limited to the mere laying down of abstract principles of law; it is proper to direct the minds of the jury to the legal bearing of the facts, and caution them, if needful, against giving undue importance to unimportant things.—Welch v. Ware, 32 Mich. 77.

§ 95. Restricting use of evidence inadmissible for some purposes.

See also ante ¶ 368.

Caution as to nature of books of account used by witness to refresh memory, see also Evidence ¶ 2673.

¶ 575. Where evidence competent for one purpose, but incompetent for another, is admitted in a jury case, an instruction should be given as to what extent and for what purpose it may be taken into consideration.— Whittemore v. Walter, 193 Mich. 365.

¶ 576. It is the duty of the court to instruct the jury not to consider testimony of what a servant of defendant said narratively about the accident and subsequent thereto as probative of the facts, where such testimony was admitted for the purpose of impeachment of such servant's testimony on the trial.—Catlin v. Michigan Cent. R. Co., 66 Mich. 358.

¶ 577. Books of account admitted to show that an item was charged are sufficiently guarded by a charge that the books are memoranda from which the party offering them may refresh his memory in testifying.—Lester v. Thompson, 91 Mich. 245.

¶ 578. Where, on the cross-examination of a witness for plaintiff, defendant is permitted to show statements made in his own interest in order to place the entire conversation before the jury, it is not error to instruct the jury that they cannot consider such statements as evidence of the facts therein stated. Eldredge v. Sherman, 79 Mich. 484.

¶ 579. Where testimony that tends to prove a fact which is inadmissible is admitted for another purpose, the court should carefully caution as to the purpose for which it is admitted, and when this is done the jury must be presumed to have acted in accordance with the instructions.—Dalton v. Dregge, 99 Mich. 250.

¶ 580. It cannot be complained that certain items in a bill of particulars were wrongfully submitted to the jury where the jury was instructed as to the items which it might consider, and the items complained of were not included.—Mott v. Penoyar, 153 Mich. 273.

¶ 581. In an action for personal injuries sustained by being thrown down an elevator shaft where it was contended on the part of the plaintiff that the elevator door had been negligently left open when the elevator

was at another floor, but the defendant contended that the plaintiff had himself opened the door, that he knew how and that he had on previous occasions done so, an instruction limiting the evidence that plaintiff had on prior occasions opened the door to the impeachment of his credibility where he had denied such acts was too restrictive, because the jury might reason that if he was untruthful in his declaration as to knowing how to open the door he was also untruthful when he testified that he did not open the door on the occasion when he was injured, and the jury should have been allowed to use the testimony for the purpose of supporting an inference that he did in fact open the door on the occasion that he was injured.—Pascieszny v. Boydell Bros. White Lead & Color Co., 146 Mich. 223.

¶ 582. In a husband's action to recover for the loss of the services and society of his wife injured while alighting from defendant's car, she was sworn as plaintiff's witness without objection to her mental incompetency to testify, and the question was not raised while she was testifying, but during the trial defendant introduced testimony on the subject. The court instructed the jury that the latter testimony was received for the purpose of allowing the jury to judge how long plaintiff might be deprived of the society of his wife, or of her labor as a wife, in the discharge of her domestic duties, and for no other purpose; that they were at liberty to investigate all the proof offered on the subject; that, if they should find that at the time of giving her testimony the wife was without sufficient mental capacity to understand what was going on, they were not at liberty to consider her testimony at all, but if they should conclude that she was sane, and capable of knowing what she was doing, and saying, and of remembering what transpired at the time of the accident, they should consider her testimony, and might also consider it in connection with the permanent character of the injury, and in weighing the testimony of the expert witnesses in the case, who, as the evidence tended to show, had testified on a previous occasion that the wife would be permanently insane. Held correct.—Bowdle v. Detroit St. R. Co., 103 Mich. 272.

§ 96. Charging upon want of evidence.

See also post ¶ 592.

¶ 583. Where there is a total want of evidence upon any essential point, the jury should be distinctly so charged.—Scripps v. Reilly, 38 Mich. 10.

¶ 584. Where the testimony in a cause fails to make a case of liability against the defendant within the issue, it is the duty of the court to so instruct the jury.—Grand Trunk R. Co. v. Nichol, 18 Mich. 170.

¶ 585. Where there is no evidence tending to show any defense to plaintiff's claim, and plaintiff's evidence is uncontradicted, the jury should be instructed that if they believe plaintiff's evidence they should find a verdict in his favor.—Roberts v. Field, 27 Mich. 337.

¶ 586. A charge to the jury in an ejectment suit "that the plaintiffs cannot recover in the action because the evidence does not show any right to recover the possession of any share, interest or portion of the premises, at the commencement of the suit," takes the whole case away from the jury, and can only be sustained where there is no evidence whatever tending to make out a case for plaintiffs.—Dubois v. Campau, 24 Mich. 360.

¶ 587. A trial judge has a right to direct the jury's attention to any essential point in the case which he thinks the plaintiff has given no evidence fairly tending to prove; and he may advise them to render verdict accordingly.—De Mill v. Moffat, 45 Mich. 410.

§ 97. Allowing jurymen to apply their general experience and knowledge.

Necessity that instructions conform to evidence, see ante § 49.

¶ 588. A charge which directs the jury to apply to the testimony and the facts, their own general intelligence and knowledge of affairs is not objectionable as allowing the jury to resort to any knowledge peculiar to any of them of material facts.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15.

¶ 589. In an action for damages caused by defendant's negligence in not providing his vessel with a fire-screen for its smokestack, as required by statute, an instruction that the jurymen, in determining whether the use of such screen would have prevented the fire, may act upon their own judgment, experience, and knowledge, instead of confining them to the evidence, is erroneous.—Burrows v. Delta Transp. Co., 106 Mich. 582.

¶ 590. An instruction in an action for personal injuries caused by an automobile running into an excavation in the street, which allows the personal knowledge of the jurors to have the weight of evidence, and which contemplates not only their determination as to the use of the street from their personal observation but also the character of the ordinances relating thereto is erroneous.—Karrer v. City of Detroit, 142 Mich. 331.

§ 98. Correcting improper arguments.

General law as to arguments, see Argument of Counsel.

¶ 591. Where counsel for both sides use improper language in the course of the trial, the court adopts the proper course by charging the jury to ignore it.—Miller v. Prussian Nat. Ins. Co., 158 Mich. 402.

¶ 592. Where counsel bases an argument to the jury upon a state of facts unsupported by the testimony, it is error to refuse to instruct the jury that no such facts have been proved, when requested by the opposing counsel at the close of such argument.—O'Callaghan v. Boeing, 72 Mich. 669.

¶ 593. Statements of counsel not sworn as witnesses, to the effect that, from their acquaintance with one of the adverse witnesses, they believe certain things concerning his character, which, if true, would tend to discredit his testimony, are properly pointed out by the court, in his instructions to the jury, as being without weight in the case.—Van Alstine v. Kaniecki, 109 Mich. 318.

¶ 594. An instruction to the jury that they should not take as true anything that the attorneys have stated as to what the evidence is, is not erroneous, where it explained by a further statement to mean that they are to be governed by the testimony of the case, not by what counsel say the evidence is.—Dalm v. Bryant Paper Co., 157 Mich. 550.

¶ 595. An instruction telling the jury to disregard all statements of counsel that might perhaps result in influencing them or might have been designed to influence them is not error when taken in conjunction with what precedes and follows it, requiring the verdict to be based on the evidence.—Neely v. Detroit Sugar Co., 138 Mich. 469.

§ 99. Expressions or admonitions as to sympathy.

¶ 596. In a suit for alienation of affections a statement by the court in his charge that the case has appealed strongly to his sympathies, but that the jury should not be influenced by sympathy, does not constitute error where there is nothing to indicate on which side the sympathy of the court lies.—Gornetzky v. Gornetzky, 174 Mich. 492.

¶ 597. In an action for damages on account of the death of a servant from the kick of a vicious mule, an instruction that the appearance of the father and mother at the trial, the "unfortunate accident," and other matters would appeal to the jury's sympathy, and that the court would not have them "cast it aside," but that the jury must govern such sympathy by their oaths, reason, judgment and charge of the court, held fair to the defendant.—Robbins v. Magoon & Kimball Co., 193 Mich. 200.

¶ 598. In answer to a request to charge that the jury had no right to be governed by or act upon their sympathies it was held not error to charge as follows: "You have no right to act upon your sympathies without any proof; but if the proof happened to concur with your sympathies you are not to disregard the proof because of that fact; you are to be governed by the proof in the case."—Sheahan v. Barry, 27 Mich. 217.

§ 100. ——As to prejudice against corporations.

Cautionary instructions as to sympathy, see ante § 99.

¶ 599. In an action against a railroad company to caution the jury against a popular prejudice against railroads is not improper especially where such caution is coupled with an injunction to be impartial and to decide justly.—Cornell v. Manistee & N. E. R. Co., 117 Mich. 238.

¶ 600. It was not error in an action against a railroad company for injuries to refuse to charge the jury that they had no right to disregard the testimony of any of defendant's witnesses through caprice or without cause, merely for the reason that they are in the employ of a railroad company, where there was nothing in the record to show that the jury did disregard the testimony of any of the witnesses, and where the court charged the jury to give such credit to the testimony of each witness as, under all the circumstances, such witness seemed entitled to, and that it was their duty to try and decide the case precisely the same as they would if it were a suit between two individuals.—Hintz v. Michigan Cent. R. Co., 140 Mich. 565.

§ 101. Comments on justice or policy of law.

¶ 601. A trial judge may as well dispense with adverse comments to the jury on the justice of the law as expounded by him.—Stebbins v. Township of Keene, 55 Mich. 552.

§ 102. Adverse comments as to conduct of litigants.

¶ 602. A judge has no right to comment adversely before the jury upon the conduct of a litigant in taking the benefit of a statutory privilege—such as the rule which excludes the testimony of a party as to facts known equally to a deceased opponent.—Ludlow v. Pearl's Estate, 55 Mich. 312.

¶ 603. The court has no right to suggest to the jury that inferences may be drawn unfavorable to a party in consequence of his claiming a legal exemption when testifying.—Carne v. Litchfield, 2 Mich. 340.

§ 103. On damages and measure of recovery.

The necessity and propriety of instructions on damages and the accuracy and correctness of particular instructions are treated in Damages, XII, B. Where the subject of damages was merely incidental and the instruction was questioned for some principle general to all instructions, the matter has been treated in appropriate places elsewhere in Instructions.

Necessity of requesting charges as to damages, see ante § 21.
Refusal of instruction as to health of plaintiff suing for personal injury, see ante ¶ 172.
Sufficiency of instruction as to damages when construed as a whole, see ante § 19.
Charges assuming undisputed facts, see ante ¶ 467.
Instructions as to what damages will carry costs, see post § 104.

§ 104. On right to costs.

General law as to costs, see Costs.

¶ 604. It is not erroneous for a court to inform the jury in an action of tort what amount of damages will carry costs.—Steketee v. Kimm, 48 Mich. 322.

¶ 605. It is improper to instruct the jury that the plaintiff will not be allowed costs unless they render a verdict of at least $100.—Phillips v. U. S. Benevolent Soc., 120 Mich. 142; Johnson v. Henry, 127 Mich. 548.

§ 105. As to agreeing upon verdict.

Charging as to care in considering testimony, see ante § 92.

¶ 606. A charge on captious doubts and stubbornness against the honest opinions of other jurors taken as a whole, held not open to the criticism that it had a tendency to deter jurymen from enforcing their ideas, or adhering to their honest opinions, if they found themselves in the minority.—Mead v. Harris, 101 Mich. 585.

¶ 607. An instruction that tends to censure jurors for not yielding to the majority is erroneous.—Stoudt v. Shepherd, 73 Mich. 588, per Campbell, J.

¶ 608. It is not reversible error to refuse to instruct, in an action for personal injuries, that "In this case it is the duty of the jury to consider the testimony and in cases of difference of opinion, to reconcile such differences, if they are able to do so. But in order to do so, no individual is required to surrender his individual opinion, and this is as true as to the amount of damages as well as any other question," where the court did instruct that they should "consider the evidence and all the facts, and reach a verdict if you can, such as shall hereafter satisfy your individual consciences," and it appeared that the jury had served some time during the term, since it is presumed that jurors know that no juror should find a verdict not based on his own convictions derived from the whole case.—Shaller v. Detroit United Ry., 139 Mich. 171.

¶ 609. A statement that the case has been once tried, that the amount involved is not large, and that neither the parties nor county can afford to have the parties litigate forever, coupled with a wish that the jury may be able to arrive at a conclusion and settle the facts in the case, is simply an admonition to agree, which the court may properly make.—Kelly v. Emery, 75 Mich. 147.

§ 106. As to considering and answering special interrogatories.

¶ 610. It is error for the court to tell the jury that having found a general verdict they were bound to answer the special questions submitted in harmony therewith.—Mechanics' Bank of Detroit v. Barnes, 86 Mich. 632.

¶ 611. An instruction that the jury must answer a specific question is not prejudicial error, where the required answer is not indicated or suggested.—Stevens v. Beardsley, 134 Mich. 506.

¶ 612. The action of the court upon submitting special questions to the jury in stating to the jury in its charge that it would be necessary for them to agree upon each answer to the questions the same as they would agree in their verdict, held not error.—Jackson v. Haverford Cycle Co., 194 Mich. 286.

¶ 612a. In an action on a liquor bond under the Civil Damage Act, Comp. L. 1897, § 5398, How., 2nd Ed., § 5074, in which the main question was whether deceased was intoxicated at the time he met his death by fire in jail personally set, an instruction that the answer of the jury to the special question whether deceased was intoxicated at the time he met his death must be in harmony with the general verdict and advising them what their answer should be under certain circumstances, held erroneous.—Taylor v. Davarn, 191 Mich. 243.

VII. DELIVERY TO JURY, AND ADDITIONAL INSTRUCTIONS.

§ 107. In general; prefatory remarks and statements.

Style and manner of charge, see ante § 8.
Time to request instructions, see ante § 23.
Remarks made on refusing requested instructions, see ante § 41.
Charges reflecting upon or discrediting witnesses, see ante § 68.
Commenting on fact of former trials or testimony, see ante § 71.
Remarks as to testimony of witnesses as to handwriting, see ante ¶ 376.
Comments on justice of law in question, see ante § 101.
Comments as to conduct of litigants, see ante § 102.
Objections to additional instructions, see post § 112.
Provisions as to reading and filing instructions, see Comp. L. 1915, § 14575.

¶ 613. It cannot be said that instructions are not given and that the jury would not

so understand them because they were prefaced by the remarks "counsel handed me some requests as stating provisions of law by which you should be guided in determining your verdict."—Noble v. Bessemer Steamship Co., 127 Mich. 108.

§ 108. Order in which instructions given.

Repetition of instructions, see ante § 15.
Time to request instructions, see ante § 23.

¶ 614. A defendant has no absolute right to have the instructions preferred by him reserved until after those proposed by the plaintiff have been passed upon, the matter being entirely within the discretion of the court.—Shaw v. Township of Saline, 113 Mich. 342.

§ 109. Additional instructions.

Necessity for instructions in general, see ante § 1.
Inaccurate or ambiguous instructions, see ante § 17.

¶ 615. Where a jury returns for additional instructions, it is not error to repeat the substance of a charge already given.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 616. Where the subject-matter inquired of by a juror for instruction was already covered by the charge, refusal to re-read or repeat the charge held not error.—Long v. Township of Weare, 195 Mich. 706.

§ 110. ——Presence and consent of counsel.

¶ 617. It is error for the court to enter the jury room and give instructions to the jury in the absence of counsel and of the court stenographer.—Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

¶ 618. It is error to send to the jury room, without consent of counsel, an answer to a written question propounded by the jurors after they have retired.—Hopkins v. Bishop, 91 Mich. 328.

¶ 619. It is not error for the court to recall the jury for further instructions though these are given in the absence of the parties or their counsel.—National Life & Trust Co. v. Omans, 137 Mich. 365.

VIII. OBJECTIONS AND EXCEPTIONS.

As proper matter to be included in bill or case on error, see Appeal § 101.
Assigning error in charge, see Appeal § 205.
Assigning error in instructions for review, see Appeal, VI, E.
Assigning error without exceptions, see Appeal § 197; Saving Questions for Review.
Showing in the record for review of instructions or disposal of requests, see Appeal § 185.
Requests not covered by instructions deemed refused, see Jud. Act, chap. XVIII, § 59, Comp. L. 1915, § 12631.

§ 111. In general; time and manner of objecting.

[Note. The practice necessary to preserve for review in the supreme court such errors as are claimed is treated in Saving Questions for Review. See that topic.]
Necessity that instructions be requested, see ante § 21.
Sufficiency of instruction ascertained from considering it as a whole, see ante § 19.
Predicating error on isolated portions of charge, see ante § 20.

¶ 620. The statutory right to have a charge reduced to writing is waived if the point is not raised until after the jury has gone out.—Garton v. Union City Nat. Bank, 84 Mich. 279.

¶ 621. A jury was instructed that their answers to special questions must conform to their general verdict or they would overrule it. Held, that if this was misleading as giving the general verdict precedence, it was too late to object to it after the jury had retired and when the judge could not correct it.—Maclean v. Scripps, 52 Mich. 214.

¶ 622. Where the court in submitting the plaintiff's requests remarked that they were to be treated in every respect as if furnished and prepared by the court, and in submitting the defendant's requests said "I give you the following requests prepared and submitted by the defendant," if the latter's counsel thought that the jury were likely to be misled by the difference in verbiage the court's attention should have been called thereto before the jury retired.—Davis v. Michigan Cent. R. Co., 147 Mich. 479.

¶ 623. In a suit to recover a commission for the sale of real estate, the court stated to the jury that, under the undisputed evidence in the case, plaintiff had the right to secure a purchaser for the land, and, in case of a sale through his procurement, he was entitled to a stated commission on the selling price. Held, that, if the statement of the court was incorrect, it was the duty of defendant's counsel then and there, before the case was finally submitted to the jury, to direct the attention of the court to the fact, and, not having done so, it must be presumed that the court was correct, and counsel cannot afterwards be permitted to contend otherwise.—Wood v. Wells, 103 Mich. 320.

§ 112. Objection to additional instructions.

Giving additional instructions, see ante § 107.

¶ 624. Where the judge, in the absence of all counsel writes an instruction in answer to a question in writing by the jury as to the effect of contributory negligence, and subsequently before reception of verdict and with both counsel in court informs them of such action, the failure to object thereto before verdict is rendered waives any error.—Le Beau v. Telephone & T. Const. Co., 109 Mich. 302.

INSUBORDINATION to INSURABLE INTERESTS
Cross-References.
Insubordination—
Ground for discharge of servant, see Master and Servant, II.
Insulators—
Actionable neglect to insulate electric wires, see Electricity § 4 et seq.; Master and Servant, III; Street Railways, IV.
Insults—
Words of insult as libel or slander, see Libel, II.
Duty of carrier to protect passengers from attack or insult, see Carriers § 187.
Insulting or intimidating witnesses as error, see Trial, V; Indictment § 393.
Insurable Interests—
See Insurance, IV; Fraternal Associations § 30.

INSURANCE.

TREATS of the general law of insurance and contracts of insurance except insurance among members of fraternal beneficiary associations (see Fraternal Associations). The law of corporations and agency except as peculiar to insurance corporations and agents is treated in Corporations and Agency respectively.

I. PUBLIC REGULATIONS AND LICENSING (§§ 1-7).
II. INSURANCE CORPORATIONS AND UNDERWRITERS (§§ 8-17).
III. AGENTS, BROKERS AND SOLICITORS (§§ 18-34).
IV. INSURABLE SUBJECTS AND INTERESTS THEREIN (§§ 35-45).
V. APPLICATION AND CONTRACT OR POLICY IN GENERAL (§§ 46-72).
VI. PREMIUMS, ASSESSMENTS OR OTHER CONSIDERATION (§§ 73-95).
VII. PROPERTY, LIFE OR INTEREST COVERED, AND RISK OR HAZARD INSURED AGAINST (§§ 96-103).
VIII. WARRANTIES, CONDITIONS AND REPRESENTATIONS (§§ 104-109).
IX. THE BENEFICIARY OR INSURED, AND CHANGES OF SAME (§§ 110-116).
X. CHANGES AND SUBSTITUTIONS IN SUBJECT-MATTER, POLICY OR RIGHTS (§§ 117-118).
XI. ASSIGNMENT OR TRANSFER OF POLICY (§§ 119-127).
XII. RESCISSION AND CANCELLATION, FORFEITURE AND AVOIDANCE (§§ 128-213).
XIII. REINSURANCE AND CONCURRENT INSURANCE (§§ 214-217).
XIV. AMOUNT OF INSURANCE, EXTENT OF LOSS AND ABANDONMENT TO INSURER (§§ 218-227).
XV. NOTICE AND PROOFS OF LOSS, DEATH OR CASUALTY (§§ 228-244).
XVI. ADJUSTMENT OF LOSS OR BENEFITS PAYABLE (§§ 245-256).
XVII. PAYMENT AND DISTRIBUTION OF MONEY AMONG CLAIMANTS (§§ 257-260).
XVIII. DISCHARGE BY RESTORATION OR OTHERWISE THAN IN MONEY (§ 261).
XIX. SUBROGATION AND OTHER RIGHTS OF INSURER (§§ 262-263).
XX. ACTIONS ON POLICY OR UNDER IT (§§ 264-350).

Analysis.

I. Public regulations and licensing.

§ 1. In general.
§ 2. Power and jurisdiction of insurance commissioner.
§ 3. Licenses and renewals and denial or revocation of license.
§ 4. Anti-rebate laws.
§ 5. Anti-coinsurance act.
§ 6. Mutual and co-operative associations.
§ 7. Regulation and licensing of foreign companies.

II. Insurance corporations and underwriters.

A. IN GENERAL.

§ 8. Who may act as insurers.
§ 9. Corporate rights, powers, liabilities and limitations.

§ 10. Mutual and co-operative associations and companies.
§ 11. ——Rights and liabilities of members, directors and officers.
§ 12. Receivership and proceedings for winding up business.

B. Foreign Insurers.

§ 13. Right to do business in general.
§ 14. Want of license or permit as defense or disability.

C. Capital or Deposit Fund, Surplus, Reserves and Interests in Same.

§ 15. In general.
§ 16. Distributive shares in reserve.
§ 17. Mutual or co-operative associations and companies.

III. Agents, brokers and solicitors.

§ 18. In general.
§ 19. Who are agents.
§ 20. Representation of insurer or insured.
§ 21. ——Insurance adjusters.
§ 22. Appointment of agents.
§ 23. Authority during negotiations of contract.
§ 24. ——Extension of credit.
§ 25. ——Modifications, indorsements and renewals.
§ 26. Limitations on authority.
§ 27. ——Provisions in policy limiting authority.
§ 28. Authority to insure own property.
§ 29. Effect of notice to or knowledge of agent.
§ 30. Estoppel to deny or assert agent's authority.
§ 31. Personal liability of agent to insured or applicant.
§ 32. Compensation of agents.
§ 33. Actions by and against agents.
§ 34. ——Presumptions and evidence.

IV. Insurable subjects and interests therein.

§ 35. In general; necessity of subject and interest therein.
§ 36. Interest in property.
§ 37. Persons in particular status, right or relation.
§ 38. ——Husband or wife.
§ 39. ——Parties to executory or conditional sales.
§ 40. ——Vendors or purchasers of realty.
§ 41. ——Mortgagees, mortgagors or foreclosure purchasers.
§ 42. ——Partnership interests.
§ 43. ——Agents, bailees, carriers and persons in possession.
§ 44. Interest in life, accident or casualty.
§ 45. Insurance after loss.

V. Application and contract or policy in general.

§ 46. In general.
§ 47. Requisites and sufficiency of application.
§ 48. ——Construction of questions and answers.
§ 49. Necessity and sufficiency of delivery.
§ 50. ——Acceptance of policy.
§ 51. Form and requisites of contract; oral contracts and binding slips.
§ 52. Designation or name of insured.

§ 53. Description of risk, subject, amount and liabilities for assessment or premium.
§ 54. Insurance "as interest may appear" and persons in secondary right.
§ 55. Conditional contracts for insurance.
§ 56. Memorandum or application as contract pending issuance of policy.
§ 57. ——Liability implied from acceptance of premium.
§ 58. Standard form of policy and statutory requirements.
§ 59. Application as part of policy contract.
§ 60. Incorporation of other instruments by reference.
§ 61. Matter contained in attached riders or on margin.
§ 62. Charter and by-laws of mutual associations as part of contract.
§ 63. By-law and charter amendments after issuance of policy.
§ 64. Variance of policy from application.
§ 65. Construction and interpretation of policy or contract.
§ 66. ——Construction in favor of insured.
§ 67. ——Provisions for forfeiture or avoidance.
§ 68. ——Written and printed portions.
§ 69. ——Subject-matter covered; particular descriptions.
§ 70. ——Stipulations as to legal effect.
§ 71. Endowment policies and clauses.
§ 72. Renewals as new contracts.

VI. Premiums, assessments or other consideration.

§ 73. In general.
§ 74. Power of mutual companies to levy assessments.
§ 75. ——Effect of insolvency of company.
§ 76. Assessments in mutual companies.
§ 77. ——Effect of withdrawal or surrender of policy.
§ 78. ——Limitation of liability by special agreement or charter provision.
§ 79. Levy and collection of assessments.
§ 80. ——Items to be included in assessment.
§ 81. Notice of assessment.
§ 82. ——Waiver of notice or defects therein.
§ 83. Remedy against excessive assessment.
§ 84. Payment or satisfaction of assessment or premium.
§ 85. ——Time, place and terms.
§ 86. ——Payment by note.
§ 87. ——Payment by note of person other than insured.
§ 88. Estoppel of insured to avoid liability.
§ 89. Action for premium or assessment.
§ 90. ——Time to sue and loss of right by delay.
§ 91. ——Delivery of policy as condition precedent.
§ 92. ——Suits by foreign companies.
§ 93. ——Presumptions and evidence.
§ 94. ——Defenses and set-offs.
§ 95. Recovery of premium or assessment paid.

VII. Property, life or interest covered, and risk or hazard insured against.

A. PROPERTY INSURANCE.

§ 96. In general.
§ 97. Consequential losses.

B. Life, Casualty or Liability Insurance.

§ 98. Death, injury or disability covered.
§ 99. ——Results of mistaken or improper medical treatment.
§ 100. ——Effect of insanity or temporary derangement.
§ 101. ——Criminal, illegal and violent acts.
§ 102. ——Blood poisoning, ptomaine poisoning and other unintentional poisonings.
§ 103. Casualty or liability insurance.

VIII. Warranties, conditions and representations.

§ 104. In general.
§ 105. Representations in application as warranties.
§ 106. ——Materiality of representations as factor.
§ 107. ——Misstatements and omissions made in good faith.
§ 108. Validity, propriety and reasonableness of conditions.
§ 109. ——Agreements for forfeiture.

IX. The beneficiary or insured, and changes of same.

§ 110. In general; designation or description in policy.
§ 111. "Heirs," "children" and other descriptions by relationship.
§ 112. Interest of beneficiary of life insurance before death of insured.
§ 113. Right, title and interest of beneficiary after death of insured.
§ 114. ——Rights against decedent's creditors.
§ 115. Change of beneficiary.
§ 116. ——Necessity for consent of beneficiary.

X. Changes and substitutions in subject-matter, policy or rights.

§ 117. In general.
§ 118. Options, privileges, consents and permits.

XI. Assignment or transfer of policy.

§ 119. In general.
§ 120. Assignment to persons without insurable interest.
§ 121. Consideration for assignment or transfer.
§ 122. Assignment to secure or pay insured's creditors.
§ 123. Assignment after loss.
§ 124. Rights and liabilities of assignees.
§ 125. ——Effect of acts or admissions of assignors.
§ 126. ——Equitable assignees.
§ 127. Presumptions and evidence.

XII. Rescission and cancellation, forfeiture and avoidance.

A. In General.

§ 128. Right to cancel and grounds for cancelling.
§ 129. Necessity and sufficiency of notice of cancellation.
§ 130. Cancellation through agents.
§ 131. What constitutes cancellation.
§ 132. Effect on rights of parties.

B. For Breach of Warranty, Representation or Condition.

§ 133. In general.
§ 134. Breach of warranty or representation.
§ 135. Warranties pertaining to person insured or family history.
§ 136. ——Statements as to health.
§ 137. ——Representations as to age.
§ 138. Warranties pertaining to property insured.
§ 139. ——Warranties as to title or interest.
§ 140. ——Warranties against incumbrances.
§ 141. ——Overvaluation of property.
§ 142. ——Representations as to other insurance.
§ 143. Avoidance for omissions or concealments.
§ 144. Fraud or false swearing.
§ 145. Estoppel to deny warranty.
§ 146. Breach of promissory or "continuing warranties."
§ 147. Breach of conditions in policy.
§ 148. ——Notice or knowledge of conditions.
§ 149. ——Necessity that breach caused or contributed to loss.
§ 150. Forfeiture for default in payment of premium or assessment.
§ 151. ——Necessity and sufficiency of demand.
§ 152. ——Note for premium not paid at maturity.
§ 153. ——Right to charge against cash surrender value.
§ 154. ——Rights under charter and by-laws of mutual companies.
§ 155. ——Excuses for nonpayment generally.
§ 156. Breach of conditions respecting person insured or his occupation or status.
§ 157. ——Condition against death by violence or design.
§ 158. ——Condition against suicide or self-destruction.
§ 159. ——Intoxication, intemperance or vice as contributing cause.
§ 160. ——"Voluntary exposure to unnecessary danger."
§ 161. Breach of conditions respecting property insured.
§ 162. ——Sole and unconditional ownership.
§ 163. ——Condition against other insurance.
§ 164. ——Change in location of property insured.
§ 165. ——Conditions against vacancy of fire risks.
§ 166. ——Introduction or use of prohibited article in building.
§ 167. ——Want of watch or protection service.
§ 168. ——Incumbrance on property.
§ 169. ——Change of title or possession.
§ 170. ——Levy of attachment or execution.
§ 171. ——Foreclosure or execution sale.
§ 172. Avoidance against mortgagee or person in secondary interest.
§ 173. Breach of marine policies or conditions.

C. Estoppel or Waiver of Right to Avoid or Cancel.

§ 174. In general.
§ 175. Sufficiency of notice to ground estoppel.
§ 176. ——Notice to agent as notice to insurer.
§ 177. ——Facts stated in previous application as notice to insurer.
§ 178. Waiver by misleading advertisement or proposal to insure.

§ 179. Waiver by delay in claiming forfeiture.
§ 180. Recognition of policy after knowledge of breach of condition.
§ 181. ——Imposition of expense on insured or beneficiary.
§ 182. ——Participating in adjustment of loss.
§ 183. ——Offer of compromise, settlement or arbitration.
§ 184. ——Agreement or order to pay loss.
§ 185. Denial of liability on specific grounds as waiver of other grounds.
§ 186. Waiver of one condition or warranty as waiver of others.
§ 187. Waiver of charter or by-laws of mutual association.
§ 188. Waiver of nonpayment of premium or assessment.
§ 189. ——By acceptance and retention after default.
§ 190. Waiver as to title, ownership or condition of property.
§ 191. Waiver as to additional insurance.
§ 192. ——Other insurance with insurer.
§ 193. Misstatements or omissions in application prepared by agent of insurer.
§ 194. ——Contradition or disregard of applicant's statements.
§ 195. ——Applications signed in blank by applicant.
§ 196. Waiver of warranty or condition by agent.
§ 197. ——Provision in policy prohibiting waiver by agent.
§ 198. ——Unauthorized indorsements and modifications.
§ 199. ——False statements induced by suggestion or advice of agent.
§ 200. ——Effect of agent's mistakes or omissions.
§ 201. ——Efficacy of parol waiver.
§ 202. Waiver or estoppel by knowledge of agent or officer.
§ 203. ——Agent's knowledge of other insurance.
§ 204. ——Agent's knowledge of title or condition of property.
§ 205. ——Knowledge of brokers and subagents.
§ 206. ——Effect of applicant's want of good faith.

D. REINSTATEMENT.

§ 207. In general.
§ 208. Authority of agent to reinstate.
§ 209. Waiver or estoppel to deny reinstatement.
§ 210. Remedies and actions for reinstatement.

E. UNEARNED PREMIUMS AND SURRENDER VALUES.

§ 211. In general.
§ 212. Necessity for refund of unearned premiums on cancellation.
§ 213. Surrender values and privileges.

XIII. Reinsurance and concurrent insurance.

§ 214. Reinsurance.
§ 215. Concurrent or other insurance on risk covered.
§ 216. Coinsurance.
§ 217. ——Insured as coinsurer.

XIV. Amount of insurance, extent of loss and abandonment to insurer.

§ 218. Life, accident and disability insurance.
§ 219. ——Disability or sickness.

§ 220. ——Reductions for negligence or misconduct.
§ 221. Property, casualty and liability insurance.
§ 222. ——Measure of value of property insured.
§ 223. Marine losses generally.
§ 224. ——Abandonment for total loss.
§ 225. ——Sufficiency and form of notice or deed of abandonment.
§ 226. ——Acceptance of abandoned vessel.
§ 227. ——Effect of abandonment.

XV. Notice and proofs of loss, death or casualty.

§ 228. Notice of loss in general.
§ 229. Time for notice and proof.
§ 230. ——Excuses for delay.
§ 231. Persons entitled to furnish notice and proof of loss.
§ 232. Sufficiency of proof of loss.
§ 233. ——Signature and verification.
§ 234. ——Effect of false statements or false swearing.
§ 235. ——Demand for further proof.
§ 236. ——Adjuster's certificate.
§ 237. ——Necessity and sufficiency of inventory.
§ 238. ——Waiver of defects.
§ 239. Estoppel arising from proof of loss.
§ 240. Effect of failure to furnish proofs.
§ 241. Waiver of notice or proof of loss.
§ 242. ——Authority of agent to make waiver.
§ 243. ——Denial of liability on other grounds as waiver.
§ 244. ——Effect of waiver.

XVI. Adjustment of loss or benefits payable.

§ 245. Arbitration in general.
§ 246. ——Notice, time, demand, or request for arbitration.
§ 247. ——Waiver or loss of right to arbitrate.
§ 248. ——Matters which may be submitted.
§ 249. Arbitrators or appraisers.
§ 250. Defects, fraud or misconduct in arbitration.
§ 251. Adjusting board or tribunal set up by mutual association.
§ 252. Appraisal of loss.
§ 253. Validity and conclusiveness of settlement or adjustment.
§ 254. Effect of arbitration on other rights.
§ 255. Examination of insured under oath.
§ 256. Action to set aside settlement of loss.

XVII. Payment and distribution of money among claimants.

§ 257. In general.
§ 258. Payment to mortgagees, pledgees, reversioners, or persons in secondary interest.
§ 259. Settlement with only one of parties interested.
§ 260. Suits and proceedings to determine rights in insurance money.

XVIII. Discharge by restoration or otherwise than in money.

§ 261. In general.

XIX. Subrogation and other rights of insurer.

§ 262. In general.
§ 263. Actions to enforce right.

XX. Actions on policy or under it.

A. Right or Cause of Action, and Time to Sue.

§ 264. In general.
§ 265. Accrual or maturity of right.
§ 266. Bar of action by default or delinquency.
§ 267. Conditions precedent to action.
§ 268. ——Submission to arbitration or award or appraisal by arbitrators.
§ 269. ——Examination of insured under oath.
§ 270. ——Opportunity to elect to restore or pay loss.
§ 271. Time to sue and loss of right by delay.
§ 272. ——Provisions in policy requiring action within specified time.
§ 273. ——Provisions forbidding action until certain time.
§ 274. ——Provisions in conflict with statutes.
§ 275. ——Pendency of other actions or proceedings.
§ 276. ——Waiver of time limitation or estoppel to assert.
§ 277. ——Extension of time.
§ 278. Defenses open to insurer.

B. Parties and Interpleader.

§ 279. Necessary and proper parties.
§ 280. ——Mortgagee or lienor of property insured.
§ 281. ——Assignee of policy.
§ 282. ——Administrator or executor of insured.
§ 283. ——Stranger to the policy.
§ 284. Intervention and interpleader.

C. Pleading and Evidence.

§ 285. Pleadings in general.
§ 286. Sufficiency of declaration.
§ 287. ——Allegation as to plaintiff's interest.
§ 288. Bill of particulars.
§ 289. Pleas and notices of defense.
§ 290. ——Necessity of special plea or notice.
§ 291. ——Form and sufficiency of notice of defense.
§ 292. ——Waiver of defense by failure to plead.
§ 293. Necessity and sufficiency of affidavit of nonexecution.
§ 294. Issues, proofs and variance.
§ 295. ——Under general issue.
§ 296. Burden of proof and presumptions.
§ 297. ——Agents and their authority.
§ 298. ——Delivery of policy and payment of premiums.
§ 299. ——Property or interest covered or risk insured against.
§ 300. ——Warranties and breach of warranties.
§ 301. ——Breach of condition in policy.
§ 302. ——Suicide.
§ 303. ——Waiver of forfeiture.
§ 304. ——Amount of loss or benefit payable.

§ 305. Admissibility of evidence.
§ 306. ——As to agents and their authority.
§ 307. ——As to interest of insured.
§ 308. ——As to other insurance.
§ 309. ——As to property or interest covered or risk insured against.
§ 310. ——As to representations and warranties in application.
§ 311. ——As to forfeiture for breach of condition or warranty.
§ 312. ——As to false swearing and fraud.
§ 313. ——As to waiver of conditions.
§ 314. ——As to proof of loss or death.
§ 315. ——As to cause of death of insured.
§ 316. ——As to amount of insurance, extent of loss or abandonment.
§ 317. Weight and sufficiency of evidence.
§ 318. ——Application and existence and terms of contract or policy.
§ 319. ——Agents and their authority.
§ 320. ——Interest or title of insured.
§ 321. ——Payment of premiums or assessments.
§ 322. ——Property or interest covered or risk insured against.
§ 323. ——Forfeiture or avoidance for breach of warranty or condition.
§ 324. ——Waiver of forfeiture.
§ 325. ——Proof of loss.
§ 326. ——Cause of death of insured.
§ 327. ——Amount and extent of loss suffered.

D. Trial Practice, Instructions and Judgment.

§ 328. In general.
§ 329. Questions of law and fact.
§ 330. ——Construction of policy or contract.
§ 331. ——Agents and their authority.
§ 332. ——Interest of insured.
§ 333. ——Property or liability covered and risk insured against.
§ 334. ——Forfeiture or avoidance for breach of condition or warranty.
§ 335. ——Truth of statements in application.
§ 336. ——Forfeiture for nonpayment of premium or assessment.
§ 337. ——Increase of risk or voluntary exposure to danger.
§ 338. ——Vacancy of premises.
§ 339. ——Waiver of warranties or forfeitures.
§ 340. ——Reinstatement of insured.
§ 341. ——Sufficiency of notice and proofs of loss.
§ 342. ——Cause of death or injury of insured.
§ 343. Directing verdict.
§ 344. Instructions.
§ 345. ——On burden of proof and presumptions.
§ 346. ——On forfeiture or avoidance for breach of condition or warranty.
§ 347. ——On increase of risk or hazard.
§ 348. ——On notice and proof of loss or claim.
§ 349. ——As to amount or extent of loss.
§ 350. Verdict, findings and judgment.

Covenants in lease as to insurance, see Landlord and Tenant § 99.
Insurance in fraternal beneficiary associations, see Fraternal Associations.
Insurance crimes and crimes against insurers, see Crimes §§ 42, 97.
Negligence of assignee in failing to insure, see Assignments for Creditors ¶ 163.

I. PUBLIC REGULATIONS AND LICENSING.

§ 1. In general.

Power and jurisdiction of insurance commissioner, see post § 2.
Licenses and renewals and denial or revocation of license, see post § 3.
Anti-rebate laws, see post § 4.
Anti-coinsurance act, see post § 5.
Mutual and co-operative associations, see post § 6.
Rights, powers, liabilities and limitations of insurers, see post II.
Exemption of fraternal benefit societies from insurance laws, see Fraternal Associations §§ 12, 16.
Reports, examinations and fees of insurance department, see Pub. Acts 1917, No. 256, part I, chap. II.
Statutory regulations of life and casualty insurance, see Pub. Acts 1917, No. 256, part III, chap. I.
Statutory requirement that form of life insurance policy be filed with insurance commissioner, see Pub. Acts 1917, No. 256, part III, chap. II, § 6.
Rating bureaus of insurance department, see Pub. Acts 1917, No. 256, part I, chap. IV.
Statutory regulations for incorporation of insurance companies and corporate management, see Pub. Acts 1917, No. 256, part II, chap. I.
Requirement for filing copy of form of policy for health and accident insurance, see Pub. Acts 1917, No. 256, part III, chap. II, § 12.
Commission for determination and removal of discrimination in rates, see Pub. Acts 1917, No. 256, part I, chap. IV, § 12.
Statutory provisions relative to reciprocal insurance, see Pub. Acts 1917, No. 256, part V, chap. II.

¶ 1. The legislature may provide for an examination into the affairs of insurance companies doing business here; and a company organized under the laws of this state may be required to submit to the examination required by a statute even before the expiration of the time allowed by said statute for conformity to its provision.—People ex rel. Secretary of State v. State Ins. Co., 19 Mich. 392.

¶ 2. Laws 1872, p. 86 (How. St. § 4244), forbids the transaction of business within the state by insurance companies that do not distinctly show by their policies the amount of life benefits assured, and that do not make premiums fixed, and not contingent on losses.—People ex rel. Nat. Life Ins. Co. of Chicago v. State Com'r Insurance, 25 Mich. 321.

¶ 3. A provision of Act 15, Pub. Acts 1911 which permits the incorporation of insurance companies "to make insurance upon automobiles, whether stationary or being under their own power against any hazard" does not give the authority to insure against liability from injuries to persons and property by reason of ownership or use of an automobile.—American Automobile Ins. Co. v. Commissioner of Insurance, 174 Mich. 295.

¶ 4. The failure of an insurance company otherwise duly incorporated to file a certified copy of its articles of association, etc., with the county clerk, as required by statute, does not avoid a policy made before filing such papers.—Thons v. People, 25 Mich. 499.

§ 2. Power and jurisdiction of insurance commissioner.

Power of insurance commissioner to revoke license of insurer, see post ¶ 8.
Investigation and proceedings by insurance commissioner for revocation of license of insurer, see also post ¶ 9.
Discretion of insurance commissioner as involving judicial functions, see Constitutional Law § 35.
Appointment, powers and functions of insurance commissioner, see Pub. Acts 1917, No. 256, part I, chap. I, § 1.
Authority of insurance commissioner to suspend insurance rates, see Pub. Acts 1917, No. 256, part I, chap. IV, § 3.
Annual report or statement of insurance companies to insurance commissioner, see Pub. Acts 1917, No. 256, part I, chap. II, § 7.
Valuation of outstanding policies of life insurance by insurance commissioner, see Pub. Acts 1917, No. 256, part III, chap. I, § 10.
Filing of by-laws of insurance companies with insurance commissioner, see Pub. Acts 1917, No. 256, part II, chap. I, § 6.

¶ 5. The court will be slow to interfere with a ruling made by a state commissioner where such ruling is an exercise of discretion.—Mutual Ben. Life Ins. Co. v. Commissioner of Insurance, 151 Mich. 610.

¶ 6. Where an insurance company is doing business within the state in a way absolutely prohibited by law, although not within the jurisdiction of the commissioner for a revocation of license, the court can give no relief against his action in revoking their license, inasmuch as the corporation is entitled to no rights whatever to do business in the state.—People ex rel. Nat. Life Ins. Co. of Chicago v. State Com'r of Insurance, 25 Mich. 321.

§ 3. Licenses and renewals and denial or revocation of license.

Revocation of license for misrepresentation, see Pub. Acts 1917, No. 256, part II, chap. IV, §§ 7, 8.

¶ 7. Under Comp. L. 1897, § 7517, a certificate renewing a life insurance company's authority to do business in the state may be denied if an examination has disclosed that the company is violating Comp. L. 1897, § 7219, prohibiting rebates.—Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85.

¶ 8. An insurance company failed to make its annual report to the insurance commissioner, to make its annual statement at the annual meeting of its members, to mail a copy of such statement to its members, and to keep its books and papers at its principal office as required by law. It did not carry out its contracts with its members in good faith, and its officers appropriated exorbitant sums of money for salaries and services. Held, a writ of mandamus asked by it compelling the insurance commissioner to renew its license to do business, would be denied.—American Health & Accident Ins. Co. v. Commissioner of Insurance, 154 Mich. 193.

¶ 9. The commissioner of insurance cannot lawfully revoke a license granted to an insurance company to do business within the state, except on the investigation and proceedings, and in the particular cases fixed by the statutes.—People ex rel. Nat. Life Ins. Co. of Chicago v. State Com'r of Insurance, 25 Mich. 321.

§ 4. Anti-rebate laws.

Compensation of agents in general, see post § 32.
Agents and brokers generally, see post III.
Premium, assessment or other consideration, see post VI.
Revocation of license generally, see ante § 3.
Revocation of license of insurer for violation of anti-rebate law, see also ante ¶ 7.
Statutory prohibition against rebates of premium or agent's commission, see Pub. Acts 1917, No. 256, part II, chap. IV, § 6.

¶ 10. Comp. L. 1897, § 7219, commonly called the Anti-Rebate Law, passed in 1889, providing against rebates by life insurance companies, applies to a mutual benefit association organized under Pub. Acts 1887, No. 187.—Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85.

¶ 11. Comp. L. 1897, § 7221, providing that certain sections of an act mentioned which refers to life insurance companies shall not apply to mutual benefit associations, does not prevent their being regarded as life insurance companies within the meaning of Comp. L. 1897, § 7219, prohibiting rebates by life insurance companies.—Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85.

¶ 12. Under Comp. L. 1897, § 7219, prohibiting rebates by insurance companies an arrangement whereby prospective policy holders are appointed "references" and receive a proportion of total premiums paid, ostensibly as remuneration, but in fact in reduction of their premium is unlawful, although this is accomplished indirectly by the payment of a certain percentage of the total premiums to an officer of the company to be distributed by him.—Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85.

¶ 13. A policy of insurance and a contemporaneous special contract between the company and the insured making him advisory representative for the company for compensation proportionate to the number of policies in force are both part of one transaction and in violation of Comp. L. 1897, § 7219, prohibiting discrimination among policyholders, so as to render void notes given for premiums on the said insurance.—State Life Insurance Co. v. Strong, 127 Mich. 346.

¶ 14. The buying of drinks by an agent of an insurance company for a prospective applicant for insurance does not constitute a distinction and discrimination within the Insurance Anti-Rebate Law, Pub. Acts 1907, No. 181, How. 2nd Ed., § 8153, where the parties solicited are sober and mentally normal.—Northern Assur. Co. v. Meyer, 194 Mich. 371.

¶ 15. The taking of notes for insurance premiums without interest until the policies are delivered does not constitute a violation of the Insurance Anti-Rebate Law, Pub. Acts 1907, No. 181, How. 2nd Ed., § 8153.—Northern Assur. Co. v. Meyer, 194 Mich. 371.

¶ 16. Under Comp. L. 1897, § 7219, prohibiting reduction of premium as an inducement to taking a life insurance policy, a note representing one-half the premium, given to an agent who had paid the premium and allowed the defendant the benefit of his commission of half of the premium, was illegal and, being so, the consideration failed.—Heffron v. Daly, 133 Mich. 613.

§ 5. Anti-coinsurance act.

Insured as coinsurer, see post § 217.
Limitations upon and prohibitions against requirement of coinsurance, see Pub. Acts 1917, No. 256, part IV, chap. II, §§ 9, 10.

¶ 17. Comp. L. 1897, § 5183 (The Anti-coinsurance Act) making it unlawful for an insurance company to provide by any policy issued by it, or by any clause, or by any separate agreement, contract or otherwise

to limit the liability or restrict it by reason of the failure of the insured to insure the property covered for any certain amount or proportion of the actual cash value of such property, also prohibits any policy in which the same result is reached by a rider with a "percentage coinsurance clause," by which the insured shall be regarded as in effect a coinsurer for a certain percentage of the property.—Attorney General ex rel. Michigan Lubricator Co., v. Commissioner of Insurance, 148 Mich. 566.

§ 6. Mutual and co-operative associations.

Rights and liabilities of mutual and co-operative associations, see post §§ 10, 11.
Funds, surplus and reserves of mutual or co-operative associations and companies, see post § 17.
Foreign mutual company, see also post ¶ 27.
Application of anti-rebate law to mutual benefit associations, see ante ¶ 10.
Effect of revocation of license on power to levy assessment, see post ¶ 301.

¶ 18. Mutual benefit and co-operative associations, whether incorporated or not, are insurance organizations within the meaning of How. St., ch. 131, whenever, in consideration of periodical contributions, they engage to pay a member or his designated beneficiary a benefit upon the happening of a specified contingency.—Rensenhouse v. Seeley, 72 Mich. 603.

¶ 19. A mutual benefit association organized under How. St., § 3949, and doing business on the assessment plan is an insurance company.—Miner v. Michigan Mut. Ben. Ass'n, 63 Mich. 338.

¶ 20. How St., § 4249, prohibiting mutual fire insurance companies from doing business in more than three counties, is still in force. as Laws 1873, Act No. 175, which attempted to authorize such action, is unconstitutional; and a policy issued by such a company outside of its territorial limits is void.—Eddy v. Merchants' M. & C. Mut. Fire Ins. Co., 72 Mich. 651.

¶ 21. Whether How. St., § 4247, which authorizes mutual fire insurance companies to insure only such buildings as constitute detached risks in villages and cities, confines the risks to incorporated or platted villages. quære.—Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407.

§ 7. Regulation and licensing of foreign companies.

Want of license or permit as defense or disability, see post § 14.
Rights, powers and limitations of foreign insurers in general, see post II, B.
Status, recognition, regulation and privileges of foreign corporations generally, see Foreign Corporations, I.
Power of state to impose terms and conditions on admission of foreign corporations to state, see Foreign Corporations §§ 2-5.
Admission of foreign companies, see Pub. Acts 1917, No. 256, part II, chap. II.
When foreign mutual fire insurance companies admitted to do business, see Pub. Acts 1917, No. 256, part II, chap. II, § 7.
Deposit by foreign insurance company with state treasurer as condition precedent to doing business, see Pub. Acts 1917, No. 256, part II, chap. II, § 5.
Appointment by foreign insurance company of resident agent on whom service of process may be made, see Pub. Acts 1917, No. 256, part II, chap. II, § 4.

¶ 22. Laws 1887, Act No. 285, regulating the manner in which foreign insurance companies shall do business, does not violate the principles "of due process of law," by providing for revocation of license for violations of the law.—Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485.

¶ 23. Laws 1887, Act No. 285, prohibiting any foreign insurance company doing business in this state from entering into any contract with any other such company or its agents, and requiring, as a condition precedent to obtaining a license to do business, an undertaking not to make such contract, is violated by such company's subscribing to a "bureau of inspection and rating" which is to examine risks and fix rates thereon for all subscribing companies, being substantially a combination of foreign companies; and for such violation the company's certificate may be revoked.—Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485.

¶ 24. How. St., § 4325 is to be construed as requiring an insurance company formed under the laws of a foreign government to make a deposit in this state in order to do business here, and a deposit in another state of the Union will not suffice.—Employers' Liability Assur. Co., Ltd. v. Insurance Com'r, 64 Mich. 614.

¶ 25. Comp. L. 1871, § 1683, How. St., § 4331, regulating the transaction of the business of insurance in Michigan by the agents of foreign companies, does not assume to forbid the making of contracts of insurance abroad upon property in this state, nor to invalidate such contracts, but applies only to operations within the state. Whether it operates to render void, at the election of insurers, such insurance as they may effect within the state without compliance with its restrictions, quære.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 26. Where there is a petition for mandamus to compel the State Commissioner of Insurance to authorize a foreign insurance company to issue liability insurance the rule

of comity does not prevail where the proposed action is contrary to the policy of the State law.—American Automobile Ins. Co. v. Commissioner of Insurance, 174 Mich. 295.

¶ 27. A foreign mutual fire insurance company, without having filed the prescribed statement and obtained the requisite authority to do business in this state, received applications from persons called "inspectors," who examined risks, suggested improvements, filled out and submitted applications, and recommended the same, if favorable, for the company to write, which applications and premium notes being signed by the applicant and received at the home office, a policy would be forwarded, and assessments demanded and paid, by mail. Held, that said inspectors were agents of the company, within How. St., § 4331 et seq., which prohibits foreign insurance companies from transacting business in this state without having first secured the requisite certificate of authority; that the whole scheme was a flagrant attempt to evade the provisions of the statute intended to restrict the insurance business.—Seamans v. Temple Co., 105 Mich. 400.

¶ 28. The companies or associations that are permitted under the act of 1887 upon certain conditions to do life insurance business in this state do not include an Illinois corporation known as "The Fraternal Alliance."—Rensenhouse v. Seeley, 72 Mich. 603.

II. INSURANCE CORPORATIONS AND UNDERWRITERS.

A. IN GENERAL.

§ 8. Who may act as insurers.

Corporate rights, powers, liabilities and limitations, see post § 9.
Mutual and co-operative associations and companies, see post § 10.
Rights and liabilities of members, directors and officers, see post § 11.
Receivership and proceedings for winding up business, see post § 12.
Rights of foreign insurers in general, see post II, B.
Capital or deposit fund, surplus and reserves, see post II, C.

¶ 29. Insurance may be given by individuals or by unincorporated associations.—People v. Jones, 24 Mich. 215.

§ 9. Corporate rights, powers, liabilities and limitations.

Public regulations and licensing, see ante I.
Duration of corporate franchise for insurance corporation, see Const. art. XII, § 3.
Statutory term of corporate existence, see Pub. Acts 1917, No. 256, part II, chap. I, § 11.
Authority of insurance companies to hold real property, see Pub. Acts 1917, No. 256, part II, chap. I, § 10.
Procedure for incorporation of insurance company and form of articles prescribed by statute, see Pub. Acts 1917, No. 256, part II, chap. I, §§ 2-4.
Incorporation of companies for fire, marine, automobile and kindred insurance, see Pub. Acts 1917, No. 256, part IV, chap. I.
Life, health, fidelity, steamboiler, automobile, plate glass, sprinkler, credit, title and burglary insurance as purposes for which incorporation may be had, see Pub. Acts 1917, No. 256, part III, chap. I, § 2.
By-laws of insurance companies and filing thereof with insurance commissioner, see Pub. Acts 1917, No. 256, part II, chap. I, § 6.
Incorporation of companies for automobile insurance, see Pub. Acts 1917, No. 256, part IV, chap. III, §§ 1-4.

¶ 30. The right of an insurance company to do business so as to bind itself and those who deal with it is complete as soon as there is a recognized corporation, and when the necessary papers are perfected in the office of the secretary of state.—Jhons v. People, 25 Mich. 499.

§ 10. Mutual and co-operative associations and companies.

Rights and liabilities of members, directors and officers, see post § 11.
Public regulations and licensing of mutual and co-operative associations, see ante § 6.
Charter and by-laws of mutual company as part of contract of insurance, see post § 62.
Public regulations and licensing, see ante I.
Estoppel of policyholder in mutual company to deny corporate existence of the company, see Corporations § 13.
Statutory provisions relative to co-operative insurance company for limited lines of casualty risks, see Pub. Acts 1917, No. 256, part III, chap. III.
Incorporation under mutual plan for insurance against fire, cyclone and hail, see Pub. Acts 1917, No. 256, part IV, chap. IV.
Incorporation of mutual insurance companies for protection against fire, lightning, hail, flood, explosion, etc., see Pub. Acts 1917, No. 256, part V, chap. III.
Procedure for organization of co-operative company for limited number of lines of casualty insurance, see Pub. Acts 1917, No. 256, part III, chap. III, §§ 1-5.
Incorporation of mutual companies for automobile insurance, see Pub. Acts 1917, No. 256, part IV, chap. III, §§ 5-8.

¶ 31. A mutual life insurance company organized under Pub. Acts 1887, No. 187, as amended by Pub. Acts 1895, No. 58, providing that any such corporation may pro-

vide in its policy for the payment, at stated periods, of premiums or assessments for the purpose of accumulating and maintaining a mortuary, an emergency, and a reserve fund, and that the members may receive the benefit of any surplus not needed by the corporation, is authorized, where its articles of association are framed with respect thereto, to write whole-life policies, term insurance, advance payment insurance, and insurance upon the joint lives of two or more persons.—Home Life Assur. Co. v. Maynard, 112 Mich. 497.

¶ 32. A mutual life insurance company, organized under a statute (Laws 1887, Act No. 187, as amended by Laws 1895, Act No. 58) requiring such companies, in their articles of association, to state definitely the object of the incorporation, the classification of members, and the purpose of the classification, cannot, where its articles of association provide for the payment of policies only in the event of the "death" of the insured, issue a policy payable upon the occurrence of total disability.—Preferred Masonic Mut. Life Ins. Co. v. Giddings, 112 Mich. 401.

§ 11. ——Rights and liabilities of members, directors and officers.

¶ 33. Members of the board of directors of a mutual fire insurance company raising its funds by assessments cannot bind the company except in regular or special meetings of the board.—Kamm & Schellinger Brewing Co. v. St. Joseph Co. Village Fire Ins. Co., 168 Mich. 606.

¶ 34. The members of a mutual fire insurance company organized under How. St., ch. 132, have the power under a charter which provides that at the annual meeting the members present shall, among other things, determine a limitation of hazards, adopt by-laws, etc., to adopt a by-law exempting the company from liability for losses caused by fire from steam power used on or about the premises of any member of the company.—Borgards v. Farmers' Mut. Ins. Co., 79 Mich. 440.

¶ 35. Where the charter of a mutual fire insurance company made it the absolute right of farm owners in the county to become members on subscribing the article and applying for insurance on prescribed terms, the secretary could not cut off this right by refusing an actual tender of the proper amount from one who was already a member and had duly applied for insurance.—Gay v. Farmers' Mut. Ins. Co., 51 Mich. 245.

¶ 36. The by-laws of a firemen's benefit association provided that any member who should be retired by the fire commissioners by reason of twenty-five years' service as a fireman might still continue a member of the association, with all of its rights and benefits, by paying the same dues and assessments as an active member, and that upon the death of any "active" or retired member there should be collected from each surviving active or retired member a specified amount for the use of the beneficiary. Held, that the placing of a member upon the retired list before the expiration of twenty-five years' service, by reason of injuries received in the line of his duty as a fireman incapacitating him for active service, does not terminate his "active" membership in the association.—Neville v. Detroit Firemen's Fund Ass'n, 104 Mich. 149.

§ 12. Receivership and proceedings for winding up business.

Effect of insolvency on power of mutual company to levy assessment, see post § 75.
Assessments levied by receiver of mutual company, see post ¶ 308.
Items received may include in assessment, see post ¶ 334.
Remedy against excessive assessment levied by receiver, see post ¶ 350.
Powers of receiver of insolvent mutual company to levy assessment, see post ¶¶ 313, 315, 316, 321.
Distribution of shares in fund of mutual company on dissolution, see post ¶ 59.
Receivership proceedings in general, see Receivers.
Liquidation and dissolution of domestic insurance companies, see Pub. Acts 1917, No. 256, part I, chap. III.
When insurance commissioner may ask for dissolution of domestic insurance company, see Pub. Acts 1917, No. 256, part I, chap. III, § 2.
Power of insurance commissioner to assess stockholders or members on liquidation of domestic company, see Pub. Acts 1917, No. 256, part I, chap. III, § 7.

¶ 37. The petition filed by the commissioner of insurance under How. St., § 4261, as the foundation of proceedings to wind up the business of a mutual fire insurance company, need not be verified.—Wardle v. Cummings, 86 Mich. 395.

¶ 38. The 9,000 members of a mutual fire-insurance company are not entitled to the application for a change of venue in receivership proceedings in the winding up of the affairs of such company.—Nichol v. Murphy, 145 Mich. 424.

¶ 39. Proceedings for appointment of receiver for company, and for levying of assessments to pay outstanding debts, are not void for want of personal notice to members of application, etc.; statute contemplates notice by publication, and all members are bound thereby.—Wardle v. Cummings, 86 Mich. 395.

¶ 40. The question of the regularity of an order for a change of venue without notice to the members, in receivership proceedings for the winding up of the affairs of a mutual fire-insurance company, cannot be raised in an action brought against a member by the

receiver of such company for the collection of an assessment.—Nichol v. Murphy, 145 Mich. 424.

¶ 41. The order of the court authorizing a substituted receiver of a mutual fire-insurance company to make a new assessment against the members of such company instead of a former assessment set aside by such court, must be held to be valid in assumpsit by the receiver for such assessment. —Nichol v. Murphy, 145 Mich. 424.

¶ 42. On demurrer to a bill by the receiver of a defunct fraternal loan and insurance society for an accounting and discovery against the trustees, officers and agents of the society reciting that funds had been lost, squandered and stolen through the negligence of the defendants, a defendant claimed the bill showed that the losses occurred after he had ceased to be a member of the executive board of the supreme lodge. Held, that while the charges should have been more specific, there was actionable conduct on the part of the defendant and losses prior to the time he ceased to be a member of the board.—Snover v. Boynton, 173 Mich. 539.

¶ 43. It is within the authority of the court having jurisdiction of receivership proceedings in the winding up of the affairs of a mutual fire-insurance company, to accept the resignation of the receiver of such company and to appoint his successor without notice to the policyholders, where an emergency makes such a change necessary.—Nichol v. Murphy, 145 Mich. 424.

¶ 44. The regularity of the acceptance of the resignation of the receiver of a mutual fire-insurance company by the court and the appointment of a successor, without notice to the policyholders, cannot be questioned in an action brought against a member of such company by such receiver to collect an assessment.—Nichol v. Murphy, 145 Mich. 424.

¶ 45. Upon the final dissolution of a mutual benefit association, or upon its incapacity to continue business and virtual death, each member is entitled to share equally in the fund belonging to his class or division.—Stamm v. Northwestern Mut. Ben. Ass'n, 65 Mich. 317.

¶¶ 46, 47. A mutual benefit association having been refused a license to continue business acquiesced in the decision, ceased to admit new members or to issue new policies, and did no further business except to make assessments for death, losses, and the officers and many members formed a new company. Held, that it was the duty of the managing agents, under the circumstances, to wind up the affairs of the corporation voluntarily, and that if they neglected to do so, any one interested could seek relief in equity to obtain a distribution of the funds among the members. —Stamm v. Northwestern Mut. Ben. Ass'n, 63 Mich. 317.

B. FOREIGN INSURERS.

§ 13. Right to do business in general.

Regulation and licensing of foreign companies, see ante § 7.

Right of foreign insurer to sue for premium or assessment, see post § 92.

General law of foreign corporations, see Foreign Corporations.

Submission of foreign corporation to state laws by doing business in state without regular admission, see Foreign Corporations ¶ 15.

Admission of foreign companies, see Pub. Acts 1917, No. 256, part II, chap. II.

Deposit by foreign insurance company with state treasurer as condition precedent to doing business, see Pub. Acts 1917, No. 256, part II, chap. II, § 5.

Appointment by foreign insurance company of resident agent on whom service of process may be made, see Pub. Acts 1917, No. 256, part II, chap. II, § 4.

¶ 48. A foreign insurance company can do no business here except upon the conditions that our laws impose.—People ex rel. Glens Falls Ins. Co. v. Jackson Circuit Judge, 21 Mich. 577; Home Ins. Co. v. Davis, 29 Mich. 238; Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485.

¶ 49. The right of a foreign company to do business in this state is derived from our statutes, and not from its charter, and it must comply with the terms and conditions those statutes impose.—American Ins. Co. v. Stoy, 41 Mich. 385.

¶ 50. The fact that a foreign company does not come within the provisions of our legislation so that the insurance commissioner can give it the requisite authority to do business in this state does not authorize it to take risks without such authority; it cannot take risks at all.—People v. Howard, 50 Mich. 239.

§ 14. Want of license or permit as defense or disability.

¶ 51. In an action on an insurance policy issued by a foreign insurance company on property in Michigan it is not necessary to prove that the company had authority under our laws to transact business in Michigan; but the company is estopped from denying its authority or defending against its contract on any such grounds.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 52. Under How. St. § 8136, which provides that when, by the laws of this state, any act is forbidden to be done by any corporation without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, ex-

press or implied, "arising out of" or made or entered into in consideration of such act, a foreign mutual benefit society which, by reason of its noncompliance with the laws of this state, is not authorized to do business therein, cannot maintain an action in this state to recover from an agent moneys collected by him, under an arrangement with its officers, on assessments by it made upon its Michigan members.—People's Mut. Ben. Soc. v. Lester, 105 Mich. 716.

C. CAPITAL OR DEPOSIT FUND, SURPLUS, RESERVES AND INTEREST IN SAME.

§ 15. In general.

Distributive shares in reserve and surrender values, see post § 16.
Mutual or co-operative associations and companies, see post § 17.
Receivership and proceedings for winding up business, see ante § 12.
Reserve fund of insurance company as subject to taxation, see Taxes, II.
Investments of funds, see Pub. Acts 1917, No. 256, part II, chap. I, § 16.
Reserve fund of companies organized for automobile insurance, see Pub. Acts 1917, No. 256, part IV, chap. III, § 3.
Statutory provisions for capital stock of life and casualty insurance companies, see Pub. Acts 1917, No. 256, part III, chap. I, § 3.
Statutory regulations as to subscriptions of capital stock, see Pub. Acts 1917, No. 256, part II, chap. I, § 5.
Computation of amount of reserve fund required, see Pub. Acts 1917, No. 256, part III, chap. I, § 8.
Unlawful use of reserve funds, see Pub. Acts 1917, No. 256, part II, chap. IV, § 4.
Penalty for misrepresentation of capital stock, see Pub. Acts 1917, No. 256, part II, chap. IV, § 2.
Statutory provisions for securing dividends and interest, from stocks, bonds and mortgages deposited with state treasurer, see Pub. Acts 1917, No. 256, part III, chap. I, § 4.
Necessity of deposit with state treasurer of security for liability of insurance company, see Pub. Acts 1917, No. 256, part III, chap. I, §§ 3, 7.
Impairment of capital sufficient to entitle commissioner of insurance to cancel company's authority, see Pub. Acts 1917, No. 256, part III, chap. I, § 8.
Capital required of insurance company insuring railway employees against loss of position or death or disability, see Pub. Acts 1917, No. 256, part III, chap. I, § 15.
Capital stock of companies organized for automobile insurance, see Pub. Acts 1917, No. 256, part IV, chap. III, § 2.

¶ 53. How. St. § 4325, requires an insurance company formed under the laws of a foreign government to make a deposit in this state in order to do business here, and a deposit in another state of the Union will not suffice.—Employers' Liability Assur. Co. v. Insurance Com'r, 64 Mich. 614.

¶ 54. The supreme court will not order the state treasurer to deliver to an insurance company that has ceased to do business the securities deposited with him under How. St. § 4224, where, from the company's showing, its death claims and outstanding policies approximate the amount deposited, where the death claims may have increased largely since such showing, and where policyholders desire to have a hearing; since section 4227 expressly provides that the securities shall remain and shall only be withdrawn on the order of the supreme court, or when the company shall show to the satisfaction of the secretary of state and the state treasurer that the risks, etc., are less than the securities.—Imperial Life Ins. Co. v. Hambitzer, 95 Mich. 513.

¶ 55. Order granted permitting a life insurance company which had ceased doing business to withdraw its surplus from state treasury to pay claims; each claim to be certified to by the state insurance commissioner as legal, and when so certified to be paid by state treasurer directly to claimant or his authorized attorney upon surrender of policy duly receipted.—Imperial Life Ins. Co. v. Hambitzer (not reported).

¶ 56. An arrangement by which the directors of a manufacturers' mutual fire insurance company (under Laws 1883, Act No. 78), which provides no method for raising funds to meet the obligations of the company other than by the payment of cash premiums and assessments upon the deposit notes or agreements of policyholders, execute a bond to the company for the purpose of establishing a reserve guaranty fund to its assets, to be drawn upon by the board of directors whenever they shall deem it necessary to protect policyholders from assessment upon their deposit notes, and which makes the obligors creditors of the company to the amount of all such advances, is void.—Goss v. Peters, 98 Mich. 112.

¶ 57. As all members of the company must be held to have had knowledge of the law, and of the articles of association, subject to which every policy is issued and received, and to have known that any such management of the company would be unlawful, the obligors are not estopped from raising the question of ultra vires in a suit upon a bond executed to the company by the directors for the purpose of establishing a reserve guaranty fund.—Goss v. Peters, 98 Mich. 112.

§ 16. Distributive shares in reserve.

Distribution of shares in fund or reserve of mutual or co-operative association or company, see post § 17.

Unearned premiums and surrender values, see post XII, E.
Taxation of reserve fund of insurance company, see Taxes, II.

¶ 58. In an action on a Free Tontine policy to recover a sum of money as cash surplus which had been set forth in an illustration blank by an agent of the defendant, such fixed sum cannot be recovered where from the rest of the blank it appears that such sum was based on the past earning capacity of the company and was merely suggestive as to what the amount would be upon that basis at the end of the tontine period, and that the future surplus would depend on future experience. —O'Brien v. Equitable Life Assur. Soc. of the United States, 173 Mich. 432.

§ 17. Mutual or co-operative associations and companies.

Public regulations and licensing of mutual and co-operative associations, see ante § 6.

¶ 59. Upon the final dissolution of a mutual benefit association, or upon its incapacity to continue business and virtual death, each member at that time is entitled to share equally in the fund belonging to his class or division.—Stamm v. Northwestern Mut. Ben. Ass'n, 65 Mich. 317.

III. AGENTS, BROKERS AND SOLICITORS.

§ 18. In general.

Who are agents, see post § 19.
Representation of insurer or insured, see post §§ 20, 21.
Appointment of agents, see post § 22.
Authority during negotiations of contract, see post §§ 23-25.
Limitations on authority, see post §§ 26, 27.
Authority to insure own property, see post § 28.
Effect of notice to or knowledge of agent, see post § 29.
Estoppel to deny or assert agent's authority, see post § 30.
Personal liability of agent to insured or applicant, see post § 31.
Compensation of agents, see post § 32.
Actions by and against agents, see post §§ 33, 34.
Insurable interest of agent, bailee or person in possession of another's property, see post § 43.
Anti-rebate laws, see ante § 4.
Estoppel by knowledge of agent or officer, see post § 202.
Agents and their authority as question for jury or court, see post § 331.
General law of agency, see Agency.
Crime of unlawfully soliciting insurance, see Crimes § 97.
Regulations of agents as class legislation, see Constitutional Law § 217.
Sufficiency of evidence to prove unlawful agency in prosecution for soliciting without license, see Indictment ¶ 1497.
General statutory provisions relative to insurance agents and adjusters, see Pub. Acts 1917, No. 256, part II, chap. III.
Form of application for agent's license, see Pub. Acts 1917, No. 256, part II, chap. III, § 10.
Statutory provisions covering auditors, abstractors, counselors and analysis of insurance companies, see Pub. Acts 1917, No. 256, part II, chap. III, §§ 19-22.

¶ 60. An insurer is not bound by the action of an agent neither authorized nor held out as having authority. The same laws of agency apply to insurers as to other persons.—Security Ins. Co. v. Fay, 22 Mich. 467.

¶ 61. Powers possessed by agents of insurance companies, like those of agents of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency.—Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270.

¶ 62. There is no distinction between mutual fire insurance companies and stock companies as to their responsibilities for the acts of their agents taking applications for insurance.—Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589.

¶ 63. Where a local agent has authority to issue policies himself, the applicant for insurance, in the absence of fraud, may generally deal with him as he would with the officers of the insurance company, and rely on his conduct as he could on theirs.—Richards v. Washington Fire & Marine Ins. Co., 60 Mich. 420.

¶ 64. A general agent of an insurance company for a district embracing several states has such authority in any one of them, though his office be in another, as will make the company liable for a malicious prosecution instituted in the company's name by his connivance in either state.—Turner v. Phoenix Ins. Co. of Hartford, 55 Mich. 236.

¶ 65. Pub. Acts 1901, No. 84, § 2, How. 2nd Ed., § 8298, as amended by Pub. Acts 1913, No. 215, relating to the granting of certificates of authority to insurance agents by the state, does not operate to increase an agent's authority and make the principal liable for his representations as to authority.—Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270.

¶ 66. Comp. L. 1897, § 7246, relating to the powers of agents of foreign fire insurance companies, does not operate to increase an agent's authority, and make the principal liable for his representations as to authority. —Barry & Finan Lumber Co. v. Citizens' Ins. Co., 136 Mich. 42.

§ 19. Who are agents.

"Inspector" as agent, see also Agency ¶ 8.

Statutory definition of insurance agent, see Pub. Acts 1917, No. 256, part II, chap. III, § 1.

Statutory definition of general, district, state or special agent, see Pub. Acts 1917, No. 256, part II, chap. III, § 1.

Residence as requisite for issuance of agent's license, see Pub. Acts 1917, No. 256, part II, chap. III, § 3.

¶ 67. The agent who takes a risk and issues a policy is a general agent for the insurance company.—Crystal Ice Co. v. United Surety Co., 159 Mich. 102.

¶ 68. A fire insurance agent who places insurance through another agent in another company for which he is not authorized to act is the agent of that company under Comp. L. 1897, § 7246, providing among other things that the term "agent" shall include any other person who shall aid in the transaction of business, although all his dealings are carried on with that company's agent only.—Pollock v. German Fire Ins. Co., 127 Mich. 460.

§ 20. Representation of insurer or insured.

See also post ¶¶ 97, 102-104, 109, 258, 524.

Insurance adjusters, see post § 21.

Admissibility of evidence as to capacity of agent, see post ¶ 1210.

¶ 69. So far as an insurance agent acts as insurance broker he is agent for the insured and not the insurer.—Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

¶ 70. A person applied for insurance to certain agents. The latter could not place the whole amount in companies which they themselves represented, and went therefore to another agent from whom they obtained the rest, making certain oral representations to him as to the condition of the property to be insured. The assured had nothing to do with these negotiations. Held, in an action on a policy thus obtained at second hand, that the persons obtaining it were agents of the insurer rather than of the assured, and that their oral representations, if false, could not avoid the policy.—McGraw v. Germania Fire Ins. Co., 54 Mich. 145.

¶ 71. A fire insurance agent who is appointed as a local agent of a mutual company with power to represent it in taking applications for insurance, does take them, and receives the premiums and receipts therefor, is the agent of the insurer and not of the insured.—Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589.

¶ 72. An insurance broker was the agent of the insurer and not of the insured, and had no authority to cancel and surrender the policy, where, in an action against a fire-insurance company for loss by fire, previous to such loss the company had canceled such policy, but had notified only the broker of such cancellation; even though it should be held that such broker, in securing such insurance without the knowledge of the insured, to take the place of policies previously canceled for nonpayment of premium, had acted as agent of the insured.—O'Neill v. Northern Assur. Co., 145 Mich. 516.

¶ 73. A solicitor of insurance who was informed by the manager of a fire insurance company that policies would be written for him and a commission allowed, and who accordingly solicited the policy in suit and others and received policies and received premiums and forwarded them to the company, was the agent of the company and not of the plaintiff.—Improved Match Co. v. Michigan Mut. F. Ins. Co., 122 Mich. 256.

¶ 74. Fire insurance agents who place excess insurance with agents of other companies are held to represent the insurer rather than the insured.—Bliss v. Potomac Fire Ins. Co., 134 Mich. 212.

¶ 75. The term "agent" within terms of a policy includes a fire insurance company's agent who writes exchange insurance and places it with the insuring company through another agent authorized to do business for that company.—Pollock v. German Fire Ins. Co., 127 Mich. 460.

§ 21. ——Insurance adjusters.

Authority of adjusting agents in general, see Agency § 37.

Statutory provisions relative to adjusters, see Pub. Acts 1917, No. 256, part II, chap. III, §§ 15-18.

¶ 76. Negotiations in regard to the value of the property destroyed and an agreement to submit the value of a building to arbitration are within the general authority of an insurance adjuster, and, in the absence of notice of a limited authority, the assured may rely upon such general authority and act accordingly.—Gristock v. Royal Ins. Co., 84 Mich. 161, adhered to on rehearing, 87 Mich. 428.

¶ 77. A fire insurance adjuster who is sent to adjust a loss has prima facie authority to deny the liability of the insurer under the policy.—Popa v. Northern Ins. Co. of New York, 192 Mich. 237.

¶ 78. A fire insurance adjuster, when acting in the line of his employment, has authority, by virtue of his employment, to bind the company by a disclaimer of liability and refusal to make payment so as to relieve the insurer from the necessity of making proofs of loss.—Fisk v. Fire Ass'n of Philadelphia, 192 Mich. 243.

¶ 79. A provision in proofs of loss of property by fire that it is understood that the furnishing of blanks to the assured and the preparing of proofs by an adjuster or any agent of the company is not any waiver of any rights of the company cannot reasonably be construed to be notice that the general power of an adjuster to agree to the amount of the loss is curtailed.—Wilms v. New Hampshire Fire Ins. Co., 194 Mich. 656.

¶ 80. A fire insurance adjuster who investigates a loss, in the absence of the disclosure of limitations on his authority, may make an agreement with the insured as to the amount of the loss and the liability of the insurer.—Wilms v. New Hampshire Fire Ins. Co., 194 Mich. 656.

¶ 81. In an action on an insurance policy, the acts of an adjuster of the insurance company whose general authority was ample to adjust the loss, are binding upon the company, and where the adjuster and the plaintiff had agreed upon the amount of the loss this dispenses with the necessity for making formal proofs, and they will be deemed to have been waived.—Gristock v. Royal Ins. Co., 87 Mich. 428.

§ 22. Appointment of agents.

Custom to control terms of agency contract, see Customs § 12.

¶ 82. The appointment of agents cannot be said as a matter of law to usually and rationally belong to the manager of a state branch of a life insurance company.—Gore v. Canada Life Assur. Co., 119 Mich. 136.

¶ 83. A general insurance agency so called, does not necessarily carry with it the authority to appoint special agents for the company.—Gore v. Canada Life Assur. Co., 119 Mich. 136.

¶ 84. There is no legal presumption that an inspector or superintendent of agencies of a life insurance company had authority to employ agents for the company and make contracts with them upon its behalf.—Gore v. Canada Life Assur. Co., 119 Mich. 136.

§ 23. Authority during negotiations of contract.

Extension of credit, see post § 24.
Modification, indorsements and renewals, see post § 25.
Limitations upon agent's authority, see post §§ 26, 27.
Burden of proof and presumptions as to authority of agents of insurer, see post § 297.
Authority of agent to reinstate, see post § 208.
Admissibility of evidence as to agents and their authority, see post § 306.
Weight and sufficiency of evidence as to agents and their authority, see post § 319.
Acts of agent amounting to cancellation, see post ¶ 529.
Authority of agents as question of law or fact, see post § 331.
Authority of agents to cancel policies, see post XII, A.
Authority of agents to waive forfeiture or breach of condition, see post XII, C.

¶ 85. The agent of an insurance company, in an oral explanation made by him as to the meaning of the terms employed in the forms of the company, will be regarded as speaking in the name of the company, especially when such terms relate to matters not generally understood; and when the applicant has reason to suppose that he has given the agent all the information desired, and as such it has been embodied in the proper form in the application, he will not be deprived of the indemnity the company contracted to give him, because of the unskilfulness, carelessness or fraud of the agent.—Aetna Live Stock, Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 246.

¶ 86. Where a representation in an application for insurance was ambiguously expressed, and the applicant was, at the time of making it, assured by the agent who acted on behalf of the insurers, and who filled out the application, that it correctly embodied the oral statement made by the applicant to the agent, upon which assurance, under the circumstances of the case, the applicant might reasonably rely, the insurers will not be heard to say that the representations were not true, and thus, for that reason, avoid the policy.—Aetna Live Stock, Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 246.

¶ 87. Where the secretary of an insurance company fills out an application for insurance the company is presumed to waive any statements of fact that are not inserted in the application and are not called for until after losses occur.—Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306.

¶ 88. Where a local agent has authority to issue policies himself, the applicant for insurance, in the absence of fraud, may generally deal with him as he would with the officers of the insurance company, and rely on his conduct as he could on theirs.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

§ 24. ——Extension of credit.

See also post ¶ 832.
Time for payment of premium or assessment in general, see post § 85.

¶ 89. A subagent employed by the agent of an insurance company to solicit applications for insurance, collect premiums and deliver policies has no general authority, by virtue of such employment, to give credit or receive anything but cash in payment.—Continental Life Ins. Co. v. Willets, 24 Mich. 268.

¶ 90. Where an insurance agent with no authority to give credit had delivered a policy before the premium was paid, but had accounted to the company for the premium, it was held that it was too late to object to the credit.—Agricultural Ins. Co. of Watertown v. Montague, 38 Mich. 548.

§ 25. ——Modifications, indorsements and renewals.

Renewals as new contracts, see post § 72.
Changes and substitutions in subject-matter or policy, see post X.

¶ 91. Where a local agent has authority to issue insurance policies himself the insured, where no written indorsement consenting to additional insurance was required by the terms of the policy, is warranted in communicating with the company through its agent, and relying upon his representations.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 92. An agent's unsigned consent to additional insurance, where such consent is required by the policy to be in writing, can be upheld only on proof of authority to bind the insurers in that way, or upon such recognition or action by them as to amount to a ratification or estoppel.—Security Ins. Co. v. Fay, 22 Mich. 467.

§ 26. Limitations on authority.

Provisions in policy limiting authority, see post § 27.
Right to insure own property, see post § 28.
Provision in policy prohibiting waiver by agent of condition or warranty, see post § 197.
Authority of agent to waive warranty or condition, see post §§ 196-201.
Authority of agent to make waiver of proof of loss, see post § 242.
Authority of agent to reinstate, see post § 208.
Estoppel to deny authority of agent, see post § 30.

¶ 93. An insurance agent can only bind the company he represents when he acts under real or apparent authority.—Barry v. Boston Marine Ins. Co., 62 Mich. 424.

¶ 94. A local agent and collector, who is also a director of a mutual fire insurance company raising its money by assessments, has no authority to waive the provisions in the charter and by-laws requiring the written consent of the secretary of said company to the assignment of policies, or to waive the conditions of membership specified in said instruments.—Kamm & Schellinger Brewing Co. v. St. Joseph County Village Fire Ins. Co., 168 Mich. 606.

¶ 95. An agent cannot, by waiver, do for the insurer what the latter is unable by express contract to do for itself; he cannot, by waiver, invest the insured with an interest he does not own.—Agricultural Ins. Co. of Watertown v. Montague, 38 Mich. 548.

¶ 96. Where an insurance agent's written commission expressly excludes authority to insure manufactories and other special hazards, the mere circumstance that he acts as the company's local insurance agent is not tantamount to a declaration by the company that he has authority to insure every kind of property, and to exercise unlimited authority as to risks, modes and terms. By itself it could imply nothing more than authority to insure in the mode required by the company's charter, and to take such risks as the policies of the company in common use by its agents would warrant.—Reynolds v. Continental Ins. Co., 36 Mich. 131.

¶ 97. Mutual and stock fire insurance companies stand on the same basis as to their responsibility for acts of their agents in taking applications for insurance; and unless an applicant to a mutual company has actual knowledge of restrictions upon an agent's authority, the agent must be considered the agent of the company in receiving the application.—Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407.

§ 27. ——Provisions in policy limiting authority.

Provisions in policy prohibiting waiver by agents of conditions or warranties, see post § 197.

¶ 98. The restrictions in policies of insurance upon the power of agents to deviate from their express terms generally apply only to those parts of the transaction which relate to the formation and continuance of the contract, and not to those which prescribe the condition of suit on the policy, such as notice, delivery of proofs or submission to examination.—O'Brien v. Ohio Ins. Co., 52 Mich. 131.

¶ 99. The insured is presumed to know, and is bound by, limitations expressed in the policy as to the authority of the insurer's agent.—Cleaver v. Traders' Ins. Co., 65 Mich. 527.

¶ 100. The question considered how far and in what cases insurance companies are bound by the knowledge, acts, assurances and representations of their agents beyond or contrary to particular provisions of their policies.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

¶ 101. Restrictions upon agent's authority, if contained in the policy alone and not in the application, cannot be construed to refer to his acts or knowledge prior to the issue of the policy.—Crouse v. Hartford Fire Ins. Co., 79 Mich. 249.

§ 28. Authority to insure own property.

¶ 102. A policy written by an agent for an insurance company upon his own property is not binding until it is approved by the company.—Zimmermann v. Dwelling House Ins. Co., 110 Mich. 399.

¶ 103. Authority from a general agent of an insurance company to a local agent to write a policy upon his own goods "in the usual way" does not obviate the necessity for an acceptance of the risk by the insurer, where none of the terms of the contract is agreed upon, although there be a custom among agents in the locality to insure their own property by merely making a memorandum of the risk, reporting it to the company, issuing a policy accordingly, and spreading it upon an insurance register.—Zimmermann v. Dwelling House Ins. Co., 110 Mich. 399

¶ 104. An agent must not be personally interested adversely to his principal. An agent for receiving applications for insurance ceases to be an agent so long as he acts in a matter in which his personal interest is concerned. If he applies for insurance on his own property, he is, as to that, not the company's agent for the purpose of accepting the application and closing a contract.—Zimmermann v. Dwelling House Ins. Co., 110 Mich. 399.

§ 29. Effect of notice to or knowledge of agent.

Presumption as to insurance company having knowledge of its agent, see post ¶ 1178.

Notice to agent as notice to insurer sufficient to ground estoppel, see post § 176.

General doctrine that notice to agent is notice to principal, see Agency, II, E.

Notice to principal to or through agent, see Agency, II, D.

¶ 105. Notice to the agent of a fire insurance company of the removal of a stock of goods to a new location is notice to the company.—Pollock v. German Fire Ins. Co., 127 Mich. 460.

¶ 106. The knowledge of an insurance agent is that of his company.—Crouse v. Hartford Fire Ins. Co., 79 Mich. 249; Gristock v. Royal Ins. Co., 84 Mich. 161; Hartford Fire Ins. Co. v. Cartier, 89 Mich. 41; Haire v. Ohio Farmers' Ins. Co., 93 Mich. 481; Michigan Shingle Co. v. State Investment & Ins. Co., 94 Mich. 389.

¶ 107. Notice to the agent that gunpowder was to be kept on the premises in violation of the provisions of the policy was notice to the principal.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 108. The knowledge of an agent of a mutual fire insurance company of the untruthfulness of answers in an application must be regarded as the knowledge of the company.—Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589.

¶ 109. Where the same person is at once agent for the insurance company and for the policyholder, the latter is bound by notice to the agent of the cancellation of his policy, and by the return or credit of the premium to the agent.—Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

§ 30. Estoppel to deny or assert agent's authority.

Estoppel to deny agent's authority to modify policy, see also ante ¶ 92.

General principles of estoppel, see Estoppel.

¶ 110. An applicant for fire insurance told the agent that he meant to obtain further insurance in other companies and asked him so to notify the company he represented. The agent replied that it would be needless to do so until such insurance was obtained. The applicant had no notice of any limitations upon the agent's authority. Held, that the company was estopped from denying liability on the ground that its policies forbade additional insurance without its consent.—Kitchen v. Hartford Fire Ins. Co., 57 Mich. 135.

¶ 111. When the agent of an insurance company has delivered a policy, or a renewal receipt, with his name written upon it, and as a completed instrument, neither he nor the company can afterwards object that it was not countersigned by him.—Hibernia Ins. Co. v. O'Connor, 29 Mich. 241.

§ 31. Personal liability of agent to insured or applicant.

Anti-rebate laws governing solicitation, see ante § 4.

Liability of agent for repayment of premium on policy not conformable to contract, see Agency ¶ 469.

Crime of unlawfully soliciting insurance, see Crimes § 97.

Statutory prohibition against rebates of premium or agent's commission, see Pub. Acts 1917, No. 256, part II, chap. IV, § 6.

¶ 112. An insurance company that has ceased to do business is not liable on a policy which persons who have ceased to be its agents have promised to renew. But if the person to whom the promise is made did not know of the revocation of their authority, he may, perhaps, have a cause of action against them.—Montross v. Roger Williams Ins. Co., 49 Mich. 477.

§ 32. Compensation of agents.

Anti-rebate laws, see ante § 4.

Compensation agreement with agent, see also Agency ¶ 541.

¶ 113. A contract between an insurance company and a state agent which agreed

that if, during the five years it was to continue, the company should allow "under similar circumstances and conditions" any other state agent compensation in excess of that fixed in such contract, he should be entitled to a like increase, contemplated similarity, not identity, of circumstances and conditions. —Gray v. Josselyn, 117 Mich. 23.

¶ 114. The question as to whether or not an insurance agent is entitled to commission only when he obtains and presents an acceptable application depends upon the nature of the contract.—Gore v. Canada Life Assur. Co., 119 Mich. 136.

¶ 115. Where an insurance company breaches a contract of employment of an agent on commission the agent should not be permitted to recover commissions in addition to the value of his services.—Midland Operating Co. v. Miller, 197 Mich. 567.

¶ 116. Where an insurance agent performs work claimed not to be a part of his contract, and at no time, until sued for advancements, makes any claim that such work is not included in his contract or that he is entitled to extra compensation therefor, he cannot recover additional compensation, unless he is able to show some agreement, express or implied, that he is entitled thereto.—Midland Operating Co. v. Miller, 197 Mich. 567.

¶ 117. Where a contract for an insurance agency provides that the agent shall devote his best energies to the interests of the company in developing and maintaining business in the allotted territory, and, on request, investigate, report upon, and render such other services as the company may require to effect the discharge of any claims presented by policyholders in such territory, services in investigating claims are covered by such contract so as not to warrant additional compensation therefor, in the absence of modification of the contract.—Midland Operating Co. v. Miller, 197 Mich. 567.

¶ 118. Requiring of bonds by an insurance company from solicitors hired by the manager of a local office, and selected by him, is not an admission that it had other contract relations with such solicitors, involving a promise to pay for their services, made by the local manager, whose relations with the company were on the commission basis.—Gore v. Canada Life Assur. Co., 149 Mich. 562.

¶ 119. T., an insurance company's general agent by whose contract a commission was to be paid to him on all premium notes or loans allowed by the company in payment of any part of the first year's premium on any policy after the policy had been in force for five full years, formed a partnership with another agent, P., assigning to him an undivided half of all commissions due or to become due to T. under his contract after a certain date which preceded by one day the time when the partnership agreement was to become operative. The insurance company then made with T. and P. a contract containing provisions as to commissions similar to those in T.'s original contract, and a further provision that "on first year's premiums or deferred portions thereof" collected on and after the date when the partnership agreement became operative, on policies issued prior to that date upon applications secured by T., the company would pay commissions which should belong exclusively to T. Eight months afterwards T. transferred to P. his interest in all commissions to which he might be entitled, excepting only such commissions or share of commissions as might thereafter become due on premium loans accepted by the company in part payment of first year's premiums. Commissions becoming due from the company after said transfer on two policies issued while the first agreement with T. was in force, upon which the company had accepted premium notes representing part of the first year's premiums, T. sued the company for the whole of said commission. The question being whether T. was entitled to the whole or whether P. was entitled to one-half, held, that the three instruments were to be construed together; that the language of the clause reserving to T. commissions on all "first year's premiums or deferred portions thereof" was not ambiguous; that the unpaid portion of the premium which was to furnish, when paid, a basis for commission, was a deferred or postponed portion of the premium, and that the true construction entitled T. to commissions on premiums represented by premium notes and thereafter paid.—Thomson v. Massachusetts Mut. Life Ins. Co., 105 Mich. 358.

§ 33. Action by and against agents.

Presumptions and evidence, see post § 34.
Action for premium or assessment, see post §§ 89-94.
Actions and suits on policy or under it, see post XX.

¶ 120. Where an action is commenced by an insurance agent against the company for renewal commissions, recovery may be had for only such payments on account of renewals as are due at the time of commencing the suit.—Kyselka v. Northern Assur. Co. of Michigan, 194 Mich. 430.

¶ 121. In an action by an employer against an agent and his sureties on a bond to recover a balance due on account for advancements over commissions for selling health and accident insurance, where a claim of set-off was interposed by defendant for damages because plaintiff had prevented the performance of his contract, held that an instruction, regardless whether on the theory that defendant was seeking to recover on quantum meruit or on the theory of damages

for the breach of the contract, was erroneous in not permitting the jury to find what the services performed were reasonably worth and in allowing recovery by defendant only of the amount of plaintiff's claim.—Midland Operating Co. v. Miller, 197 Mich. 567.

¶ 122. In an action for commissions as an insurance agent, evidence that plaintiff solicited for the defendant company, but that he was acting under a contract negotiated with certain managers of a branch office of such company who had no authority to issue policies, but merely to obtain and submit applications to the head office, and who were paid commissions and paid plaintiff, does not establish an employment by the company.—Gore v. Canada Life Assur. Co., 119 Mich. 136.

¶ 123. In an action upon an insurance agent's bond, where the question in dispute was whether or not the company through its state agent had agreed that the bond should be discharged and a "new arrangement" should be made, an instruction stating in effect that unless the company annulled and surrendered the bond and consented to release the agent he would not be released and the bondsmen would be liable, was not open to the objection that the jury were required to find against the defendant unless they found that the company canceled the bond by affirmative formal action; where the court also stated that it was not necessary to bring notice to the home office and that the company was charged to receive notice through its state agent that the agency had ceased.—Union Cent. Life Ins. Co. v. Smith, 119 Mich. 171.

¶ 124. A declaration in an action by a foreign insurance company on a bond given to it by its agent need not aver that plaintiff has a license from the Commissioner of Insurance of Michigan to carry on its business in Michigan.—Prussian Nat. Ins. Co. v. Eisenhardt, 153 Mich. 198.

¶ 125. Where one is employed by the state manager of a life insurance company to assist the subagents of the company in any manner such manager may direct, and while in such employment receives from one of the subagents he has assisted a percentage of such subagent's commissions, he is liable to the company for the money so received, unless he can prove that it was given him as a voluntary gift, out of gratitude for his assistance, and not in recognition of any obligation to pay it.—Gay v. Paige, 150 Mich. 463.

¶ 126. An insurance agent who was chargeable with $2 for each application obtained by him, and who obtained 199 applications and forwarded $61, was not estopped from showing that most of the applications were received from subagents who were entitled to the application fee, because he signed each of the applications as agent and thus led defendant to believe he had obtained them; it appearing that there was a disputed question as to whether the defendant had not been sufficiently informed that the liability for such fees was denied, and continued to employ plaintiff thereafter.—Lee v. Huron Indemnity Union, 135 Mich. 291.

§ 34. ——Presumptions and evidence.

¶ 127. The alleged possession of a blank contract form, apparently designed for contracts directly with the insurance company, claimed to have been given an insurance solicitor by a local manager of the company, who denies all knowledge of it, is not evidence of such a holding out of authority in the local manager as would render the company liable to the solicitor for commissions in a suit by the latter on a contract made with such manager.—Gore v. Canada Life Assur. Co., 149 Mich. 562.

¶ 128. Testimony consisting of written papers, such as applications, book entries, a list of agents, and advertising matter bearing the name of a solicitor as agent, and kept in the home office of an insurance company, together with credits and payments listed to such solicitor as agent in the books kept at a local office, by a representative of the company who acted as bookkeeper, the office being in charge of a local manager who did business for the company on a commission basis, is not sufficient evidence that the company considered the solicitor as its agent, and thereby ratified a contract made by the local manager with the solicitor.—Gore v. Canada Life Assur. Co., 149 Mich. 562.

¶ 129. Where an insurance solicitor enters into a contract with the local manager and the superintendent of agents of an insurance company, who were not authorized to bind the company to the obligation of paying commissions or salaries to hired solicitors, he cannot recover commissions from the company unless there appears to have been such a holding out of authority in these men by the company as to induce the solicitor to rely upon it.—Gore v. Canada Life Assur. Co., 149 Mich. 562.

¶ 130. In an action by an agent for commissions, the fact that an insurance company filed a list of its agents containing the name of a solicitor with the state commissioner of insurance, as required by statute, is not sufficient to show that a contract made by a local agent of the company with the solicitor, under which the latter was to receive certain commissions, was the contract of the company.—Gore v. Canada Life Assur. Co., 149 Mich. 562.

¶ 131. In an action by an employer against an agent and his sureties on a bond to recover a balance due on account for advancements for selling health and accident insurance, where a claim of set-off was inter-

posed by defendant for damages because plaintiff had prevented the performance of the contract, evidence held insufficient to show breach of such contract by plaintiff.—Midland Operating Co. v. Miller, 197 Mich. 567.

IV. INSURABLE SUBJECTS AND INTERESTS THEREIN.

§ 35. In general; necessity of subject and interest therein.

Interest in property, see post § 36.
Persons in particular status, right or relation, see post §§ 37-43.
Interest in life, accident or casualty, see post § 44.
Insurance after loss, see post § 45.
Assignment to persons without insurable interest, see post § 120.
Admissibility of evidence as to interest of insured, see post § 307.
Property, life or interest covered and risk or hazard insured against, see post VII.
Gambling contracts in general, see Gambling Contracts.
Necessity of averring interest of insured in declaring upon policy of insurance, see 1916 C. C. Rule 22, § 5.

¶ 132. A contract of insurance upon a life in which the beneficiary has no insurable interest is void as against public policy, being a wager upon the life of assured.—Smith v. Pinch, 80 Mich. 332.

¶ 133. A wager policy, that is to say, one upon a risk wherein the assured has no interest, is void as contrary to public policy.—O'Hara v. Carpenter, 23 Mich. 410; Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15.

¶ 134. It is immaterial that the insurer granted the policy on a risk in which the assured had no interest with full knowledge of all the facts; the policy of the law does not admit of such insurance.—Agricultural Ins. Co. of Watertown v. Montague, 38 Mich. 548.

¶ 135. Policies of insurance founded upon mere hope and expectation and without some interest in the property, or the life insured, are objectionable as a species of gambling, and are called wagering policies.—Crossman v. American Ins. Co. of Newark, N. J., 198 Mich. 304.

¶ 136. Spirituous liquors illegally kept for sale may, notwithstanding, be lawfully insured against destruction by fire. The risks insured against are not the consequences of illegal acts, but of accidents.—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

§ 36. Interest in property.

Necessity for insurable interest in general, see ante § 35.
Persons in particular status, right or relation as affecting insurable interest in property, see post §§ 37-43.
"Unconditional and sole ownership" clause in standard fire insurance policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
Uninsurable or excepted property under provision in standard fire policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 137. The controlling consideration in determining the question of insurable interest in property insured against loss by fire is not what is the title of the insured, or whether he has a lien thereon or possession, but rather, will he be damaged pecuniarily by its loss.—Crossman v. American Ins. Co. of Newark, N. J., 198 Mich. 304.

¶ 138. The owner of the record title has an insurable interest.—Quackenbush v. Citizens' Ins. Co. of Missouri, 150 Mich. 555.

¶ 139. The term "owner" in an application for fire insurance is comprehensive and includes any insurable interest which entitles the applicant to possession and use and hence covers a life estate.—Convis v. Citizens' Mut. Fire Ins. Co. of Calhoun County, 127 Mich. 616.

¶ 140. An insurance policy may be taken jointly to secure property owned in severalty.—Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15.

¶ 141. A policy of insurance on property is good for all the owners for whom it is made though they have several as well as joint interests, and when it all belongs to the parties insured it makes no necessary difference to the insurer how their interests are apportioned.—Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15.

§ 37. Persons in particular status, right or relation.

Husband or wife, see post § 38.
Parties to executory or conditional sales, see post § 39.
Vendors or purchasers of realty, see post § 40.
Mortgagees, mortgagors or foreclosure purchasers, see post § 41.
Partnership interests, see post § 42.
Agents, bailees, carriers and persons in possession, see post § 43.
Necessity for insurable interest in general, see ante § 35.

¶ 142. A minor may have his property insured.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 143. An assignee under the assignment law (Pub. L. 1879, p. 181) is not obliged to wait until he has filed his bond before he can insure the property assigned.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

¶ 144. The insurable interest of the assignee of an insolvent debtor is not defeated by the fact that the policies which went with the assignment covered the loss on the property; he could take out additional insurance subject to the customary conditions.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

§ 38. ——Husband or wife.

Insurable interest in life of spouse, see post § 44.

General law of husband and wife, see Husband and Wife.

¶ 145. A husband has an insurable interest in real property held under a contract running to himself and wife jointly, and the amount of his recovery does not depend upon the loss to his individual interest, but on the damage accruing to whatever interests are covered by the policy, where the wife authorized or ratified his act in procuring the insurance.—Miotke v. Milwaukee Mech. Ins. Co., 113 Mich. 166.

¶ 146. Insurance taken in good faith on goods belonging to the wife of the insured is void, though the insurance company, through its agent, had knowledge of the facts of the ownership.—Agricultural Ins. Co. of Watertown v. Montague, 38 Mich. 548.

¶ 147. Under a policy providing that the interest of the assured at time of loss must be that of owner or mortgagee, a husband who has procured insurance upon buildings and afterward conveyed to his wife the land on which they stand cannot recover for a loss on the ground that the buildings were upon the homestead and that he therefore retained an insurable interest.—Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co., 87 Mich. 349.

§ 39. ——Parties to executory or conditional sales.

See also post ¶ 653.

General law of sales of personalty, see Sales.

¶ 148. The seller of saloon fixtures under a conditional sale contract reserving title in itself until payment has an insurable title and interest.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 142 Mich. 29.

¶ 149. One who contracts to sell lumber and receives payment therefor based on a scaling he claims to be incorrect, and who forbids the removal thereof by the purchaser until a new scale is made, has an insurable interest in the lumber, since the title thereto, or at least to that portion which had not been scaled or paid for, remained in the seller.—Fuhrman v. Sun Ins. Office of London, 180 Mich. 439.

¶ 150. A buyer of goods may insure his property for the benefit of his creditor, the seller, if the insurer consents to the arrangement.—Guiterman v. German American Ins. Co., 111 Mich. 626.

§ 40. ——Vendors or purchasers of realty.

See also post ¶ 707.

General rights of purchasers and sellers of realty, see Vendor and Purchaser.

¶ 151. The vendee in a land contract has an insurable interest in a building he is erecting on the land.—Hall v. Niagara Fire Ins. Co., 93 Mich. 184.

¶ 152. The vendor in a land contract, under which the vendee has taken possession, has an insurable interest in a building on the land, and, if such interest is insured understandingly, the insurer is estopped from denying its liability on the ground of breach of a warranty of sole and unconditional ownership.—Hamilton v. Dwelling House Ins. Co., 98 Mich. 535.

¶ 153. Where the owners in fee of a house insured in defendant company sell the house on a land contract, and the vendee in performance of the agreement to keep the property insured for the benefit of the vendor, pays the vendor the premium on the unexpired portion of the policy, the insurance company consenting to the sale with knowledge the vendor is to retain the policy recognizes that vendor retains an insurable interest.—Smith v. American Insurance Co., 177 Mich. 123.

¶ 154. Where a vendee in a land contract and a contractor, who had erected a building for the former, were named in the loss payable clause attached to a policy of fire insurance issued in the name of the vendor's husband, the vendee and the contractor may recover on the policy in the event of loss.—Houran v. Aetna Ins. Co., 183 Mich. 418. (Ostrander, Stone, Bird and Steere, JJ., dissenting.)

¶ 155. Where a grantee contracts to pay to his grantor whatever, beyond a certain amount, he realizes on sale of the property conveyed, and where the conveyance is not in its nature a mortgage, the grantor has no insurable interest.—Balow v. Teutonia Farmers' Mutual F. Ins. Co., 77 Mich. 540.

¶ 156. One having an option for the purchase of property for which he has paid a considerable sum has an insurable interest therein.—Crossman v. American Ins. Co. of Newark, N. J., 198 Mich. 304.

§ 41. ——Mortgagees, mortgagors or foreclosure purchasers.

Provision in standard form of fire insurance covering interest of mortgagee, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 157. A mortgagee has an equitable interest in the loss recovered under a policy ef-

fected by a purchaser from the mortgagor, containing a "loss payable clause" in the mortgagee's favor.—Beistle v. McConnell, 141 Mich. 463.

¶ 158. Where a mortgagor's covenant to insure is not kept the mortgagee may insure and add the premium, if fair and reasonable, to his debt.—Leland v. Collver, 34 Mich. 418.

¶ 159. It seems that a foreclosure purchaser has an insurable interest in the mortgaged premises even before the time for redemption has expired; but, though he is the mortgagee, he cannot add the cost of insurance to the sum required for redemption.—Walton v. Hollywood, 47 Mich. 385.

§ 42. ——Partnership interests.

General law of partnership, see Partnership.

¶ 160. One partner may insure his interest in partnership property in his own name.—McPhee v. Millers' Nat. Ins. Co., 198 Mich. 215.

¶ 161. An insurance of partnership property by one partner in his own name cannot be made to embrace the interest of the other partner, though it was written by the agent with full knowledge of the facts.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 162. If one partner insure the partnership property against loss by fire in his own name only, and it does not appear that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transactions subsequently ratified by the other partner, the policy will cover only the individual interest of the party insuring.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 163. Insurance by one partner in his own name will perhaps cover partnership property where the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the property insured.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 164. Where a policy when made covers the interest of one partner only, the remaining interest cannot be brought within it by his subsequently becoming the owner of the whole.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

§ 43. ——Agents, bailees, carriers and persons in possession.

General law as to rights of agents, bailees and carriers, see respectively Agency, Bailments and Carriers.

Effect of provision for insurance upon consignment for sale, see Brokers § 2.

¶ 165. The custodians of property, such as factors, agents or consignees, can have it insured for the benefit of present owners or notwithstanding changes of ownership.—Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15; and see Perrott v. Shearer, 17 Mich. 48.

§ 44. Interest in life, accident or casualty.

Necessity for insurable interest in general, see ante § 35.

Right of husband to insure his life for benefit of his wife or children, see Pub. Acts 1917, No. 256, part III, chap. II, §§ 24-26.

¶ 166. One who is dependent upon another for his or her support may have an insurable interest in the life of the person upon whom he is so dependent.—Berdan v. Milwaukee Mut. Life Ins. Co., 136 Mich. 396.

¶ 167. An insurance policy issued for the benefit of a person who is neither an heir nor a relation of the assured, and whose interest is not promoted by the latter's continuing alive, is in the nature of a wager policy, and void as against the public interests.—Mutual Benefit Ass'n v. Hoyt, 46 Mich. 473.

¶ 168. A sister has at the common law an insurable interest in her brother's life.—Hosmer v. Welch, 107 Mich. 470.

¶ 169. Where, by the by-laws of an insurance company, children may be named as beneficiaries in a policy on the lives of their parents they may recover without otherwise showing insurable interests.—Voorheis v. People's Mut. Ben. Soc., 91 Mich. 469.

¶ 170. The term "family" as found in Comp. L., ch. 94 (How. St., ch. 118), will cover a case where the insured and the beneficiary were an old man and a young woman who were not related, but had lived for many years in the same household, and had treated each other as father and daughter, and such young woman had an insurable interest in his life.—Carmichael v. Northwestern Mut. Ben. Ass'n, 51 Mich. 494.

¶ 171. A married woman may take out and own as her separate property an insurance policy on her husband's life; and if she dies before he does, the policy may be payable to their children or to the children's guardian (How. St. §§ 4238, 6300, 6301).—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

¶ 172. A person was injured on a railroad, which had a policy covering such accidents, in an indemnity company. Shortly thereafter it took out a policy in defendant casualty company. Suit was brought for the injury and the railroad sent the declaration to an officer of the indemnity company who sent it to their general attorneys who were also local attorneys for defendant, and the latter, assuming that the casualty company

was interested in the suit, sent it to plaintiff and directed him to appear in the case, which he did. Later he corresponded with the indemnity company and also sent his bill to it before he brought suit against the casualty company. It appeared that the casualty company was not the successor of the indemnity company. Held that his contract was not with defendant and since the latter had no interest in the case he could not recover.—Lillis v. Pennsylvania Casualty Co., 131 Mich. 301.

¶ 173. One has an insurable interest in the life of another where she has lived in his household from early youth to the age of thirty-six, the two treating each other as father and daughter although not related by blood or marriage.—Carmichael v. Northwestern Mut. Ben. Ass'n, 51 Mich. 494.

¶ 174. Where a life insurance company concedes its liability upon a policy payable to a specified person if surviving, otherwise to the legal representatives of the insured, and pays the amount of the policy into court, the administrator cannot resist payment to the beneficiary named on the ground that he had no insurable interest in the life of the insured.—Standard Life & Accident Ins. Co. v. Catlin, 106 Mich. 138.

¶ 175. Where the first premium is paid by insured with a check drawn in her name by her agent who was also named as a beneficiary, and subsequent premiums were paid in the same way, the policy is not a wager contract even if the beneficiary has no insurable interest in the life of the insured; and this is especially so if the policy provides that in case of the beneficiary not surviving the insured it is to be paid to the estate of the latter.—Heinlein v. Imperial Life Ins. Co., 101 Mich. 250.

¶ 176. A beneficiary who was generally known as the nephew of the insured and was described as such in the application and who was dependent upon such insured, though not a relative, was eligible to be named as a beneficiary in a policy issued by a mutual company organized under Wisconsin laws of 1895, chap. 175, § 3, providing that any member shall have the right to name as his beneficiary any person having an insurable interest in his life, and under laws of the order containing a like provision; and the policy was valid notwithstanding the misstatement in the application.—Berdan v. Milwaukee Mut. Life Ins. Co., 136 Mich. 396.

§ 45. Insurance after loss.

Assignment after loss, see post § 123.

Payment of overdue premium note after loss, see post ¶ 613.

¶ 177. Public policy will not permit an officer of an insurance company to waive any of its charter provisions so as to place in effect a policy of insurance on a building that has been destroyed.—Harper v. Michigan Mut. Tornado, Cyclone & Windstorm Ins. Co., 178 Mich. 459.

¶ 178. A contract of insurance on a vessel cannot be made subsequent to its loss where the owner knows of the loss.—Gauntlett v. Sea Ins. Co., 127 Mich. 504.

V. APPLICATION AND CONTRACT OR POLICY IN GENERAL.

§ 46. In general.

Requisites and sufficiency of application, see post §§ 47, 48.

Necessity and sufficiency of delivery, see post §§ 49, 50.

Form and requisites of contract, oral contracts and binding slips, see post § 51.

Designation or name of insured, see post § 52.

Description of risk, subject, amount and liabilities for assessment or premium, see post § 53.

Insurance "as interest may appear" and persons in secondary right, see post § 54.

Conditional contracts for insurance, see post § 55.

Memorandum or application as contract pending issuance of policy, see post §§ 56, 57.

Standard form of policy and statutory requirements, see post § 58.

Application as part of policy contract, see post § 59.

Incorporation of other instruments by reference, see post § 60.

Matter contained in attached rider or on margin, see post § 61.

Charter and by-laws of mutual associations as part of contract, see post § 62.

By-law and charter amendments after issuance of policy, see post § 63.

Variance of policy from application, see post § 64.

Construction and interpretation of policy or contract, see post §§ 65-70.

Endowment policies and clauses, see post § 71.

Renewals as new contracts, see post § 72.

Provisions in policy for premium, see post VI.

Facts stated in previous application as notice to insurer to ground estoppel, see post § 177.

Weight and sufficiency of evidence as to application, see post § 318.

Construction of policy or contract as question for law or fact, see post § 330.

General law of contracts in matters not peculiar to insurance, see Contracts.

Benefit or insurance contract of fraternal society, see Fraternal Associations, II.

Insurance provisions in chattel mortgage, see Chattel Mortgages § 63.

Effect of provisions specifying which law governs policy, see Conflict of Laws § 12.

Validity and effect of insurance written on Sunday or of acts under the policy done on Sunday, see Sunday.

¶ 179. Contracts of insurance, so far as the public is concerned, stand upon no basis different from other contracts.—Armstrong v. Western Manufacturers' Mut. Ins. Co., 95 Mich. 137.

¶ 180. An insurance contract is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.—Rensenhouse v. Seeley, 72 Mich. 603.

¶ 181. A contract of insurance on buildings is personal and not real; and the circumstance that the liability to pay is made to depend on an event happening to real property in Michigan does not make it a Michigan contract, or in any legal sense make Michigan the place of performance by the insurance company; nor does the fact that the contractee is a Michigan corporation impress upon the contract the quality of locality so as to cause it to be affected in point of law by the Michigan laws relating to business done in Michigan by agents of foreign companies.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 182. Insurance being indispensable to the business interests of the country and beneficial to all classes is to be properly protected. Therefore a person entering into a contract for insurance must be presumed competent to contract and to understand the contract, especially when expressed in unambiguous terms; and unless some imposition has been practiced to prevent it, and he is not shown to be unable to read, he must be presumed to have read the paper he has signed.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

§ 47. Requisites and sufficiency of application.

See also post ¶ 388.
Construction of questions and answers, see post § 48.
Variance of policy from application, see post § 64.
Application as contract pending issuance of policy, see post § 56.
Application as part of policy contract, see post § 59.
Representations in application amounting to warranties, see post §§ 105-107.
Action for premium based on application, see post ¶ 373.
Warranties and representations in general, see post VIII.
Cancellation for breach of warranty or representation, see post XII, B.
Representations in application as warranties, see post §§ 105-107.
Application prepared by agent of insurer, see post §§ 193-195.
Formation of contracts in general by proposal and acceptance, see Contracts, III.

¶ 183. A person applying for insurance on property is not required by law to explain the exact state of the title nor the precise nature of his interest in it, if he is not distinctly required to do so by the company.—Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15.

¶ 184. A written application for insurance, the policy issued thereon, and the note given by the assured in payment, are parts of the same transaction, and should be construed together in determining the rights of the parties.—American Ins. Co. v. Stoy, 41 Mich. 385.

¶ 185. The sending and retention of an application do not constitute a contract of insurance; acceptance on the insurer's part is necessary. In a case where no time was fixed in the application from which the policy was to run, and where the insurer was not fully informed as to the character and nature of the risk, and did not know the names of the parties to be insured, it was held that the contract was not complete.—Faugner v. Manufacturers' Mut. Fire Ins. Co., 86 Mich. 536.

¶ 186. Application was made for insurance on a house and its contents. The company asked the cost value of the property, and accepted an answer giving an aggregate valuation. Held, that it thereby waived a separate valuation of the house.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

§ 48. ——Construction of questions and answers.

See also post ¶ 825.
Construction and interpretation of contract or policy, see post §§ 65-70.

¶ 187. Questions and answers in an application for insurance should be construed liberally in favor of the assured.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306; Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290.

¶ 188. The word "or" in a question in an application for life insurance "Have you ever had chronic or persistent cough or hoarseness?" is held not disjunctive but expository of the preceding word.—Blumenthal v. Berkshire Life Ins. Co., 134 Mich. 216.

¶ 189. "Attendance by a physician," in the meaning of an application for insurance, must be considered as referring to attendance for some sickness of importance, and not for a mere temporary indisposition.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 190. To have been "attended by a physician," or to have "consulted one professionally," within those terms as used in an application for life insurance, there must have

been an attendance or consultation with reference to some disease or ailment of a serious character, affecting the person's sound bodily health, and not in relation to a mere temporary indisposition, or an ailment trivial in its nature, such as all persons are liable to who are nevertheless considered to be in sound health generally.—Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

§ 49. Necessity and sufficiency of delivery.

See also post ¶ 367.
Acceptance of policy, see post § 50.
Burden of proof and presumptions as to delivery of policy, see post § 298.
Delivery of policy as condition precedent to action for assessment or premium, see post § 91.
Presumptions arising from delivery of policy in benefit society, see Fraternal Associations, ¶ 79.
Delivery and acceptance of instruments in general, see Execution of Instruments, III.
Delivery or transfer of policy only as gift, see Gifts ¶ 64.

¶ 191. A policy is sufficiently delivered where the agent issues it to replace one that is canceled, acting under direction to keep property covered, and advancing the premium, retains the policy as custodian until insured should call for it.—Dibble v. Northern Assur. Co., 70 Mich. 1.

¶ 192. Where the application for a policy of insurance stated that the policy was not to take effect until delivered and the first premium paid while the health of the applicant was in the same condition as described in the application, and it appeared that the policy was sent to the district manager in the usual course of business and by him forwarded to the agent who had taken the application but the applicant had been killed in the meantime, held, there being no delivery the policy was void.—Bowen v. Prudential Ins. Co., 178 Mich. 63.

¶ 193. The applicant for insurance in his application agreed that the policy should not be in force until delivered during his lifetime, while in good health, and until the first premium should be paid in full. The policy was not delivered until after the applicant's death. The company in refusing to send proof of death blanks to the widow stated in a letter that there was no contract of insurance, since the policy was never delivered in the applicant's lifetime. Held, the letter did not waive the defense of nondelivery.—Dennis v. Fidelity Mut. Life Ins. Co., 159 Mich. 594.

¶ 194. Where dealings are had exclusively with the insurance agent, his delivery of the policy is binding on the company, even though it be not countersigned as required by their rules. Delivery is a waiver of the formal condition.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

¶ 195. It is sufficient delivery of an insurance policy to leave it in the hands of the agents of the company, if they are willing to retain it, subject to the order of a third person, even though he does not call for it.—Home Ins. Co. of Columbus, Ohio v. Curtis, 32 Mich. 402.

¶ 196. Plaintiff had for several years given an insurance agent authority to keep his property insured with such companies as the agent might select, and to renew his policies whenever necessary. A policy on plaintiff's property having been canceled by the insurer under a power reserved therein, the agent issued to plaintiff a policy in the defendent company, of which he was also agent, advanced the premium and placed it in his safe for plaintiff, and reported it to defendant with the premium, notifying plaintiff the same day by letter. Held, that the policy was binding from that day.—Dibble v. Northern Assurance Co., 70 Mich. 1.

¶ 197. Where the secretary of a mutual accident company indorses an acceptance upon the application, and fills out the policy with intent to have it take immediate effect, and causes it to be mailed to the applicant as of force and effect at that time, the company cannot be heard to say that there was no delivery, though the policy did not reach its destination until after the death of the applicant.—Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289.

¶ 198. Where one applies to an insurance agent for a certain amount of insurance on specified property, neither companies nor rate being mentioned, and where, though the agent says he will issue the policies at once, they are not delivered until several days thereafter, during which time the property is destroyed, they being, however, signed before the fire, held, that there is a valid contract with each company in which the agent issues a policy, as he binds both parties in selecting the companies and distributing the risk.—Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482.

¶ 199. The agent of an insurance company wrote a policy and forwarded it to one S., that it might be tendered to plaintiff in renewal of a former policy which had expired. The property covered by the policy having been burned in the meantime, the agent, on Sunday, telegraphed S. not to deliver the policy, and on the same day S. informed plaintiff that the policy had been received and recalled. On the next day plaintiff telegraphed S. to hold the policy. By mistake of a clerk they were delivered thereafter to insured. Held, that no contract of insurance was made.—New York Lumber & Woodworking Co. v. People's Fire Ins. Co., 96 Mich. 20.

¶ 200. An insurance agent was in the habit of issuing policies on blanks furnished by the company for that purpose. Being about to leave home, and anticipating a request for a renewal of a policy so issued by him which would expire before his return, the agent signed a policy in blank, and left it with his office boy to fill up, and deliver to the insured, if called for. On the day the old policy expired, an agent of the insured called at the office of the insurance agent to secure a renewal of the policy, and was informed by the office boy that it had been renewed, and was shown the entry of the new policy on the insurance register. Two days later the insurance agent returned, and, in obedience to a letter from the general agent of the insurance company, sent the new policy to the general agent for cancellation, but did not notify the insured until the morning after the fire, which occurred seven days after the policy had been sent to the general agent. No premium was paid, nor was any asked for by the insurance agent. Held, that a valid contract of insurance was made, though the policy remained in the agent's hands, as it was treated as delivered, and must be so held.—Lum v. United States F. Ins. Co., 104 Mich. 397.

§ 50. ——Acceptance of policy.

Acceptance of instruments generally, see Execution of Instruments § 42.
Necessity for acceptance, see also ante ¶ 185.

¶ 201. The acceptance of an insurance policy concludes the bargain with the insurer and excludes any parol promises for the future inconsistent with it.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 202. An insurer is not required to inquire into the condition of the title to the insured property, or to inform the insured of all the conditions and terms of the policy to be issued, or to read it to him, or inform him of its contents; and, when the policy is accepted without objection, the insured is bound by its terms, unless the same are waived by the insurer.—Wierengo v. American Fire Ins. Co., 98 Mich. 621.

§ 51. Form and requisites of contract; oral contracts and binding slips.

Designation or name of insured, see post § 52.
Description of risk, subject, amount and liabilities for assessment or premium, see post § 53.
Insurance "as interest may appear" and persons in secondary right, see post § 54.
Conditional contracts for insurance, see post § 55.
Memorandum or application as contract pending issuance of policy, see post §§ 56, 57.
Standard form of policy, see post § 58.
Weight and sufficiency of evidence as to insurance contract or policy, see post § 318.
Authority of agent for modifications, indorsements and renewals, see ante § 25.
Changes and substitutions in subject-matter, policy or rights, see post X.
Merger of prior agreements and understandings generally, see Contracts § 265.

¶ 203. Insurance may be effected or changed by parol unless the statute of frauds or some similar prohibition prevent. Oral and written bargains are the same in legal degree, and either may vary or discharge the other.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252.

¶ 204. An oral agreement made with an agent for insurance is merged in an accepted policy.—Kleis v. Niagara Fire Ins. Co., 117 Mich. 469.

¶ 205. An oral contract of fire insurance is valid and binding where there is nothing in the provisions of the charter of the insurance company relating to the method of making applications expressly forbidding the acceptance of parol applications.—Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties, 192 Mich. 230.

¶ 206. When an oral contract for insurance has been merged in a policy delivered to and accepted by the insured, which policy however does not accord with the oral contract, the insured should apply for relief to a court of equity instead of ignoring the written contract and bringing action upon the parol agreement.—Kleis v. Niagara Fire Ins. Co., 117 Mich. 469.

¶ 207. One who receives a certificate of insurance that does not embody terms, but refers for them to the policy, is bound to take notice of the policy and of defects therein.—Barry v. Boston Marine Ins. Co., 62 Mich. 424.

§ 52. Designation or name of insured.

Designation or description in policy of beneficiary, see post § 110.
Name in which partnership property may be insured, see ante ¶ 161.

¶ 208. The validity of a policy is not affected by the fact that defendant's agent in filling out the application incorrectly stated the maiden name of a female applicant.—Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

§ 53. Description of risk, subject, amount and liabilities for assessment or premium.

Sufficiency of description of property insured in attached rider, see post ¶ 239.
Risk or hazard insured against, see post VII.

¶ 209. An accident insurance policy is not invalidated by the fact that the insured was erroneously classed as "preferred," instead

of "medium," in accordance with a request contained in his application, where, at the time of issuing the policy, the company had before it all the facts essential to enable it to make a proper classification.—Emlaw v. Travelers' Ins. Co., 108 Mich. 554.

¶ 210. The term "good health," as used in a policy of life insurance, or in an application therefor, means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition, which does not tend to weaken or undermine the constitution of the insured.—Hann v. National Union, 97 Mich. 513; Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

¶ 211. Where a mutual insurance company issues policies on the cash premium plan, and does not stipulate in such policies that the holders shall be subject to assessment to meet statutory liability, such policies are void.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

¶ 212. A fire insurance company in issuing a policy to an estate in course of probate is presumed to know that it is dealing with a temporary condition of property of inheritance which must terminate by sale or distribution of said property, and makes the contract comformable to, and to be construed in the light of, the relations of the parties and circumstances surrounding the property insured.—Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555.

¶ 213. It makes no difference with regard to the amount of partnership property covered that the agent of the insurer knew the interest of the parties, and that it was the intention of both the insurer and insured, at the time of issuing the policy, that the insurance should cover the whole.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

§ 54. Insurance "as interest may appear" and persons in secondary right.

¶ 214. An insurance policy in which the insurance is stated to be for the benefit of a mortgagee creates, nevertheless, no contract relation between the company and the mortgagee. It is a contract with him who executed the mortgage and owed the debt secured by the insurance. Payment on the policy, though made to the mortgagee, would inure to the benefit of the assured. The right of action for the insurance is vested in him, and whatever defeats his right of recovery must defeat any right of the mortgagee, which in this case can only be derived through him. The assured has the same legal, real and beneficial interest in the insurance as if the mortgagee was not mentioned in the policy.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

¶ 215. A stipulation for insurance for a mortgagee's benefit being intended to afford security supplementary to and connected with the mortgage, and to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the building should burn, was held in equity a sort of adjunct to the mortgage, and binding on the mortgagor and all others in his place without notice.—Miller v. Aldrich, 31 Mich. 408.

§ 55. Conditional contracts for insurance.

¶ 216. A contract of marine insurance is not made out by a telegram to an agent, having authority to bind his company, requesting insurance on Lloyd's Classification, a reply stating that the vessel has no classification in Lloyd's, another telegram from the owner stating that the agent of Lloyd's is present, a reply "will cover if Lloyd's say she is seaworthy; send application" and a subsequent letter confirming telegrams "will cover—send application" where the agent of Lloyd's was not present as per telegram and never classified the vessel or stated that it was seaworthy.—Gauntlett v. Sea Ins. Co., 127 Mich. 504.

§ 56. Memorandum or application as contract pending issuance of policy.

Liability implied from acceptance of premium, see post § 57.
Application as part of policy contract, see post § 59.
Sufficiency of application in general, see ante § 47.
Variance of policy from application, see post § 64.
Effect of custom of agents in insuring own goods by memorandum without formal contract, see Customs ¶ 67.
Merger of preliminary in permanent contract in general, see Contracts § 265.

¶ 217. An insurance application which has been received by the company and accepted, and the premium paid, becomes the contract of insurance until the policy is issued and received by insured.—Robinson v. United States Benevolent Soc., 132 Mich. 695.

¶ 218. Quære, whether delay of more than a month in forwarding application for marine insurance after the receipt of a telegram "We cover—send application" will defeat the contract of insurance.—Gauntlett v. Sea Ins. Co., 127 Mich. 504.

¶ 219. Deceased applied for life insurance before going on a trip which fact was known to the agent, and his application was accepted and the premium paid. The policy was issued and sent to the agent for delivery but insured had already started on his trip and the policy was delivered to his son. It contained provisions inconsistent with his application. He was killed and suit was brought though under the policy as issued no

recovery could be had. Held that the application and not the policy controlled and recovery allowed.—Robinson v. United States Benevolent Soc., 132 Mich. 695.

§ 57. ——Liability implied from acceptance of premium.

¶ 220. One who has contracted for a policy of insurance is not bound to accept in lieu thereof and as of equal value any such resulting liability as might be incurred by implication from the acceptance of his note as payment of the premium.—Lawrence v. Griswold, 30 Mich. 410.

§ 58. Standard form of policy and statutory requirements.

Application as part of policy, see post § 59.
Incorporation of other instruments by reference, see post § 60.
Matter contained in attached riders or on margin, see post § 61.
Charter and by-laws of mutual associations as part of contract, see post § 62.
By-law and charter amendments after issuance of policy, see post § 63.
Variance of policy from application, see post § 64.
Construction and interpretation of policy or contract, see post §§ 65-70.
Form and requisites of contract in general, see ante § 51.
Time for action on standard form policies, see post § 271.
Right to require adjuster's certificate for loss under standard form policy, see post § 236, ¶ 965.
Statutory requirement that application be part of policy, see post ¶ 228.
Certificate in benefit society, see Fraternal Associations § 19.
Validity of policy not in standard form, see also Contracts, § 67.
Invalidity of stipulation for particular proofs, see Contracts § 47, ¶ 198.
Validity of policy variant from standard form prescribed by unconstitutional law, see Contracts ¶ 173.
Due process of law in regulations affecting admissible forms of policy or defenses thereto, see Constitutional Law § 162.
Invalidity of standard form law as a delegation of power, see Constitutional Law ¶ 415.
Validity of provisions for primary resort to arbitration, see Contracts § 48.
Invalidity of agreement that certain right of action should be foregone, see Contracts ¶ 200.
Form of standard fire insurance policy, see Pub. Acts 1917, No. 256, part IV, chap. II, §§ 6-13.
Statutory provisions relating to contracts of fire insurance, see Pub. Acts 1917, No. 256, part IV, chap. II.
Matters not included in standard form of fire insurance policy which may be added, see Pub. Acts 1917, No. 256, part IV, chap. II, § 7.
Mutual fire insurance companies not required to use standard fire insurance form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 8.
Life and casualty insurance contracts in general, see Pub. Acts 1917, No. 256, part III, chap. II.
Provisions not permitted in life insurance policy, see Pub. Acts 1917, No. 256, part III, chap. II, § 4.
Standard provisions required in life insurance policies, see Pub. Acts 1917, No. 256, part III, chap. II, § 3.
Statutory requirement that policy of life or casualty insurance contain entire contract, see Pub. Acts 1917, No. 256, part III, chap. II, § 1.
Statutory provision that policy for life insurance contain requirement for advance payment of premiums with one month's grace after first year, see Pub. Acts 1917, No. 256, part III, chap. II, § 3, ¶¶ 1, 2.
Safeguards against lapse of life insurance policies, see Pub. Acts 1917, No. 256, part III, chap. II, § 2.
Standard forms of policy for insurance against loss from sickness, disability or accidental death, see Pub. Acts 1917, No. 256, part III, chap. II, §§ 12-16.
Invalidity of provisions other than those provided in standard form of fire insurance, see Pub. Acts 1917, No. 256, part IV, chap. II, § 15.
Approval of policy of foreign life insurance company, see Pub. Acts 1917, No. 256, part III, chap. II, § 7.

¶ 221. Act No. 187, Pub. Acts 1907, prescribing standard forms for insurance policies, provides for the payment of premiums in advance, and for thirty days' grace in the payment of premiums after the first. The relator submitted to the respondent insurance commissioner policy forms which read: "If any premium is not paid when due or if any note or part thereof is not paid when due, this policy shall be ipso facto null and void." Held, in mandamus to compel the respondent to vacate an order rejecting such forms, that they were in conflict with the statute, and that the writ should be denied.—Franklin Life Ins. Co. v. Commissioner of Insurance, 159 Mich. 636, Federal Life Ins. Co. v. Same, Id.; United States Annuity & Life Insurance Co. v. Same, Id.

¶ 222. Where the statute provides that certain provisions should be, and certain others should not be, incorporated in insurance policies, no provision may rightfully be used which would, with or without the action of the policyholder, materially change the statutory scheme of the contract.—Mutual Ben. Life-Ins. Co. v. Commissioner of Insurance, 151 Mich. 610.

¶ 223. The form of words adopted in the "Michigan Standard Policy" of fire insurance should be construed with reference to the relation of the parties and the character

and situation of the property insured, and the forfeiture clauses should be interpreted in the light of the facts and circumstances having in mind the ordinary meaning of the language found in them as applied to the purpose for which the contract was made. Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555.

¶ 224. Pub. Acts 1905, No. 277, providing for a standard form, and for a penalty for using any other form of policy may be regarded as a remedial statute aimed to correct real or supposed mischiefs.—Attorney General ex rel. Michigan Lubricator Co. v. Commissioner of Insurance, 148 Mich. 566.

¶ 225. Comp. L. 1897, § 5187, enacted in 1885, applies only to contracts theretofore made between mutual companies and policyholders, and does not apply to the contract of a member of a mutual fire insurance company made in 1896.—Nichol v. Murphy, 145 Mich. 424.

¶ 226. How. St. § 4349, which prohibits the issue of any policy containing any other or different terms than those expressed in the Michigan standard policy, does not avoid a policy so as to defeat action thereon by the insured, merely because it contains a clause not contemplated by the act.—Armstrong v. Western Manufacturers' Mut. Ins. Co., 95 Mich. 137.

§ 59. Application as part of policy contract.

See also post ¶ 418.
Application as contract pending issuance of policy, see ante § 56.
Requisites and sufficiency of application, see ante § 47.
Variance of policy from application, see post § 64.
Copy of application set out in policy as warranty, see post ¶¶ 419, 420.
Oral application as part of policy, see also post ¶ 417.

¶ 227. A provision in an insurance policy that "if this policy be issued upon or refer to an application, etc., such application shall be considered a part of the contract, and a warranty by the insured," will not make the application a part of the contract, and therefore necessary to be set forth in stating the contract according to its legal effect, unless its terms are such as to be capable of being impressed with the character of a warranty by force of the stipulation it contains.—Throop v. North American Fire Ins. Co., 19 Mich. 423.

¶ 228. If the copy of an application for insurance, incorporated in the policy, is not substantially a correct and complete one, the statute is not complied with (Act 180, Public Acts of 1907).—New York Life Ins. Co. v. Hamburger, 174 Mich. 254.

¶ 229. Where a policy of insurance expressly refers to the application, and makes it a part of the contract of insurance, the two instruments must be construed together, in determining what the real contract is; and if the policy, as delivered, contains provisions not in the application and which are not accepted by the applicant, they may be treated as waived by the company, and as constituting no part of the insurance contract. Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289.

¶ 230. A railroad conductor's application for accident insurance, stating that his sole business was running passenger trains, was accepted by the company, and a certificate was issued, containing a condition that attempting to enter or leave moving conveyances using steam, electricity, water or compressed air as a motive power were hazards not contemplated or covered by the insurance, and that no sum would be paid for injuries or death in consequence of such exposure, or while the insured was thus exposed. The certificate expressly referred to the application, which contained no such restriction as to entering or leaving trains when in motion, and made it a part of the contract of insurance. The insured was killed while attempting to alight from a moving train, and before the certificate had reached him in due course of mail. Held, that it is common knowledge that conductors of passenger trains on all railroads must not only enter their trains when in motion, but leave them before they come to a full stop; that this is among the risks which the passenger conductor assumes when he enters such employment; and that this knowledge is so general that the company, when it took and approved the application, must have had knowledge of it, and in view of this it cannot insist upon said restriction.—Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289.

¶ 231. Under Act No. 180 of the Public Acts of 1907, the failure of an insurance company to attach the application to the policy or indorse the same thereon, must be held as an expression on the part of the company of its purpose to waive or relinquish its right to have the application considered as part of the contract.—New York Life Ins. Co. v. Hamburger, 174 Mich. 254.

¶ 232. Where, in an action on an insurance policy, the defense is based upon a written application, such policy and application would necessarily be resorted to for the determination of the question whether the general verdict is not inconsistent with the special findings of the jury, especially where they are specifically referred to in such findings.—Gilbert v. American Ins. Co., 30 Mich. 400.

¶ 233. The receipt and acceptance of an insurance policy without examination does not estop insured from insisting that the application is part of the contract, where the agent taking the application assured the ap-

plicant that it was not necessary to retain a copy of the application because one would be attached to the policy.—Employers' Liability Ass'n Corp. v. Grand Rapids Bridge Co., 139 Mich. 351.

¶ 234. The stipulation in an insurance policy that any application, survey, plan or description of the property referred to therein shall be considered part of the policy, does not apply where the application, etc., is not in writing.—O'Brien v. Ohio Ins. Co., 52 Mich. 131.

§ 60. Incorporation of other instruments by reference.

¶ 235. Reference in a second fire insurance policy to the application of the insured made upon a previous policy since canceled held to incorporate the application in the second policy.—Convis v. Citizens' Mut. Fire Ins. Co. of Calhoun County, 127 Mich. 616.

¶ 236. In his application to the defendant for a policy of life insurance, plaintiff's decedent did not agree, as he did in the order of assignment of wages to pay the premium, that neither he nor his beneficiary would present a claim for injuries arising during the first month if he had left the employment designated in the assignment of wages, but the application referred to the order, and the policy was in terms issued in consideration of both. Held, that because plaintiff left the employment before the beginning of the month, his intestate could not recover on the policy. —Lilja v. Standard Acc. Ins. Co. of Detroit, 171 Mich. 378.

¶ 237. Where the certificate of the agent for an insurance company upon an application for life insurance, gives the date of a former application and across the certificate appears the number of such application indorsed thereon by the home office, the company cannot predicate a defense upon want of knowledge of what appeared in the first application.—Rhode v. Metropolitan Life Ins. Co., 132 Mich. 503.

§ 61. Matter contained in attached riders or on margin.

Renewals as new contracts, see post § 72.
Standard form for rider clause for coinsurance against fire loss, see Pub. Acts 1917, No. 256, part IV, chap. II, §§ 9, 10.
Standard form for rider clause for "average or pro rata" liability for fire loss, see Pub. Acts 1917, No. 256, part IV, chap. II, §§ 11, 12.

¶ 238. The essential purpose of Pub. Acts 1905, No. 277, adopting the same form of policy as provided by the act of 1881, but repealing that act, and providing for a penalty for using any other form of policy, must be assumed to be to provide a standard form of policy, and the sixth exception, providing that provisions added to or modifying the provisions of the standard form may be embodied in riders cannot be construed literally so as to permit the standard form of policy to be used as a mere frame upon which to affix riders embodying the contract of the parties.—Attorney General ex rel. Michigan Lubricator Co. v. Commissioner of Insurance, 148 Mich. 566.

¶ 239. The contention that an "iron-safe clause" was not a valid and binding part of the contract of insurance, because it was contained in a rider attached to the policy, and not in the policy itself, cannot be maintained, where such rider contained the only description of the property insured, and without which the policy would be incomplete.—King v. Concordia Fire Ins. Co., 140 Mich. 258.

¶ 240. An insurance policy provided that the insured must be the unconditional owner of the property. In a suit upon it, plaintiff testified that he informed the agent at the time of taking the policy that he did not own the property unconditionally. The court instructed with reference to riders attached to the policy that it must clearly appear by the language of such riders that an exception was made as to unconditional ownership. Later, at plaintiff's request, the court charged that his instructions with reference to the riders should be considered by the jury only with reference to the question of fact whether plaintiff did inform defendant that he was not the unconditional owner. Held, no error was contained in these instructions.—Goodwin v. Union Ins. Co. of Philadelphia, 163 Mich. 41.

¶ 241. All parts of an insurance policy will be harmonized and given effect if possible, but, where the body of the policy and the riders attached thereto are irreconcilable, the latter will control.—Jackson v. British America Assur. Co., 106 Mich. 47.

¶ 242. Defendant insured a vessel against loss by fire from Dec. 4, 1893, to May 1, 1894. The policy, which was written upon a marine insurance blank, contained a warranty by the insured that the vessel should be navigated between April 1st and Nov. 30th only, and from the last-mentioned date to April 1st next ensuing should be "laid up and safely moored." A rider was attached more specifically assuming to insure "the steamer B., laid up and properly moored" in a certain harbor, and giving permission to do painting, to make necessary alterations and repairs, to fit out in the spring, and to "move from dock to dock for the purpose of loading and unloading cargo." Another rider provided: "This policy covers against fire only, on the terms and conditions of the standard form fire policy of the State of New York, and anything in this policy conflicting therewith is hereby waived." By the "standard form fire policy" mentioned in the rider, property was insured "while located and contained" as described therein, and it became void if mechanics should be employed in

repairing for more than fifteen days. The boat burned at a distance from the harbor on April 16, 1894, while engaged in navigation. Held, that the clause permitting navigation after April 1 was not in conflict with the terms of the standard policy.—Jackson v. British America Assur. Co., 106 Mich. 47.

¶ 243. A fire policy on a vessel written on a marine insurance form with riders limiting it to a fire risk according to the New York Standard Form, which standard form contains a provision that it shall be void if mechanics should be employed in repairing more than 15 days, and with a rider giving permission "to do painting, to make necessary alterations and repairs, and to fit out in the spring," is to be construed as having carried the last-mentioned rider in order to avoid the prohibitive effect of the repair clause in the standard policy form.—Jackson v. British America Assur. Co., 106 Mich. 47.

¶ 244. A clause in a fire policy on a vessel to be navigated during specified months and "laid up and moored" during other months, does not conflict with a rider permitting her to move from dock to dock and to load and unload, and does not indicate an intention to limit the insurance to such time as the boat should remain in the specified harbor, but were consistent with the navigation clause.—Jackson v. British America Assur. Co., 106 Mich. 47.

¶ 245. The fact that after the fire, upon defendant's repudiating liability under a fire policy on a vessel laid up and moored, the insured claimed that he had the right to navigate under a further provision permitting the vessel to move from dock to dock for the purpose of loading and unloading cargo, cannot alter the construction to be given to the policy.—Jackson v. British America Assur. Co., 106 Mich. 47.

§ 62. Charter and by-laws of mutual associations as part of contract.

Amendments of charter or by-laws as affecting policy after issuance, see post § 63.
Rights and limitations of mutual associations generally, see ante § 10.

¶ 246. The charter and by-laws of a mutual fire insurance company are parts of the contract of insurance.—Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties, 192 Mich. 230.

¶ 247. Where the charter and by-laws of a company are inserted in and made a part of its policies of insurance, any insurance in violation thereof is invalid, even though taken for mortgagee's benefit.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

¶ 248. The charter of a nonmutual insurance company is not binding on the assured unless the contract of insurance provides that it shall be.—American Ins. Co. v. Stoy, 41 Mich. 385.

¶ 249. The valid by-laws of a mutual fire insurance company are a part of the policy or contract of insurance.—Douville v. Farmers' Mut. Fire Ins. Co., 113 Mich. 158.

¶ 250. Existing by-laws of a mutual insurance company are properly regarded as entering into contracts of insurance and binding the members where the policy is made subject to them. But a by-law cannot destroy a contract in force before its adoption.—Becker v. Farmer's Mut. Fire Ins. Co. of Wayne & Monroe Counties, 48 Mich. 610.

¶ 251. A by-law of a mutual benefit society that is reasonable and valid, not oppressive or against public policy forms part of the contract between a member and the other members of the society, and binds each member by its terms.—Van Poucke v. Netherland St. Vincent de Paul Soc., 63 Mich. 378.

¶ 252. The provisions in the charter and by-laws of a mutual fire insurance company that "no insurance shall be binding until the payment of the premium" that the insurance shall be suspended in default of payment of assessments and that the insured shall have no claim for losses until assessments are paid, render the insurance company not liable for losses while the insured is in default.—Hill v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 129 Mich. 141.

¶ 253. The by-laws of a mutual insurance company are a part of the insurance contract, as binding upon the member as the policy itself; and the power conferred by How. St. § 4253, to make by-laws, authorizes a by-law requiring the secretary to cancel any risk that in his opinion is unsafe. Such a by-law is not contrary to public policy.—Douville v. Farmers' Mut. Fire Ins. Co., 113 Mich. 158.

¶ 254. A by-law of a mutual fire insurance company, to which each applicant's attention is directed and his written assent obtained, which is authorized by charter, and which provides that all differences between the company and its members which cannot be settled shall be submitted to arbitrators, the agreement of a majority of whom shall determine the matter submitted, is valid, and does not contravene How. St. § 4258, giving to members the right to maintain suits at law against such corporations for "accrued" claims, since, by the terms of the contract, no claims accrue, in case of differences, until a sum is awarded by arbitrators.—Raymond v. Farmers' Mut. Fire. Ins. Co., 114 Mich. 386.

§ 63. By-law and charter amendments after issuance of policy.

¶ 255. A mutual fire insurance policy cannot be affected by the subsequent adoption of a by-law providing that insurance shall be

forfeited if premises are left vacant.—Becker v. Farmers' Mut. Fire Ins. Co. of Wayne & Monroe Counties, 48 Mich. 610.

¶ 256. One who in his application for insurance in a mutual fire insurance company agreed to be governed by all the conditions of the charter and by-laws as they then existed, and who, when a change was subsequently made, the effect of which was to limit the risk on his property, received a copy of the new by-law and has made no objection but continues his membership, becomes bound by such new by-law.—Borgards v. Farmers' Mutual Ins. Co., 79 Mich. 440.

§ 64. Variance of policy from application.

Application as contract pending issuance of policy, see ante § 56.
Application as part of policy contract, see ante § 59.
Requisites and sufficiency of application in general, see ante §§ 47, 48.

¶ 257. Where a policy of insurance is issued inconsistent with the application, it is the duty of the company to call the attention of insured thereto so that he may ratify or reject, since he has a right to assume that the policy will be in accordance with the terms of the application and is not bound by one differing therefrom until he has ratified or waived.—Robinson v. United States Benevolent Soc., 132 Mich. 695.

¶ 258. Where an insurance policy was sent by the company to its agent for delivery to insured, the agent does not become the agent of insured so as to bind him by conditions in the policy different from those in his accepted application.—Robinson v. United States Benevolent Soc., 132 Mich. 695.

¶ 259. An applicant for insurance is entitled to reply upon the presumption that his policy will be in accordance with his oral application, and if the insurer desires to make the policy anything different it must, in order to be binding upon the assured, call his attention to the clauses differing from his application.—Gristock v. Royal Ins. Co., 87 Mich. 428, on rehearing affirming 84 Mich. 161.

§ 65. Construction and interpretation of policy or contract.

Construction in favor of insured, see post § 66.
Provisions for forfeiture or avoidance, see post § 67.
Written and printed portions, see post § 68.
Subject-matter covered and particular descriptions, see post § 69.
Stipulations as to legal effect, see post § 70.
Rules for interpretation of warranties in insurance policies, see also post ¶ 416.
Construction of conflicting clauses in body of policy and in rider, see also ante ¶¶ 241-244.
Provisions in policy requiring action within specified time, see post § 272.
Provisions in policy forbidding action until certain time, see post § 273.
Provisions in policy relative to actions in conflict with statutes, see post § 274.
Construction of questions and answers in application, see ante § 48.
Construction of policy or contract as question of law or fact, see post § 330.
Contract to pay given sum monthly for life as price for property as a contract for insurance or for an annuity, see also Corporations ¶ 267.
Intendment of terms most strongly against author or draftsman of the contract, see Contracts § 166.
Invalidity of any article, by-law, resolution or policy provision of life or casualty insurance company prohibiting member or beneficiary from bringing suit, see Pub. Acts 1917, No. 256, part II, chap. I, § 8.

¶ 260. All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 261. While it is true that any clause of an insurance policy should be construed somewhat strictly, the parties may stipulate what risks shall be covered by the policy, and if the terms of the instrument are not ambiguous, they will be enforced.—Frey v. Germania Life Ins. Co., 56 Mich. 29.

¶ 262. An insurance policy, covering both real and personal estate, is not to be held a divisible contract, part of which may remain in force though the rest be invalid, where it is not perfectly clear that the insurer would have assumed both risks separately.—Aetna Ins. Co. v. Resh, 44 Mich. 55.

¶ 263. An insurance for a gross sum on a number of enumerated articles is not a separate insurance on any of those articles for any sum.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

¶ 264. The terms of the standard policy of fire insurance are to be construed as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted.—John Davis & Co. v. Insurance Co. of N. A., 115 Mich. 382.

¶ 265. The term "legal representative," as used in the clause in the Michigan standard fire insurance policy, "wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured," refers to those who succeed to the insured's legal rights, by reason of his death or the transfer of the policy, and does not include an agent of the insured.—Metzger v. Manchester Fire Assur. Co., 102 Mich. 334.

¶ 266. In construing words of a policy, there is no substantial difference in signification between the phrases "shall die by his own hand," "shall commit suicide" and "shall die by suicide."—Blackstone v. The Standard Life & Accident Ins. Co., 74 Mich. 592.

§ 66. ——Construction in favor of insured.

See also ante ¶ 187.

Presumption that insured has read and understands application and insurance contract, see ante ¶ 182.

¶ 267. When a stipulation or exception to a policy of insurance, emanating from the insurers, is capable of two meanings, the one is to be adopted which is most favorable to the assured.—Utter v. Travelers' Ins. Co., 65 Mich. 545.

¶ 268. Where a contract, a policy of accident insurance, is for indemnity, its terms and provisions, if uncertain in meaning or contradictory of each other, must be given a meaning and construction most favorable to the insured.—Lilja v. Standard Acc. Ins. Co. of Detroit, 171 Mich. 378.

¶ 269. As to how far the rule that insurance contracts are to be construed most favorably to the insured is modified where the form of policy is prescribed by statute, quære.—John Davis & Co. v. Insurance Co. of N. A., 115 Mich. 382.

¶ 270. A provision in a charter of a fire insurance company which is part of an insurance policy and relates to the method of making applications for insurance must be strictly construed against the insurer where its agent has orally agreed to issue a new policy in place of a canceled policy held by the insured's predecessor in title and accepted the required fee.—Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties, 192 Mich. 230.

§ 67. ——Provisions for forfeiture or avoidance.

Validity of agreements for forfeiture, see post § 109.

Forfeiture or avoidance in general, see post XII.

Estoppel of waiver of right to avoid or forfeit, see post XII, C.

Statutory provisions designed to curb right to forfeiture, see post ¶¶ 532, 533.

Construction of clause for forfeiture for suicide, see also post ¶¶ 629, 630.

Public policy as to onerous cancellation terms in policy, see Contracts § 68.

Promise of insurer as consideration for iron safe clause and other conditioning clauses, see Contracts ¶ 410.

¶ 271. Provisions in an insurance policy that involve forfeiture must be strictly construed.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Lyon v. Travelers' Ins. Co. of Hartford, Connecticut, 55 Mich. 141; Miner v. Michigan Mut. Ben. Ass'n, 63 Mich. 338.

¶ 272. As forfeitures and penalties are not favored in the law the language of a policy should not be unnecessarily extended by construction.—Metzger v. Manchester Fire Assur. Co., 102 Mich. 334.

¶ 273. Forfeitures should never be more rigorously enforced than will be fairly justified by a strict construction of the provisions on which they are based, as against the party insisting upon them.—Olmstead v. Farmers' Mut. Fire Ins. Co., 50 Mich. 200.

¶ 274. Clauses of forfeiture in an insurance policy must be explicit.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

§ 68. ——Written and printed portions.

¶ 275. Where a provision in an insurance policy is part of the printed form designed to be sufficiently general in its conditions to answer in all cases, it cannot be supposed to have special and exceptional cases particularly in view.—Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

¶ 276. When a written and a printed clause appear in a policy of insurance, relating to the same subject (e. g., other insurance), the former in a prominent place, and associated with the other written provisions of the policy, and the latter in small type, and therefore obscure, — the intention of the parties will be sought for in the written rather than in the printed provision.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

§ 69. ——Subject-matter covered; particular descriptions.

Property, life or interest covered, see post VII.

¶ 277. Horses are covered by a policy on "live stock."—Hapeman v. Citizens' Mut. Fire Ins. Co., 126 Mich. 191.

¶ 278. A policy of insurance covered several separate buildings and dwellings. It provided that the live stock, carriages, hay, wool, etc., were insured anywhere on the premises. The insured invalidated the policy as to the real estate by incumbering same contrary to the stipulations of the policy. Held, the policy was divisible, and the insured might recover for the loss of such of the personalty as was intended to be moved about from place to place on the premises.—Benham v. Farmers' Mut. Fire Ins. Co., 165 Mich. 406. (Hooker and McAlvay, JJ., dissenting.)

¶ 279. Complainant owned a brick building, and back of it and connected by a walk

was a wooden structure which was used by complainant in connection therewith. Complainant asked the local agent of defendant insurance company to place a policy on the premises. The policy being made to cover only the brick building, complainant asked for one covering also the wooden structure. The agent, doubting his authority to issue such a policy, called in the state agent, who after inspecting the premises issued a policy covering the brick building "and its additions adjoining and communicating with the foundations." Held, the policy should as a matter of law be held to cover the wooden structure.—Shepard v. Germania Fire Ins. Co., 165 Mich. 172.

¶ 280. A policy of insurance covering lumber "piled in mill building, on cars, under mill sheds and in sheds adjoining to said mill building," was construed to cover lumber in sheds located some distance from the mill, there being undisputed evidence that these sheds were known as "mill sheds," though the roof of the mill also projected 10 or 12 feet and formed sheds with open ends and sides for the protection of men loading cars but not intended for lumber sheds. It should not read, "piled in mill building, on cars under mill sheds, and in sheds adjoining," etc. —Wolverine Lumber Co. v. Palatine Ins. Co., 139 Mich. 432.

¶ 281. A fire insurance policy permitting the keeping of kerosene on the premises insured provided it be drawn and lamps filled in the daytime, or at a distance not less than ten feet from artificial light, is entirely consistent with the fact that the insurance covers kerosene; but it must be used and handled as stipulated.—Vandervolgen v. Manchester Fire Assur. Co., 123 Mich. 291.

¶ 282. In a fire policy on a creamery, "all materials and supplies for the (manufacture chiefly of butter and cheese) including packages" includes milk cans.—Cronin v. Fire Ass'n, 112 Mich. 106.

¶ 283. A clause in a policy which provided that if gunpowder, or other articles subject to legal restriction, should be kept in greater quantities or in a different manner than was provided by law, the policy should be void, was held to have reference only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute.—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

¶ 284. A description in an insurance policy of the subject insured in these words, "the stock, lumber and goods manufactured and in process of manufacture in said building," will not cover property in the yard adjoining the building. The words "in said building" will be held to qualify the description of all the property insured, and not merely that "in process of manufacture," and, therefore, evidence that the agent of the company was told at the time the policy was issued that insurance was wanted "on the lumber outside as well as inside the building" is inadmissible, especially when the subject insured is laid in the declaration as "lumber and stock of felloes, poles, bows and shafts, manufactured and in process of manufacture, contained in the" building.—North American Fire Ins. Co. v. Throop, 22 Mich. 146.

¶ 285. The term "plate," in a clause excluding from an insurance policy "money, bullion, jewels, plate and watches," does not embrace silver forks and tea and table spoons. —Hanover Fire Ins. Co. v. Mannasson, 29 Mich. 316.

¶ 286. Whether a word in a clause stating the number of rods the insured buildings were from any other building was "six" or "oix" was held to be for the court to determine as matter of construction in an action on the policy.—Lapeer County Farmers' Mut. Fire Ins. Co. v. Doyle, 30 Mich. 159.

¶ 287. Under a fire insurance policy insuring certain city fire engine appliances while "located and contained in" a described building, and not elsewhere, the company was not liable for loss of said property while being used outside of said building in an attempt to extinguish fire.—Village of L'Anse v. Fire Ass'n of Philadelphia, 119 Mich. 427.

¶ 288. The words, "occupied as a dwelling-house," when used in a policy of insurance, do not necessarily exclude the idea that some part of the building may be used as a stable. If the family live in the building it is not deprived of its character as a dwelling because domestic animals are also housed there. So a policy upon "one two-story frame building and additions thereto, occupied by assured as a dwelling-house," "with shingle roof," was held to cover a carriage-house and stable under the same roof, and in the rear of the portion occupied for dwelling purposes, but attached thereto, being under the same "shingle roof."—Hannan v. Williamsburg City Fire Ins. Co., 81 Mich. 556; Hannan v. Westchester Fire Ins. Co., 81 Mich. 561.

¶ 289. Insurance "on a stock of eggs in store (in pickle)" written by an agent who afterwards testified he understood it to cover the stock "while being pickled and disposed of," was held to cover the entire stock though all the eggs were not in the pickling vats at the time of the fire.—Hall v. Concordia Fire Ins. Co., 90 Mich. 403.

¶ 290. Where an insurance policy covered property owned by the assured and "property held by it in trust, or sold and not delivered, and piled on the docks," held, that there was no delivery, within the meaning of the policy,

of lumber that had been sold, piled by itself, marked for the purchaser and was awaiting removal by vessel.—Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482.

¶ 291. Stack has a well-defined meaning, and insurance upon "stacks on farm" does not include the threshed wheat in a mow in a barn.—Benton v. Farmers' Mut. Fire Ins. Co., 102 Mich. 281.

¶ 292. It was provided in the policy that it should be void if the premises were used for storing or keeping therein any articles included in certain classes of hazards annexed to the policy, "except as herein specially provided, or hereafter agreed to by the insurers upon this policy." It was held that where a stock of goods was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation did specially provide for them "in writing upon the policy."—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

¶ 293. An insurance policy containing the provision "stock insured against lightning anywhere in Kent, Allegan and Ottawa Counties" will cover loss by lightning of horses located at the time off the insured's farm.—Hapeman v. Citizens' Mut. F. Ins. Co., 126 Mich. 191.

§ 70. ——Stipulations as to legal effect.

¶ 294. An insurance policy cannot be construed by the court on a stipulation as to its legal effect.—American Ins. Co. v. Reed, 40 Mich. 622.

§ 71. Endowment policies and clauses.

¶ 295. An insurance certificate payable at the end of a specified time (100 months), or upon total disability or death, is an endowment policy.—Walker v. Giddings, 103 Mich. 344.

§ 72. Renewals as new contracts.

Authority of agents to make renewals, see ante § 25.

¶ 296. Each renewal of a policy of insurance is a new contract, and is subject to the local laws in force at the time of the renewal.—Brady v. Northwestern Ins. Co., 11 Mich. 425.

¶ 297. Renewals of policies of insurance, though amounting to a new contract, in no way change the terms and conditions of the original policy except as they continue it in force, but the rights of the parties are governed by the provisions of the policy as originally issued, except as the same are affected by any waiver that may have arisen in the meantime.—Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

¶ 298. Waiver of an arrangement whereby a policy was surrendered and a new one issued in its place is not shown by the collection, subsequent to such arrangement, of the annual premium-note given on the issue of the first policy, where it appears that the company promptly corrected its mistake in such collection by notifying the assured and tendering back the amount collected less the quarterly premium due on the second policy.—Krause v. Equitable Life Assur. Soc., 105 Mich. 329.

¶ 299. Whether the collection of a note given for premiums on a life insurance policy constitutes a waiver by the company of an agreement between the parties substituting a new policy in place of the one for premiums on which such note was given is a question for the jury, to be determined by taking into consideration the denial of the company that it was intended to have such effect, together with the acts of the parties inconsistent with such denial.—Krause v. Equitable Life Ins. Co., 109 Mich. 327.

VI. PREMIUMS, ASSESSMENTS OR OTHER CONSIDERATION.

§ 73. In general.

Power of mutual companies to levy assessments, see post §§ 74-75.
Assessment in mutual companies, see post §§ 76-78.
Levy and collection of assessments, see post §§ 79, 80.
Notice of assessment, see post §§ 81, 82.
Remedy against excessive assessment, see post § 83.
Payment or satisfaction of assessment, see post §§ 84-87.
Estoppel of insured to avoid liability, see post § 88.
Actions for premium or assessment, see post §§ 89-94.
Recovery of premium or assessment paid, see post § 95.
Anti-rebate laws, see ante § 4.
Consideration for assignment or transfer, see post § 121.
Forfeiture for default in payment of premium or assessment, see post §§ 150-155.
Contract or policy in general, see ante V.
Waiver of nonpayment of premium or assessment, see post § 188.
Unearned premiums and surrender values, see post XII, E.
Premium or fee paid for surety bond as taxable costs, see Costs § 66.

¶ 300. If a fire insurance policy is null and void, or suspended, from whatever cause, so that the company incurs no risk and the assured receives no protection, there is no legal responsibility for the amount of the premium.—American Ins. Co. v. Stoy, 41 Mich. 385.

§ 74. Power of mutual companies to levy assessments.

Effect of insolvency of company, see post § 75.
Dues and assessments of benefit society, see Fraternal Associations III.

¶ 301. After a license to do business has been refused a mutual benefit association, no assessments to pay death losses occurring after such refusal can legally be made.—Stamm v. Northwestern Mut. Ben. Ass'n, 65 Mich. 317.

§ 75. ——Effect of insolvency of company.

Receivership and proceedings to wind up business, see ante § 12.

¶ 302. A receiver of a fire insurance company, organized under Act No. 82, Laws of 1873, derives directly from the statute his authority to make assessments; assessments, when so made, are not conclusive upon members, and an order from court on his ex parte petition confers no additional authority, wherefore if he acts beyond or against the statute his acts may be questioned as if no such order had been made.—Wardle v. Townsend, 75 Mich. 385.

¶ 303. In preparing for an assessment on policyholders to meet losses, it is the duty of the receiver of the insolvent insurance company to ascertain and report to the circuit court the number of each class of policies, the amount of unearned premiums due thereon, the money necessary to meet losses, together with the cost of services and the expenses of the receiver.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

§ 76. Assessments in mutual companies.

Effect of withdrawal or surrender of policy, see post § 77.
Limitation of liability by special agreement or charter provision, see post § 78.
Actions to enforce assessments, see post §§ 89-94.

¶ 304. A member of a mutual life insurance company who in his application agrees to make punctual payment of all dues and assessments for which he may become liable, is supposed to have understood that circumstances might arise creating a liability for assessment or the promise would not have been made.—Calkins v. Angell, 123 Mich. 77.

¶ 305. Policyholders in manufacturers' mutual fire insurance companies organized under How. St., chap. 134a (Laws 1883, Act No. 78), are liable only for losses occurring during the lifetime of their policies and not for prior losses.—Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill, 101 Mich. 393.

¶ 306. Each member of the company makes a contract, not only with the corporation itself, but with each member thereof, and the corporation possesses no power to release policyholders from the liability for losses and expenses which they assumed by their membership.—Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill, 101 Mich. 393.

¶ 307. A member of a mutual life association organized under Comp. L. 1897, § 7497 et seq., is liable to an assessment for the payment of death claims levied by the receiver of the association after the dissolution of the association, as such member is bound by the act of organization which in section 22 provides for the levying of assessments by the receiver to pay death claims which have accrued at the time of his appointment.—Calkins v. Angell, 123 Mich. 77.

¶ 308. A member of a mutual life association organized under Comp. L. 1897, § 7497 et seq., cannot escape liability for assessments levied by a receiver to pay death claims, on the ground that the contract to pay assessments was unilateral and that such member had the right to decline to pay an assessment at any time and the only consequence would be that his policy would lapse and he cease to be a member.—Calkins v. Angell, 123 Mich. 77.

¶ 309. An insured is held to have made an ordinary contract of insurance and not to have become a member of a mutual fire insurance company and hence is not liable for assessments levied by the receiver, where he applied for and bargained with the agent and paid for ordinary insurance in accordance with the Michigan Standard policy and received a Standard policy issued by a mutual company containing a statement that "if this policy be made by mutual or other company having special regulations such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto" and with no further regulations written upon or appended to the policy except a statement that "the articles of association and by-laws of this association are hereby declared to be and form a part of this policy and are to be resorted to in order to determine the rights and obligations of the several parties hereto."—Osius v. O'Dwyer, 127 Mich. 244.

¶ 310. A by-law making the whole amount of the premium note to a mutual insurance company collectible on default in paying an assessment thereon within thirty days—the money to be paid into the treasury of the company to meet past and future losses—held a lawful by-law.—Cahill v. Kalamazoo Mut. Ins. Co., 2 D. 124.

§ 77. ——Effect of withdrawal or surrender of policy.

¶ 311. A policyholder in a mutual fire insurance company is liable for all assessments made against the members of such company during the term of his policy, even

though he has sought to withdraw from the company by handing his policy to the company's local agent; where at the time of such attempted withdrawal, he is in arrears in his assessments, and where such arrearages remain unpaid.—Nichol v. Murphy, 145 Mich. 424.

¶ 312. The liability of a member of a mutual fire insurance company, when the affairs of the company are being closed by a receiver, is not limited by his contract with such company, but by his proportionate share of losses and expenses for the period during which he was a member.—Nichol v. Murphy, 145 Mich. 424.

¶ 313. Under How. St. § 4263, a receiver of an insolvent mutual fire insurance company can assess none but members and persons insured, and, therefore, one whose policy has been surrendered and canceled cannot be assessed.—Tolford v. Church, 66 Mich. 431.

¶ 314. A withdrawing member of a mutual fire insurance corporation, upon the surrender of his policy, must pay not only all regular assessments outstanding against him, but also all other obligations that might lawfully be made the subject of assessment at the time of surrender, and such amount is payable at once upon ascertainment.—Patrons' Mut. Fire Ins. Co. v. Butler, 193 Mich. 648.

¶ 315. Members of a mutual fire insurance company, if liable at all for assessments made by a receiver under How. St. § 4263, can be made so only by the contract existing between them and the corporation, which contract is shown by the application and the policy.—Wardle v. Hudson, 96 Mich. 432.

¶ 316. A member of a mutual insurance company is liable for an assessment made by a receiver after he has ceased to be a member and received a receipt for specified items reciting that it was "in full of all demands," where the assessment in suit covered nonassessments for previous years, and losses by failure to collect from irresponsible members assessments made prior to the defendant member's withdrawal.—Peake v. Yule, 123 Mich. 675.

¶ 317. A member of a mutual insurance company cannot by a surrender of his policy escape liability for such obligations as might lawfully be made the subject of assessment at the time of the surrender.—Peake v. Yule, 123 Mich. 675.

¶ 318. One who has surrendered his policy in a mutual fire insurance company, and become discharged from liability, is not, by paying an assessment for which he is not legally liable, estopped from denying future liability, where the assessment paid was claimed by the company and believed by him to have been one that he was liable for before the policy was surrendered.—Tolford v. Church, 66 Mich. 431.

¶ 319. Where the charter of a mutual fire insurance company provides that a member may withdraw by returning his policy to the secretary and paying all assessments to which he is then liable, membership is not terminated nor is the member or the company released from liability if the member without surrendering his policy merely directs the secretary to take his name from the books and pays all assessments then due.—Schroeder v. Farmers' Mut. Fire Ins. Co., 87 Mich. 310.

¶ 320. A policyholder in an assessment insurance company had his policy canceled, and paid the amount stated by the company to be due. Later a receiver for the company was appointed, on account of insolvency. Held, the member was still liable for his share of the liabilities of the company incurred prior to the ending of his membership.—Nichol v. Newman, 160 Mich. 582.

¶ 321. The receiver of a mutual insurance company was entitled to recover the amount of an assessment levied against a member, where the member had theretofore surrendered his policy and settled a suit to recover an assessment, it appearing however that the assessment so settled was insufficient and that the one in suit was made to cover the deficiency.—Cavanagh v. Connon, 123 Mich. 685.

¶ 322. A member who surrenders his policy under a clause of the charter permitting it on the payment of "his proportion of all assessments to which the company is liable at the time of his withdrawal," remains liable for such obligations as might lawfully be made the subject of assessment at the time of such surrender (e. g., losses in litigation pending when he withdrew), but not for losses arising subsequently from failures to collect or from any other cause.—Ionia, E. & B. F. M. Fire Ins. Co. v. Otto, 96 Mich. 558; Union Mut. Fire Ins. Co. v. Spaulding, 61 Mich. 77.

¶ 323. Defendant, a member of a mutual fire insurance company, paid an assessment made Jan. 5, 1884, and March 19, 1884, surrendered his policy, which was then canceled. Certain losses which accrued prior to the latter date were not included in the assessment, but under a subsequent assessment defendant paid $4 as his proportion of such loss on March 5, 1885, which amount more than paid all of defendant's liabilities up to the time of the cancellation of his policy. Held, that defendant was discharged from further liability.—Tolford v. Church, 66 Mich. 431.

¶ 324. A member of a mutual fire insurance company obligates himself to pay a pro-

portionate share of the losses and expenses for the period during which he is insured; and, if such liability has not been covered by assessment, it continues, although he may have meanwhile ceased to be a member.—Ionia, etc., Mut. Fire Ins. Co. v. Ionia Circuit Judge, 100 Mich. 606.

§ 78. ——Limitation of liability by special agreements or charter provision.

¶ 325. The liability of persons insured in mutual fire insurance companies organized under Pub. L., 1873, Act No. 82, and 1877, Acts No. 66 and 142 (How. St. § 4247), to pay their proportion of such assessments as shall be sufficient to meet all of the company's losses and liabilities, cannot be avoided by any arrangements entered into with the company whereby the insured seeks to limit such liability; nor can it be lessened by any provisions in the articles of association.—Russell v. Berry, 51 Mich. 287.

¶ 326. The general insurance law (How. St., ch. 132) authorizes the incorporators of a mutual insurance company to prescribe in their charter the liability of members to assessments. But it also provides that, if the company becomes insolvent, a receiver may assess them for enough to meet all liabilities. A member of an insolvent company filed a bill to restrain such an assessment, averring it to be the general understanding, as well as his own, that no one was to be assessed beyond the amount which he had agreed to pay by his premium note. This fact was admitted by demurrer. Held, that as a general agreement to that effect would not be illegal, and as individual members could waive the provision made by the statute for their protection, it would be inequitable for any member of a mutual company to insist on its enforcement after all had become insured with the understanding that their liability was limited to their premium notes.—Macklem v. Bacon, 57 Mich. 334.

§ 79. Levy and collection of assessments.

Items to be included in assessment, see post § 80.

Notice of assessment, see post § 81.

¶ 327. The individual action of the directors in signing the warrant attached to the assessment roll, no meeting of the board being called for the purpose, was not such a ratification as would validate the assessment of a mutual insurance company void because not made by directors.—Johnson v. Farmers' Mut. Fire Ins. Co., 110 Mich. 488.

¶ 328. The charter of a mutual fire insurance company provided that "all assessments" should be made by "the board of directors," who should ascertain the amount of loss, determine a sum to be raised as surplus fund, and make an assessment embracing the loss, expenses incident thereto, and the sum to be raised as surplus. This assessment was then to be handed to the secretary, who was to notify the members. Held, that an assessment made by the secretary pursuant to a resolution of the board of directors providing for an assessment, but failing to indicate the date of it, or the amounts, or the members liable or method of apportionment was invalid—at least in the absence of a formal adoption by the board.—Johnson v. Farmers' Mut. Fire Ins. Co., 110 Mich. 488.

¶ 329. A forfeiture of insurance in a mutual insurance company for nonpayment of an assessment cannot be sustained where the assessment was invalid because not made by the officers designated by law.—Johnson v. Farmers' Mut. Fire Ins. Co., 110 Mich. 488.

¶ 330. A void assessment is no impediment to a new assessment, in making which the officers of the company may reassess the amount paid upon the void assessment upon the payers, and credit on such assessments such amounts.—Ionia, etc., Mut. Fire Ins. Co. v. Ionia Circuit Judge, 100 Mich. 606.

¶ 331. The charter of a fire insurance company requiring payment of assessments within thirty days after the "issuing" of the notice of assessment, means within thirty days after the giving or delivery of such notice.—Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 153 Mich. 594. (Montgomery, Hooker and Carpenter, JJ., dissenting.)

§ 80. ——Items to be included in assessment.

¶ 332. Where a mutual insurance company issues policies on the cash-premium plan, and stipulates in such policies that the holders shall be subject to assessment to meet statutory liability, such policyholders are liable to assessments to cover losses and expenses.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

¶ 333. Where a receiver of an insolvent insurance company applies in a proper case to the court for instruction as to the levying of assessments, the expense may be provided for in the assessment.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

¶ 334. In making an assessment on members to meet the liabilities of an insolvent insurance company, the receiver may include unearned premiums as a part of such liabilities.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

¶ 335. Where the statute expressly forbids an insurance company from issuing farm policies, the receiver of the insolvent company may nevertheless levy assessments to pay back to holders of farm policies their unearned premiums.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

¶ 336. A policyholder in a manufacturers' mutual company who contracts to pay as-

sessments for the losses and expenses of the company cannot be assessed to pay unearned premiums, as his contract does not cover them.—Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill, 101 Mich. 393.

¶ 337. As a new assessment for a deficiency arising from a failure to collect a former assessment cannot be made upon members whose policies had been canceled previous to the first assessment, it is proper to include a liberal sum for contingencies, and this is usually within the discretion of the directors of the company.—Ionia, etc., Mut. Fire Ins. Co. v. Ionia Circuit Judge, 100 Mich. 606.

¶ 338. Interest on obligations which it is the duty of the company to pay, and money spent in an attempt to avoid such payment, cannot be charged to subsequent policyholders, who have no interest in, or liability upon, such obligations.—Ionia, etc., Mut. Fire Ins. Co. v. Ionia Circuit Judge, 100 Mich. 606.

¶ 339. Assessments may be made to make good deficiencies arising by reason of the nonpayment of assessments by irresponsible members, and the receiver may assess in the first instance enough to pay all liabilities and expenses, and his discretion in ascertaining the amount will not be interfered with unless abused; it cannot be said, without proof, that an assessment of one hundred per cent in excess of the liabilities is unwarranted.—Wardle v. Townsend, 75 Mich. 385.

§ 81. Notice of assessment.

Waiver of notice or defects therein, see post § 82.

¶ 340. An assessment ordered by a mutual benefit association to pay death losses does not become due, nor can its nonpayment warrant forfeiture of a member's rights, until proper notice as required by the by-laws is given to the member.—Miner v. Michigan Mut. Ben. Ass'n, 63 Mich. 338.

¶ 341. The charter of a mutual insurance company made the nonpayment of assessments within a fixed period a cause of forfeiture. In a case in which this period has been exceeded and the assessment not paid, an affidavit of loss admitted that the notice of assessment had been received shortly after it was sent. But the affidavit was filled out by the agent of the company, and the insured was not led to suppose that the company intended to rely on the provision for forfeiture, or that the date of receiving the notice was of any importance. Held, that in an action on the policy he was not estopped by the recital in his affidavit, from showing that, although the notice was taken from the postoffice soon after it was sent, it had not been delivered to him until long afterward.—Castner v. Farmers' Mut. Fire Ins. Co., 50 Mich. 273.

¶ 342. Notice of an assessment from the secretary of a mutual insurance company is notice from the company, which is bound by his act.—Olmstead v. Farmers' Mut. Fire Ins. Co., 50 Mich. 200.

¶ 343. Where the statute governing contracts of insurance between co-operative insurance associations and their members prohibits a forfeiture without notice, and prescribes what a notice of assessment shall contain, the statutory provisions cannot be avoided by a condition attached to the policy, that, in case no notice is given, the member shall be required to forward to the association an amount equal to the previous assessment; and a failure to give the prescribed notice will prevent the association's declaring a forfeiture of the policy for nonpayment of the assessment.—Warner v. National Life Ass'n, 100 Mich. 157.

¶ 344. In an action against a benefit association to recover a death claim, payment was resisted on the ground that the member had been suspended for nonpayment of assessments, while plaintiff claimed that no legal notice to pay said assessments had ever been served upon the member. It appeared that, at the time when the notices of assessment were directed to be given, a quorum of the board of trustees was not present, but that at the next meeting of the board, when a quorum was present, the proceedings of the former meeting, which had been duly recorded, were read and adopted. Held, that any irregularity in ordering said notices to be given was cured by the further action of the board.—Wolf v. Michigan Masonic Mut. Ben. Ass'n, 108 Mich. 665.

¶ 345. The mere fact that but thirteen days intervene between the giving of the first and the second notice of an assessment by a benefit association, instead of fifteen days, as provided for by the articles of association, does not render invalid the suspension of the member for nonpayment after the expiration of the full period allowed by the articles for the payment of assessments.—Wolf v. Michigan Masonic Mut. Ben. Ass'n, 108 Mich. 665.

¶ 346. Where the constitution of a mutual benefit company provides that any member may make a deposit in advance for the payment of assessments, that such money shall not be used by the company for any other purpose, and that when an assessment is made a notice shall be sent to each member stating "the amount due from the member to whom the notice is sent," a notice that states the full amount of assessment but fails to show how much of the deposit remains in the company's hands as a credit is invalid, and will not let in a defense of nonpayment of the assessment.—Dowling v. Knights Templars' & Masons' Life Ind. Co., 116 Mich. 471.

¶ 347. Where the charter of a fire insurance company provides the notice of assessment that shall be given to members, a member can only be put in default by the notice provided for, and his knowledge otherwise acquired is not sufficient.—Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 153 Mich. 594.

§ 82. ——Waiver of notice or defects therein.

¶ 348. One who has been suspended from membership for failure to pay an assessment of which he received no valid notice does not waive defects in the notice by seeking reinstatement and offering to pay the assessment when at the same time his correspondence with the company insists that he was not in fault.—Dowling v. Knights Templars' & Masons' Life Ind. Co., 116 Mich. 471.

§ 83. Remedy against excessive assessment.

Necessity for refund of unearned premium on cancellation, see post § 212.

¶ 349. On a charge that an assessment is excessive, the proper remedy is by vacating it or by securing a proper distribution of the funds raised by assessment, and not by filing a bill of review.—Daniel v. Citizens' Mut. Fire-Ins. Co. of Jackson, 149 Mich. 626.

¶ 350. It is within the discretion of the court in the winding-up proceedings to set aside for irregularities, and because excessive, an assessment levied by the receiver of a mutual fire insurance company against the policyholders, even though the assessment was not a void order.—Nichol v. Murphy, 145 Mich. 424.

§ 84. Payment or satisfaction of assessment or premium.

Time, place and terms, see post § 85.
Payment by note, see post § 86.
Payment by note of person other than insured, see post § 87.
Burden of proof and presumptions as to payment of premium, see post § 298.
Sufficiency of evidence of payment of premium or assessment, see post § 321.
General requisites, media and sufficiency of payments, see Payment, I.

¶ 351. No actual tender of the assessment money is necessary where an insurance company refuses to receive assessments from a delinquent member and absolutely denies any liability.—Jones v. Preferred Bankers' Life Assur. Co., 120 Mich. 211.

¶ 352. A brakeman who had taken an accident policy gave the insurance company a written order on the railway company that employed him to pay the insurance company out of his wages the instalments of the premium as they fell due. This was delivered by the insurance to the railway company, according to custom. The policy provided that so long as an instalment remained unpaid there could be no claim for an injury received meanwhile. The railway company neglected to pay one of the instalments, and within the period which it should have covered the brakeman was killed. Held that, notwithstanding the nonpayment, the beneficiary in the policy was entitled to recover; the arrangement between the insured and the companies amounted to an assignment to the insurance company of enough of his wages to pay the premium when the instalments fell due, and must be regarded as a payment so long as the insurance company did not notify the insured that it was not paid.—Lyon v. Travelers' Ins. Co. of Hartford, Conn., 55 Mich. 141.

¶ 353. In an action on a benefit certificate upon the death of the insured, a by-law providing that a member failing to pay his assessment within the month due shall be suspended is construed not to contemplate a forfeiture for nonpayment during the disability resulting in death when at the same time there was money in the hands of the company belonging to the insured as a disability benefit.—Albrecht v. People's Life & Annuity Ass'n, 129 Mich. 444.

¶ 354. Where a beneficial society is under obligation to pay a disability benefit of $25 per month it cannot be heard to say that because the injury had not lasted a month when the assessment became due or because no demand was made on it for the benefit, it had the right to suspend the member and avoid the death penalty for his failure to pay the assessment rather than to allow the assessment out of the disability benefit due him.—Albrecht v. People's Life & Annuity Ass'n, 129 Mich. 444.

§ 85. ——Time, place and terms.

Extension of time, see also post ¶ 607.
Authority of agent to extend credit, see ante § 24.

¶ 355. As between the articles of association of an accident association and by-laws which are adopted by the directors, the former govern as to the time for payment of assessments and dues.—Shelden v. National Masonic Acc. Ass'n, 122 Mich. 406.

¶ 356. That a life insurance policy dated August 1, and providing that payments of premiums shall be made on the first of each following quarter, was not issued until August 18th, does not postpone the time of payments of the subsequent premiums to the 18th of the respective months.—Jewett v. Northwestern Nat. Life-Ins. Co., 149 Mich. 79.

¶ 357. Under articles of an accident association providing for a forfeiture of benefits upon failure to pay assessments or dues within 30 days after notification, and that mailing a notice should constitute such noti-

fication, a member had 30 days after receipt of notice, or 30 days after a notice mailed to him would reach him in the ordinary course of the mails, to pay the assessment.—Shelden v. National Masonic Acc. Ass'n, 122 Mich. 403.

¶ 358. An application for a life insurance policy provided that if a premium be settled by note such note should be regarded only as an extension of time of payment and that the company should not be liable for a loss occurring while such note remained due and unpaid. A premium note, past due and unpaid at the time of the assured's death, contained the words, "Send to office for collection," the words "office" being written in the blank, and plaintiff claimed that the note not having been sent to assured's office for collection, the company was in default and the policy in force. Held, that if the quoted words could be regarded as a part of the note, rather than as a mere memorandum for the company's benefit, there was nothing to show that the "office" referred to was the office of assured rather than that of the company, and that the company was not liable.—Burnham v. Michigan Mut. Life-Ins. Co., 149 Mich. 84.

¶ 359. When the right to make payments of insurance premiums at a residence of the insured depends upon custom, good faith requires that the custom should not be discontinued and payments required at the office of the society without notice to the insured.—Baker v. Michigan Mut. Protective Ass'n, 118 Mich. 431.

§ 86. ——Payment by note.

Payment by note of person other than insured, see post § 87.
Construction of application with note given in payment of premium, see ante ¶ 184.
Payment by note as violation of anti-rebate law, see ante ¶¶ 15, 16.
Effect of nonpayment of note given for premium, see post § 152.
General law as to promissory notes, see Negotiable Instruments.

¶ 360. The acceptance of a note for the amount of premium due on a life insurance policy, and the giving of a renewal receipt by the company, amounts to a payment of the premium.—Tabor v. Michigan Mut. Life Ins. Co., 44 Mich. 324.

¶ 361. A policy provided that a note taken in settlement for a premium should not be deemed a payment of the premium, but only an extension of the time for such payment, and that if the note was not paid at maturity the company should be liable for any loss occurring while the note was so dishonored, but the whole amount of the premium included in the note should be considered as earned and be collectible by the company. Held, that this authorized the taking of notes for premiums, and that as the policy was operative until the note became due, its delivery was a sufficient consideration to support the note as between him and the company.—Marskey v. Turner, 81 Mich. 62.

¶ 362. If insurance agents advance to the company the money for a premium and take the note of the insured for the amount, and negotiate it, the condition of the policy that the premium shall be actually paid before the company becomes liable is sufficiently complied with; and the company cannot cancel the policy without notifying the assured and refunding, or offering to refund, the unearned premium.—Home Ins. Co. of Columbus, Ohio v. Curtis, 32 Mich. 402.

¶ 363. Where the general agent of an insurance company, acting for himself, advances to the company the first annual premium, and accepts the note of the assured for the amount as his own, the condition of the policy requiring the premium to be actually paid before the company shall be liable is sufficiently complied with, and the company cannot cancel the policy without notifying the assured, and returning the unearned premium.—Krause v. Equitable Life Assur. Soc., 99 Mich. 461.

¶ 364. A payment of insurance premiums due two different insurance companies represented by the same agent in the form of a note payable for convenience to one of the companies without the knowledge of the other, which note is discounted by the payee and applied, at the agent's request, in payment on a personal account of the agent, the note being subsequently paid, constitutes payment to both companies.—Travelers' Ins. Co. v. Benjamin Douglas Co., 198 Mich. 457.

¶ 365. A life insurance agent received a policy, to be delivered on payment of the premium, for which he took the note of the assured, payable to the order of the company, and delivered the policy. He indorsed the note in blank, and placed it in a bank for collection. The assured became dissatisfied and demanded his note, and offered to surrender his policy, which demand and offer were refused by the agent. The note not being paid the agent brought suit upon it, in his own name, claiming that the premium was charged to his account by the company, and that, on his annual settlement the note having been dishonored, the company refused to credit him with it, but insisted on his taking it, he having guaranteed its payment; that the note was transferred to him, he paying in such settlement the premium, which was the consideration of the note as between him and the company, and that by so doing the title to the note became vested in him. Held, that if the agent's claim was correct the title to the note passed to him under the blank indorsement, its sufficiency to pass the title being recognized by the company, but that if, as defendant claimed, the company

repudiated the whole transaction, treating the policy as void, and did not transfer the note to the agent, no one could recover thereon.—Marskey v. Turner, 81 Mich. 62.

§ 87. ——Payment by note of person other than insured.

¶ 366. Where an insurance company takes the notes of some person other than the assured when the premium falls due, it cannot, as against the assured, insist that they did not amount to a payment. So held where a husband's life was insured for his wife's benefit and his notes were given in renewal of the policy.—Michigan Mut. Life Ins. Co. v. Bowes, 42 Mich. 19.

¶ 367. Where an application for insurance provided that any neglect to pay the premium when due should render the policy void and forfeit all payments made thereon, and that the policy should not be binding on the company until all premiums due upon it should be received by the company or by some one authorized to receive them, and during the lifetime of the insured, it was held that the company was not liable on an undelivered policy, upon evidence that a subagent of its agent had, without its authority, taken from the insured a promissory note of a third person in part payment of the first premium, and in the absence of any showing that such subagent was allowed to substitute his own personal liability to the company in place of the premium.—Continental Life Ins. Co. v. Willets, 24 Mich. 268.

§ 88. Estoppel of insured to avoid liability.

See also ante ¶ 318.

¶ 368. An applicant for insurance after knowing that the insurer has accepted the application and holds his note in payment of the first-year premium, takes possession of the policy and receipt and retains them during the entire year they are in force and has the benefit of the insurance, is estopped from asserting that the note signed was obtained by fraudulent representations of the soliciting agent.—Northern Assur. Co. v. Meyer, 194 Mich. 371.

¶ 369. It seems that one who effects an insurance with an incorporated company, by the terms of whose charter he, by so doing, becomes a member of the corporate body, and on receiving his policy gives a premium note in consideration therefor, payable to the company by its corporate name, is estopped from denying the corporate existence of the company in an action on the note. —Cahill v. Kalamazoo Mut. Ins. Co., 2 D. 124.

¶ 370. Under the rule that a partial failure of the consideration is a defense pro tanto, a judgment for the defendant in an action on a promissory note given in renewal of a life insurance premium note, which second note the defendant claims was given on the plaintiff's assurance that he had obtained a contract of work for the defendant, cannot be sustained where the defendant retained the insurance policy.—Sebring v. Hazard, 128 Mich. 330.

¶ 371. Though a note given as first premium on an insurance policy, is obtained by fraud of the agent, continued retention of the policy for two years, without any repudiation of the transaction, waives the fraud and renders the maker liable on the note, though the policy provides that nonpayment of premiums renders the policy void, there being also a provision for reinstatement and provision for payment of a specified sum at the end of a ten-year term.—National Life & Trust Co. v. Omans, 137 Mich. 365.

§ 89. Action for premium or assessment.

Time to sue and loss of right by delay, see post § 90.
Delivery of policy as condition precedent, see post § 91.
Suits by foreign companies, see post § 92.
Presumptions and evidence, see post § 93.
Defenses and set-offs, see post § 94.
Liability for assessments of mutual companies, see ante §§ 76-78.
Actions by and against agents, see ante §§ 33, 34.
Forfeiture for default in payment of premium or assessment, see post §§ 150-155.
Amount requisite to jurisdiction of suit by receiver to recover assessments in mutual companies, see Equity § 16.
Right to costs in action for assessments by receiver of mutual company, recovery of less than $100, see Costs § 19.

¶ 372. With his application for an insurance policy in plaintiff company, defendant gave his note in payment of the first premium. The policy was never delivered to him and there was no evidence that plaintiff actually mailed said policy with sufficient postage paid thereon to defendant. Plaintiff never notified defendant that his application was accepted. In a suit on the note, held, a verdict was properly directed for defendant.—State Life Ins. Co. v. Harrah, 169 Mich. 127.

¶ 373. Defendant signed an application for life insurance which stated that the company should be free to accept or reject the risk. He gave a note to the agent for the premium. He then refused to be examined by the medical examiner. In a suit on the note, held, it was supported by no consideration, no contract of insurance having been made, and plaintiff could not recover.—Ten Broek v. Jansma, 161 Mich. 597.

§ 90. ——Time to sue and loss of right by delay.

¶ 374. The statute of limitations does not begin to run against an action by the receiver of a mutual insurance company to recover an assessment levied by the receiver

for the payment of losses and expenses, until the assessment is made.—Peake v. Fuller, 123 Mich. 684.

¶ 375. The statute of limitations does not start to run against an assessment made against a member of an insolvent insurance company at the time of the appointment of the receiver, but begins at the date of the assessment.—Nichol v. Newman, 160 Mich. 582.

¶ 376. The receiver of an assessment insurance company was ordered by the court to mail an assessment notice, and to bring suit if payment was not made within thirty days. Held, that the assessment became due upon mailing the notice, and the statute of limitations began to run then, and not at the end of the thirty days.—Pratt v. Broadwell, 159 Mich. 375.

§ 91. ——Delivery of policy as condition precedent.

Necessity and sufficiency of delivery, see ante §§ 49, 50.

¶ 377. Where a promissory note was given in part consideration of a policy of life insurance, and it was claimed in an action thereon that the policy was not to be delivered until after the note was paid, it was held error to receive evidence of the custom of the company and of its agents in this regard, in the absence of any showing that such custom was known to the other party, or that the latter contracted in reference to it.—Lawrence v. Griswold, 30 Mich. 410.

¶ 378. Where, on making application for life insurance, a promissory note was given as part payment of the premium of a policy to be thereafter issued, and a receipt was returned referring to the note and stating how and for what it was received, it was held that the two must be read together as evidence of what the contract was; that neither the insurance company nor its agent could maintain the right to hold both note and policy until the note should be paid, and could not make its previous payment a condition of the delivery of the policy; that in an action on the note, the agent, as plaintiff, was not entitled to recover until he had delivered or tendered the policy to the defendant who had applied for insurance, without any conditions as to the previous payment of the note; and that when no such delivery or tender was made, and no notice given to the applicant of the acceptance of his application until after the maturity of his note, the applicant would be at liberty to rescind and recover back the money advanced, in addition to the note given in payment of the premium. If the construction of the note and receipt could be changed in any way by parol evidence, the question would belong to the jury.—Lawrence v. Griswold, 30 Mich. 410.

§ 92. ——Suits by foreign companies.

Rights of foreign insurers in general, see ante II, B.

Disability of unlicensed foreign insurance company to sue for premiums, see Foreign Corporations, ¶¶ 51, 52.

¶ 379. A foreign mutual fire insurance company which has not filed the prescribed statement and obtained the requisite authority to do business in this state cannot maintain an action in this state for premium upon contracts of insurance.—Seamans v. Temple Co., 105 Mich. 400.

¶ 380. Where the commissioner of insurance has revoked the authority of a foreign insurance company to do business within the state, it cannot thereafter recover on instalment notes upon which, by the terms of its policies, payments fall due in advance.—American Ins. Co. v. Stoy, 41 Mich. 385.

§ 93. ——Presumptions and evidence.

Evidence in action on policy, see post XX, C.

¶ 381. In an action upon a note given by a member of a mutual insurance company in consideration of his policy, parol evidence is admissible to prove that A., who signed the policy as president, was acting president of the company, and that the policy was therefore valid and binding upon the company and a good consideration for the note.—Cahill v. Kalamazoo Mut. Ins. Co., 2 D. 124.

¶ 382. The payment of a part of the premium upon an insurance policy based on an application which provided that the policy should not bind the company until the latter should receive all premiums due upon it does not, by itself, raise a presumption of an understanding that time was to be given for the payment of the remainder.—Continental Life Ins. Co. v. Willets, 24 Mich. 268.

¶ 383. Parol proof may be given of the authority of insurance agents and of the official character of officers.—Jhons v. People, 25 Mich. 499.

¶ 384. Plaintiff in an action upon a premium note, having given the defendant notice to produce the policy upon which the note was given, which he refused to do, made the affidavit required by R. S. 1846, p. 461, § 100, setting forth the facts within the knowledge of the defendant to be, the issuing of the policy, its number, its receipt by defendant, its contents, and the policy. Held, that under this affidavit plaintiff was entitled to examine the defendant as to the existence of the policy, its receipt by him, its contents, and to its production in court if in his possession or under his control.—Way v. Billings, 2 Mich. 397.

¶ 385. The admission of a policy of insurance in a premium note is sufficient evidence

of the policy in a suit on the note.—Way v. Billings, 2 Mich. 397.

¶ 386. Judgment for defendant is properly directed in an action by the receiver of a mutual benefit society to recover an assessment, where the receiver testified that he was appointed receiver and acted as such and made the assessment by order of the court, and a purported certified copy of the order was also introduced, but there was no evidence that the court ever obtained jurisdiction of the defendant or of the company, nor were the pleadings shown, or any evidence that defendant was a member of the society or that he had any notice of the assessment.—Taft v. Pullen, 130 Mich. 595.

¶ 387. In suit for premium applications, policies issued thereon and official bonds of officers admissible to prove user of corporate charter and existence of corporation.—Cahill v. Kalamazoo Mut. Ins. Co., 2 D. 124.

§ 94. ——Defenses and set-offs.

Anti-rebate laws as defense, see ante § 4.
Excuses for nonpayment generally, see post § 155.
Pleading and proof of payment, see Payment, V.

¶ 388. Defendant signed an application for life insurance which stated that the company should be free to accept or reject the risk. He gave a note to the agent for the premium. He then refused to be examined by the medical examiner. Held, that no contract of insurance resulted; that if there was any contract it was with the plaintiff agent to take insurance; and that plaintiff must recover, if at all, for breach of this contract and could not recover on the note. —Ten Broek v. Jansma, 161 Mich. 597.

¶ 389. Where policyholders of an insolvent insurance company are subject to a levy of special assessments to meet losses, they may set off what is due them as unearned premiums.—Ely v. Oakland Circuit Judge, 162 Mich. 466.

¶ 390. An insurance company cannot recover against a policyholder on an instalment note of which the instalments are to be paid in advance, where the policy stipulates that so long as an instalment remains due and unpaid the policy shall be null and void as to any losses occurring during the period of default in payment.—American Ins. Co. v. Stoy, 41 Mich. 385.

¶ 391. A life insurance agent whose powers were not restricted by the printed application purposely misstated, in filling up the application the occupation of the applicant, which had been correctly stated to him by the latter, and which rendered the latter uninsurable under the conditions of the policy. Held, that the assured on discovering the fraud had a right to rescind the contract of insurance, and to show the facts as a defense in a suit upon a note given for the premium.—Michigan Mut. Life Ins. Co. v. Reed, 84 Mich. 524.

§ 95. Recovery of premium or assessment paid.

See also ante ¶ 335.
Necessity for refund of unearned premium on cancellation, see post § 212.
Recovery of illegal or mistaken payments in general, see Payment, VI.

¶ 392. Statements by an insurance company, which has reinsured a life policy, that dividends ought to operate to reduce very materially the charges against the policy, even though they did not entirely offset them, constitute merely an opinion as to what might occur in the future and cannot be made the basis of an action for fraud, nor for the recovery of the premiums paid. —Warren v. Federal Life Ins. Co., 198 Mich. 342.

¶ 393. In an action against an insurance company, which had reinsured a life risk, to recover premiums paid, held that plaintiff was estopped from invoking the provisions of Comp. L. 1897, § 7217, How. 2nd Ed., § 8151, relating to the requirements of life insurance policies and giving the right of action for recovery of premiums paid under policies not complying with the statute.—Warren v. Federal Life Ins. Co., 198 Mich. 342.

VII. PROPERTY, LIFE OR INTEREST COVERED, AND RISK OR HAZARD INSURED AGAINST.

A. PROPERTY INSURANCE.

§ 96. In general.

See also post ¶ 427.
Consequential losses, see post § 97.
Measure of value of property insured, see post § 222.
Description in policy of risk or hazard insured against, see ante § 53.
Construction of policy provisions as to subject-matter covered, see ante § 69.
Warranties and conditions governing the insurance, see post VIII.
Life, casualty or liability insurance, see post VII, B.
Insurable subjects and interest therein, see ante IV.
Separate insurance on enumerated articles where insurance is for gross sum, see ante ¶ 263.
Insurance of property after loss, see ante § 45.
Forfeiture for breach of conditions respecting property insured, see post §§ 161-171.
Burden of proof and presumption as to property or interest covered or risk insured against, see post § 299.
Admissibility of evidence as to property or interest covered or risk insured against, see post § 309.

Sufficiency of evidence as to property or interest covered or risk insured against, see post § 322.
Property covered or risk insured against as question of law or fact, see post § 333.
Construction of words of policy to determine the property covered or the risk insured against, see ante V.
Risk and causes insured against in benefit societies, see Fraternal Associations, § 21.
"Hazards not covered" clause in standard fire insurance policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 394. A farmers' mutual fire insurance company, organized under Comp. L. 1897, chap. 195, providing for the insurance of personal property "being upon farms as farm property," cannot lawfully make a contract of insurance covering the fixtures and utensils of a slaughterhouse, conducted by claimant and used by him in the wholesale meat business.—Geraghty v. Westenaw Mut. Fire-Ins. Co., 145 Mich. 635.

¶ 395. The company is not liable for loss where property was not situated as required by statute and by-laws, and as specified in policy.—Wildey v. Farmers' Mut. F. Ins. Co., 52 Mich. 446.

§ 97. Consequential losses.

Adjustment of losses and benefits payable in general, see post XVI.

¶ 396. The policy covers all loss which necessarily follows from the occurrence of a fire, whenever the injury arises directly or immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided.—Brady v. Northwestern Ins. Co., 11 Mich. 425.

¶ 397. Insurance covering "damage by fire" extends to loss occasioned by water used in case of fire to prevent the destruction of the insured property.—John Davis & Co. v. Insurance Co. of N. A., 115 Mich. 382.

¶ 398. A policy of insurance against loss by lightning covers loss of horses by fire caused by lightning.—Hapeman v. Citizens' Mut. F.-Ins. Co., 126 Mich. 191.

¶ 399. A fire insurance policy upon a stock of goods provided that the company should not be liable for loss caused "by invasion, * * * or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind." By a subsequent clause it was provided that "if a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." Held, that the latter clause did not preclude a recovery upon the policy for damages to the stock by fire ensuing upon an explosion which caused the store building to collapse.—John Davis & Co. v. Insurance Co. of N. A., 115 Mich. 382.

B. LIFE, CASUALTY OR LIABILITY INSURANCE.

§ 98. Death, injury or disability covered.

Results of mistaken or improper medical treatment, see post § 99.
Effect of insanity or temporary derangement, see post § 100.
Criminal, illegal and violent acts, see post § 101.
Blood poisoning, ptomaine poisoning and other unintentional poisonings, see post § 102.
Casualty or liability insurance, see post § 103.
Construction of policy provisions as to subject-matter covered, see ante § 69.
What amounts to disability, see also post ¶ 900.
What constitutes total disability, see also post ¶¶ 898, 899.
Sickness covered by sick benefit policy, see also post ¶ 903.
Amputation amounting to "amputation of limb" under accident insurance policy, see post ¶¶ 901, 902.
Breach of condition against suicide, see post § 158.
Construction of words in policy covering death by suicide, see also ante ¶ 266.
Description in policy of risk or hazard insured against, see ante § 53.
Forfeiture for breach of conditions respecting person insured or his occupation or status, see post §§ 156-160.

¶ 400. Under an accident insurance policy providing that the insurance shall not extend to accidental injuries or death resulting from or caused directly or indirectly, wholly, or in part, by hernia or disease in any form, there can be recovery for death only if it is due solely to the injury received and not partly to disease as a contributing cause.—Skinner v. Commercial Travelers Mut. Acc. Ass'n, 190 Mich. 353.

¶ 401. An accident policy, providing indemnity for loss of time resulting from bodily injuries which shall "immediately following the receipt thereof wholly and continuously disable and prevent the assured from performing any and all duties pertaining to any business or occupation," does not cover an injury, where the testimony shows that the insured continued his employment for some time immediately following the receipt of such injuries, although subsequently he discontinued work because of such injuries.—Letherer v. United States Health & Accident Ins. Co., 145 Mich. 310.

¶ 402. The provision in a sick benefit policy, that in order to recover the insured must be "continuously confined to the house and subject to the personal calls of a physician," does not require the insured in order to

recover to remain in the house continuously; it is sufficient if he is necessarily confined to the house the larger part of the time and only goes forth to consult his physician or under the physician's direction.—Hoffman v. Michigan Home & Hospital Ass'n, 128 Mich. 323.

¶ 403. In an action upon an accident insurance policy wherein the insurer agreed to defend the assured in all suits brought against him by reason of injuries occasioned by or damages growing out of the operation of his automobiles, held, the insurer was under no obligation to defend a criminal action against the assured for manslaughter.—Patterson v. Standard Accident Ins. Co., 178 Mich. 288.

§ 99. ——Results of mistaken or improper medical treatment.

Death resulting from poisoning in course of mistaken medical treatment, see also post ¶ 626.

¶ 404. If an injury to an eye does not continuously disable an insured from the performance of his business duties, the disabling thing being the result of improper medical treatment, he cannot recover weekly indemnity under a policy of accident insurance, notwithstanding the insurer is liable for the loss of the member as the result of such treatment.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 405. The loss of an eye by the introduction of acid into it as the result of a physician's mistake in treating it after an accident to it is within a provision of a policy of accident insurance for indemnity for the accidental loss of such member.—Hummer v. Midland Casualty Co., 181 Mich. 386.

§ 100. ——Effect of insanity or temporary derangement.

See also post ¶¶ 632-635.

¶ 406. Where an assured was drowned by falling or jumping from a vessel while temporarily deranged from the effect of a chronic malady of long standing, there can be no recovery on an accident insurance policy which relieved the insurer from liability for death or injury caused by illness or disease irrespective of whether the assured was sane or insane.—Rathman v. New Amsterdam Casualty Co., 186 Mich. 115.

§ 101. ——Criminal, illegal and violent acts.

Breach of condition against death by violence or design, see post § 157.

Breach of condition against death by suicide or self-destruction, see post § 158.

¶ 407. Intentional homicide is an accident where the deceased is in nowise responsible for it.—Furbush v. Maryland Casualty Co., 131 Mich. 234.

§ 102. ——Blood poisoning, ptomaine poisoning and other unintentional poisonings.

Poisoning within exceptions of accident insurance policy although result of physician's mistake, see post ¶ 626.

¶ 408. Plaintiff insured under a policy that provides, among other things, that such insurance shall not cover accident, injury, death, loss of limb, sight or disability, resulting wholly or partly, directly or indirectly from disease in any form, who accidentally burned his feet in a hot air bath, which resulted in gangrene, and subsequently necessitated the amputation of one leg, can recover, even though he was afflicted with diabetes; where the evidence showed that plaintiff's physician had pronounced him cured of diabetes at the time of the issuance of the policy, and that defendant's own physician diagnosed the gangrene as being traumatic; i. e., caused by the wound.—Jiroch v. Travelers' Ins. Co., 145 Mich. 375.

¶ 409. Ptomaine poisoning causing death is an accident within the meaning of a policy of accident insurance.—Johnson v. Fidelity & Casualty Co. of New York, 184 Mich. 406.

§ 103. Casualty or liability insurance.

¶ 410. A policy of insurance against loss by insolvency of debtors owing for merchandise sold and delivered between April 1, 1893, and March 31, 1894, both inclusive, and by its terms to "expire" on March 31, 1894, does not exclude insurer's liability for losses occurring after March 31st on sales made on or before that date, and duly proved according to terms of the policy; since the obvious purpose was to insure against losses by extending credit, and in view of provisions giving 90 days after expiration of the policy for making proofs, and other provisions giving a renewal the effect of carrying forward to the new policy such liability, it must be intended that the word "expire" was merely a limitation on the sales period covered by the policy.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 411. Insurance against loss by insolvency of debtors owing insured for merchandise sold, does not include a claim reduced to a balance consisting wholly of attorney's fees, expenses, interest, and protest fees which the debtor refuses to pay and the creditor declines to litigate.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 412. Plaintiff was the holder of an employer's liability insurance policy in defendant company. One Lund, an employee of plaintiff, started suit for personal injuries, alleging in his original declaration a common-law liability due to plaintiff's negligence. Defendant insurance company was notified of this suit, by plaintiff, and the original declaration was turned over to it.

Lund afterwards filed an amended declaration basing plaintiff's liability on the violation of a statute which forbade the employment of minors under the age of sixteen in dangerous occupations. Defendant, upon receiving this amended declaration from plaintiff, advised plaintiff that under the terms of the policy defendant was not liable to indemnify plaintiff for damages recovered by Lund against the plaintiff on the said statutory ground. Thereafter plaintiff's attorney and defendant's attorney united in the defense of the suit. The jury found the plaintiff liable on the statutory ground alone. Held, defendant by undertaking the defense against Lund's suit did not waive any of its rights so as to make it liable for damages recovered by Lund against the plaintiff.—Sargent Mfg. Co. v. Travelers' Ins. Co., 165 Mich. 87.

¶ 413. Under an insurance contract indemnifying employees against loss of time by "discharge or suspension as a penalty or method of discipline," there can be no recovery where the discharge is an absolute termination of the contract of employment.—Stitt v. Locomotive Engineers' Mut. Protective Ass'n, 177 Mich. 207.

¶ 414. Under a contract of insurance in a mutual protective association providing for indemnity against loss of time occasioned by "discharge or suspension as a penalty or method of discipline," and that the reason given by the employer for suspension or discharge shall be "the sole basis of determining the liability of the association." Held, that while the reason given by the employer must be taken as the general basis of discharge, it is an unreasonable construction to hold that such reason shall be the sole basis for determining liability.—Stitt v. Locomotive Engineers' Mut. Protective Ass'n, 177 Mich. 207.

¶ 415. Under an insurance contract of indemnity against loss of time by discharge or suspension of an employee, providing that no recovery can be had if suspension or discharge was the result of knowingly disobeying rules. Held, that an engineer who exceeded the speed limit over a certain bridge, and used a hand signal instead of the semaphore at an interlocked crossing, must be said to have knowingly disobeyed rules.—Stitt v. Locomotive Engineers' Mut. Protective Ass'n, 177 Mich. 207.

VIII. WARRANTIES, CONDITIONS AND REPRESENTATIONS.

§ 104. In general.

Representations in application as warranties, see post §§ 105-107.

Validity, propriety and reasonableness of conditions, see post §§ 108, 109.

Notice or knowledge requisite to charge insured with conditions, see post § 148.

Burden of proof and presumptions as to warranties, see post § 300.

Rescission, forfeiture and avoidance for breach of warranty, representation or condition, see post XII, B.

Waiver of breach of warranty or condition, see post XII, C.

¶ 416. In construing warranties in insurance policies, the prime object to be reached is the intention of the parties, which, when found, must control, and such warranties must be interpreted by the rules applicable to the interpretation of other mercantile contracts.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

§ 105. Representations in application as warranties.

Materiality of representations as factor, see post § 106.

Misstatements and omissions made in good faith, see post § 107.

Construction of questions and answers in application, see ante § 48.

Misrepresentations made by agent of insurer in preparation of application, see post §§ 193-195.

Admissibility of evidence as to representations and warranties in application, see post § 310.

Truth of representations in application as question of law or fact, see post § 335.

¶ 417. A warranty in an insurance policy that any application or statement connected with its procurement is true, and shall be a part of the policy, makes an oral application, and the accompanying statements made to the agent as to the condition of the title, a part of the policy.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 418. Where an insurance policy expressly makes the application for insurance a part of itself, and a warranty by the assured of the truth of all statements contained in it as to the value of property insured, etc., and further provides that false representations, material omissions and overvaluations in the written application, or otherwise, shall render the policy void, all statements contained in such application must be treated as warranties, and under the general rule must be strictly true to authorize a recovery upon the policy.—American Ins. Co. v. Gilbert, 27 Mich. 429.

¶ 419. Where a policy issued on an oral application and statement to the insurer's agent provides that the assured, by accepting the policy, warrants that any application or statement connected with procuring the insurance, or referred to in the policy, is true and shall be a part of the policy, a further provision that the insurer "shall not be bound under this policy by any act of or statement made to or by any agent or other person which is not contained in this policy, or in any written paper above mentioned," is not

a warranty, nor does it have any effect upon the assured, except as to statements and acts of agents and others after the delivery and acceptance of the policy.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 420. The rule that where a copy of the application is set out in the policy it is the duty of the insured to know that the representations therein contained, constituting the inducement for the issuance of the policy, are true, applies to accident insurance where the policy is issued by the home office upon the representations contained in the application.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 421. A written application for fire insurance should be considered a part of the contract, and a warranty in any event, if the policy was issued upon it.—Cronin v. Fire Ass'n of Philadelphia, 123 Mich. 277.

¶ 422. False representations made by an applicant for life insurance, as to holding policies in other companies, as to having been rejected by other companies and as to the making of unfavorable reports by physicians in several instances, were warranties, and the company had the right to rely on them as such.—Moore v. Mutual Reserve Fund Life Ass'n, 133 Mich. 526.

¶ 423. A life insurance policy not being issued until delivered, the fact that such part of the application containing representations which were claimed to have been untrue, was made after the date of the policy, was no basis for the claim that the policy was not issued in reliance upon such representations.—Malicki v. Guaranty Fund Life Soc., 119 Mich. 151.

¶ 424. An accident insurance company has the right to provide that statements by the insured in his application with respect to the refusal of other companies to issue insurance to him, and with respect to the receipt by him of indemnity for accident, shall be material representations and warranties.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 425. A statement in an application for accident insurance, which was made a part of the policy, that the applicant had not been disabled or received medical or surgical treatment during the preceding five years, is an affirmative warranty.—Rathman v. New Amsterdam Casualty Co., 186 Mich. 115.

¶ 426. Where an application for insurance has due notice printed upon the form of application and of the policy of the charter and by-laws of the company, which require that the property to be insured be not mortgaged above half its value, and that the insurance and mortgage do not exceed three-fourths of its value, the presentation of an application signed under such charter and by-laws, and the applicant's acceptance of the insurance, amount to a warranty of the facts therein required as stated, and the company need not inquire into them. And in agreeing to the charter and by-laws he has agreed that the fact is material to the risk.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

¶ 427. An agreement in an application for insurance on a saw-mill, "not to use movable, open lights," is construed to relate to the general and ordinary use of lights in and about the mill, and not to their special and necessary use in making repairs permitted to be made by the express terms of the policy.—Au Sable Lumber Co. v. Detroit Manufacturers' Mut. Fire Ins. Co., 89 Mich. 407.

§ 106. ——Materiality of representations as factor.

See also post ¶ 541.
Estoppel or waiver of breach of warranty or condition, see post XII, B.
Avoidance of policy for breach of immaterial warranty, see also post ¶¶ 534, 536, 537.

¶ 428. Overvaluation of property in applying for insurance thereon can hardly become material where the insurance contract provides that the amount to which the insured shall be entitled in case of loss shall not exceed three-fourths of its actual value at the time of loss.—Schmidt v. Mutual City & Village Fire Ins. Co., 55 Mich. 432.

¶ 429. A warranty of the value in an insurance policy is not rendered immaterial by a provision in the policy that the insurer shall in no case be liable to pay more than the true cash value of the property insured. —Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52.

¶ 430. Parties may contract on such conditions as they see fit, and if an insured person has chosen to make his representations warranties, as regards the condition and value of his property, he is estopped from denying, and the insurer relieved from showing, that they are material to the contract, and no court can presume to say that the insurer would have made the contract on any other terms.—American Ins. Co. v. Gilbert, 27 Mich. 429.

¶ 431. The omission in an application for a policy of insurance to mention a small mortgage upon the property, which, by the terms of the contract under which the insured purchased the property, his vendor was bound to pay, and which was less than the amount unpaid on the contract, was held not material to the risk, and therefore, under the terms of the policy, unimportant.—American Ins. Co. v. Gilbert, 27 Mich. 429.

¶ 432. Where the material fact is ownership it is unimportant that an applicant for insurance states that he holds under a will

when in fact he holds under a deed.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 433. The existence of any substantial incumbrance upon property is a material fact in insurance, whether the statements of the insured are made warranties or not.—Ætna Ins. Co. v. Resh, 40 Mich. 241.

¶ 434. Failure on the part of an owner of property insured to mention in the policy, which stated that he held under a land contract, that such contract was assigned as security for a building debt if not inquired about and known to the insurance agent and no deceit is practiced, is not a material misrepresentation of title.—Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98.

¶ 435. A stipulation in an insurance policy, that if the insured shall obtain other insurance without the consent of the company the policy shall be void, is a part of the contract with which, if material, the insured must comply to enable him to recover upon the policy.—Continental Ins. Co. v. Horton, 28 Mich. 173.

§ 107. ——Misstatements and omissions made in good faith.

Avoidance for omissions or concealments, see post § 143.
Immaterial omissions, see also ante ¶ 431.
Good faith as defense for misstatement, see also post ¶ 535.

¶ 436. Under section 1 of Act No. 187 of the Public Acts of 1907, regarding life insurance policies, innocent misstatements or omissions to answer on the part of the applicant shall be held to be simply representations, but in case that fraud can be shown, they shall be held to be warranties.—New York Life Ins. Co. v. Hamburger, 174 Mich. 254.

¶ 437. In an action on an insurance policy under evidence that plaintiff's employee who signed the application did so under the belief that it was "a survey blank" as used in maritime law; that certain portions of the application referring to the exposure of the boat insured by the location of buildings within a certain distance of the place in which it was to be stored were not called to his attention, an instruction, that if such facts were true plaintiff's recovery would not be barred by the falsity of the answers with respect to such questions, was held correct.—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443.

¶ 438. Where an applicant for insurance was at the time in the occupancy of the premises, under an oral arrangement between his wife, her father and himself, whereby the father-in-law had advanced $2,000 of the $6,000 purchase price of the premises, and caused the same to be conveyed to his daughter, subject to a mortgage of $4,000, for a home for herself and husband, with the understanding that she was to deed to her husband, the applicant, when he should have paid off the incumbrance, and he had accordingly gone into possession, made improvements, and made large payments upon the incumbrance, in reliance upon this arrangement, and all the parties were proceeding in good faith under the same, it was held that this was sufficient to make out such an equitable title in the applicant as would answer the representation that he was owner of the property.—Farmers' Mut. Fire Ins. Co. of St. Joseph v. Fogelman, 35 Mich. 481.

¶ 439. Where in an application for insurance the applicant has represented, in answer to a question, that he was the owner of the property to be insured, a showing that he had the equitable title to the same is sufficient to satisfy the representation.—Farmers' Mut. Fire Ins. Co. of St. Joseph v. Fogelman, 35 Mich. 481.

¶ 440. An applicant for fire insurance is not bound to tell the agent what the agent assumes to know and does know; or to assume that it is his duty to consider as material, and express in words what the agent knows, and does not treat as material or necessary to be written down.—Richards v. Washington Fire & Marine Ins. Co., 60 Mich. 420.

¶ 441. Where one applies for fire insurance without making any representations whatever for the purpose of procuring it, the insurer takes the risk of undisclosed taxes when it issues the policy.—Kennedy v. London & L. Fire Ins. Co., 157 Mich. 411.

¶ 442. Where an assured, in making a verbal application for a policy of fire insurance on lumber, informed the insurer's local agent that he had contracted to sell it, his failure to disclose the exact amount of payments he had received under the contract will not avoid the policy, where such information was not requested by such agent.—Fuhrman v. Sun Ins. Office of London, 180 Mich. 439.

§ 108. Validity, propriety and reasonableness of conditions.

Agreements for forfeiture, see post § 109.
Breach of conditions in policy, see post §§ 147-171.
"Other insurance" clause in standard fire insurance policy form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
"Hazards not covered" condition in standard fire insurance form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
"Unconditional and sole ownership" condition in standard fire insurance policy form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
Condition against increase of risk in standard fire insurance form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

Condition against "building, altering or repairing" in standard fire insurance form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
Condition against vacancy in standard fire insurance policy form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
Condition against explosives in standard fire insurance form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
Condition against incumbrance in standard fire insurance form, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.
Condition in standard fire insurance form prescribing and limiting mode of waiver of provisions of policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 443. A condition avoiding the policy of fire insurance if without consent of the insurer indorsed on the policy foreclosure proceedings should be begun against the property is reasonable and proper.—Cronin v. Fire Ass'n of Philadelphia, 119 Mich. 74.

¶ 444. A provision in an insurance policy that "The transfer, incumbering, or vacating of said property * * * without notice in writing to the secretary of said company, will avoid the policy," is valid.—Jaskulski v. Citizens' Mut. Fire-Ins. Co., 131 Mich. 603.

¶ 445. Conditions in policies of life insurance limiting the time for bringing actions thereon at law or in equity to less than six years from the accrual of the cause of action, are prohibited by § 2, Act No. 187, Pub. Acts 1907, § 8313, How. St., 2nd Ed., and § 6, Act No. 236, Pub. Acts 1909, § 8317, How. St., 2nd Ed.—Johnson v. Fidelity & Casualty Co. of New York, 184 Mich. 406.

¶ 446. Insurers may always frame contracts of insurance to suit themselves, and may, if they choose, insert express stipulations to the effect that insanity shall not in any case prevent avoidance by suicide of the insured.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

¶ 447. Under a fire insurance policy providing that it shall be void if the insured fail to take an inventory of stock at least once a year, the insured is entitled to a reasonable time after the issue of the policy within which to make an inventory, if there is none in existence which satisfies the requirements of the policy.—Allen v. Milwaukee Mech. Ins. Co., 106 Mich. 204.

¶ 448. The "iron-safe clause" of an insurance policy cannot be held invalid on the ground that it is not competent for the insurer to contract with the assured for the preservation of testimony; since, in order to preserve exact evidence of the loss, parties may contract that the books of account and inventory of the assured shall be kept in an iron safe.—King v. Concordia Fire-Ins. Co., 140 Mich. 258.

¶ 449. A provision of a policy of fire insurance that, "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached to or appended hereto," has the effect of freeing the person named in the loss payable clause from all conditions of the policy except those that are, in substance, at least written upon the policy or attached or appended thereto at the time of creating such interest. (Affirmed by equally divided court.)—Gourlay v. Insurance Co. of North America, 181 Mich. 286.

¶ 450. A stipulation avoiding an insurance policy if the property be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, is reasonable and valid.—Olney v. German Ins. Co., 88 Mich. 94.

¶ 451. A provision in a policy of insurance indemnifying insured against loss or liability on account of any bodily injuries accidentally suffered by any person during the testing of the automobiles of insured before sale, requiring immediate written notice of injuries as a condition of liability, must be construed as meaning within a reasonable time after insured learns of the accident or claim, provided he exercises reasonable diligence to acquire such information.—Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74.

§ 109. ——Agreements for forfeiture.

Construction of provisions in policy calling for forfeiture, see ante § 67.

¶ 452. There is no impediment to agreements for forfeitures in fire insurance policies if the parties choose to make them.—Allen v. Milwaukee Mech. Ins. Co., 106 Mich. 204.

IX. THE BENEFICIARY OR INSURED, AND CHANGES OF SAME.

§ 110. In general; designation or description in policy.

"Heirs," "children" and other descriptions by relationship, see post § 111.
Interest of beneficiary of life insurance before death of insured, see post § 112.
Right, title and interest of beneficiary after death of insured, see post §§ 113, 114.
Change of beneficiary, see post §§ 115, 116.
Changes and substitutions in subject-matter, policy or rights, see post X.
Assignment or transfer of policy, see post XI.

Description or name of insured as requisites of policy or contract, see ante § 52.
Interest or title of beneficiary or insured as question of law or fact, see post § 332.
Beneficiary and change of beneficiary in fraternal benefit policies, see Fraternal Associations, IV.

¶ 453. Where the constitution of a mutual benefit association gives members the absolute right of naming beneficiaries, it is the duty of the officer who issues a certificate of membership to insert therein the name of the beneficiary designated in the application for membership.—Eckler v. Terry, 95 Mich. 123.

¶ 454. On the death of a member of a mutual benefit or co-operative society company, who dies intestate, and whose certificate is made payable to his "heirs at law," the widow is entitled to share in the proceeds of said policy.—Lyons v. Yerex, 100 Mich. 214.

¶ 455. An application by a member of an endowment order for transfer to another class in the order, from the fact that it was made a part of the contract of insurance, will control, in preference to the certificate of membership issued thereon, where the designation of the beneficiaries differed in the two instruments.—Eckler v. Terry, 95 Mich. 123.

§ 111. "Heirs," "children" and other descriptions by relationship.

See also ante ¶ 454.

¶ 456. The same rules of construction should be applied to dispositions of property to "heirs," created by mutual benefit associations as are applied to bequests by will.—Union Mut. Ass'n v. Montgomery, 70 Mich. 587; Silvers v. Michigan Mut. Ben. Ass'n, 94 Mich. 39.

¶ 457. Under a mutual benefit certificate payable to the member's wife, heirs, etc. (Laws 1869, Act No. 104), children of a deceased brother of the member may take as "heirs" if the wife predeceases her husband, although they have no insurable interest in the member's life.—Silvers v. Michigan Mut. Ben. Ass'n, 94 Mich. 39.

¶ 458. A policy to the widow of insured, if she survived him, but to her children, if she died before him, vests in them on her dying before insured; and on the children's dying thereafter before the insured passes to their children.—Voss v. Connecticut Mut. Life Ins. Co., 119 Mich. 161.

¶ 459. A life insurance policy payable to the insured's wife if living, or, if not, to the children of the insured and his wife, was payable, where, prior to the death of the insured, his wife and one of their two children died, to the remaining child and the issue of the deceased child; since the heirs of such deceased child had a vested, though contingent, interest in such policy.—Michigan Mut. Life-Ins. Co. v. Basler, 140 Mich. 233.

¶ 460. Under How. St. §§ 4238, 6300, 6301 a wife may have her husband's life insured in her favor with a provision that in case she predeceases him the insurance shall be paid to their children or to the children's guardian.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

¶ 461. Where two beneficiaries are named in the certificate of a mutual benefit association, "in case of death of either, full amount to go to the survivor, if living; if not living, to the heirs of said member," upon the member's death the shares of both beneficiaries vest in them, and if either dies before the expiration of the time limited for payment his share goes to his personal representative, not to the survivor.—Union Mut. Ass'n of Battle Creek v. Montgomery, 70 Mich. 587.

¶ 462. A benefit, under a mutual benefit certificate which provides that upon a member's death a sum shall be paid "to L. E. L., heirs, administrators or assigns," L. E. L. having been a member's wife and having died before him, and there having been no children of the marriage, goes to the husband's heirs and not the wife's.—Michigan Mut. Ben. Ass'n v. Rolfe, 76 Mich. 146.

¶ 463. A life insurance policy made payable to the insured's wife if she be living at his death and, if she be then dead, to her children, held to pass on its issuance a vested interest to her contingent upon her surviving the insured, and to her children and to the children of her children contingent upon her nonsurvival of the insured.—Germania Life Ins. Co. v. Wirtz, 196 Mich. 145.

§ 112. Interest of beneficiary of life insurance before death of insured.

Rights of beneficiary after death, see post § 113.
Weight and sufficiency of evidence as to title or interest of insured, see post § 320.
Right of beneficiary to re-establish policy surrendered by insured through misrepresentations of insurer's agent, see post ¶ 881.

¶ 464. A beneficiary named in the certificate of a mutual benefit society has no vested rights before the member's death.—Union Mut. Ass'n of Battle Creek v. Montgomery, 70 Mich. 587.

¶ 465. In respect to a benefit certificate of a mutual benefit association prior to the member's death, the beneficiary has not any assignable interest.—Michigan Mut. Ben. Ass'n v. Rolfe, 76 Mich. 146.

¶ 466. The death, before the death of the member to whom a beneficiary certificate has

been issued, of the person to whom the certificate is made payable terminates the latter's contingent interest in the fund so that it cannot pass by the beneficiary's will.—Wood v. Lenawee Circuit Judge, 84 Mich. 521.

§ 113. Right, title and interest of beneficiary after death of insured.

Rights against decedent's creditors, see post § 114.

Interest of beneficiary of life insurance before death of insured, see ante § 112.

Weight and sufficiency of evidence as to title or interest of insured, see post § 320.

Right to re-establish policy surrendered by insured through false representations of insurer's agent, see post ¶ 881.

Assignment after death or loss, see post § 123, ¶ 498.

¶ 467. A life insurance policy which was from time to time surrendered for reduction in amount only, is to be construed from the date of the original policy in relation to the interest of the heirs of a beneficiary after whose death a further reduction was made.—Voss v. Connecticut Mut. Life Ins. Co., 119 Mich. 161.

§ 114. ——Rights against decedent's creditors.

Validity of transfer of life insurance made to avoid creditors, see Fraudulent Conveyances § 14.

¶ 468. The fund or benefit payable cannot be appropriated to payment of deceased member's debts, is not part of his estate, and goes not to his administrator, but to the beneficiary or to the latter's guardian.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44; Supreme Council Cath. Mut. Ben. Ass'n v. Priest, 46 Mich. 429; Supreme Council Cath. Mut. Ben. Ass'n v. Firnane, 50 Mich. 82.

§ 115. Change of beneficiary.

Necessity for consent of beneficiary, see post § 116.

Changes and substitutions in subject-matter, policy or rights, see post X.

Change under contracts and laws of fraternal associations, see Fraternal Associations § 33.

Mental competency of parties to make or assent to change, see Insane Persons, I.

Waiver of right as beneficiary by widow in favor of estate by bringing suit in her representative capacity, see Estates of Decedents ¶ 229.

¶ 469. Although a policy of insurance gives the right to the insured to change the beneficiary, he cannot do so, so as to deprive a beneficiary of her equity in such insurance when the insured has made an agreement calling for the payment of the premiums by the latter.—In re Reid's Estate, 170 Mich. 476.

¶ 470. The rules of a regularly incorporated mutual benefit association provided that on the death of a member his share of the beneficiary fund should be paid to the persons named by him on the will book, and that if he named no one it should be divided equally among his family. The rules did not assume to take away the right to change the disposition of the fund. Held, where a member made a will after entering an order on the will book, that the will should be followed.—Supreme Council Cath. Mut. Ben. Ass'n v. Priest, 46 Mich. 429.

¶ 471. A life insurance company is not obligated to change the beneficiary of a policy on designation of another beneficiary by reason of the condition of the policy to the effect that the production, by the company, of the policy and a receipt in full by any of a number of designated relatives, etc., shall be conclusive evidence of payment.—Malburg v. Metropolitan Life Ins. Co., 127 Mich. 568.

¶ 472. The member's accepting and retaining a certificate without objection did not imply assent to the designation therein of a beneficiary so as to preclude claim by the beneficiary designated in the application; where the application designated the beneficiary and was part of the contract, mere silence on the member's part not being sufficient to set aside a designation that was part of the contract.—Eckler v. Terry, 95 Mich. 123.

¶ 473. The second wife of the testator became insane, and was sent to a sanitarium. The testator was constantly surrounded by the influence of his daughter by a former wife and her husband. He substituted the daughter in place of the insane wife as beneficiary in an insurance policy, made no other provision for the wife, and sought to charge the expenses of the asylum upon her small estate. Testator was afflicted with Bright's disease, and was despondent. Held, the circumstances were sufficient to justify a verdict of undue influence.—Andrews v. Lavery, 159 Mich. 26.

§ 116. ——Necessity for consent of beneficiary.

¶ 474. The beneficiary named in a policy of a mutual benefit society has no such vested right that the insured cannot change the beneficiary by a compliance with the terms of the policy and by the consent of the association.—Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584; Union Mut. Assoc. v. Montgomery, 70 Mich. 587.

¶ 475. Upon the execution of a life insurance policy, the beneficiaries therein named acquire an interest which the law recognizes, and which the insured cannot dispose of at his own will.—Lockwood v. Michigan Mut. Life Ins. Co., 108 Mich. 334.

X. CHANGES AND SUBSTITUTIONS IN SUBJECT-MATTER, POLICY OR RIGHTS.

§ 117. In general.

See also post ¶ 881.

Authority of agent to make modifications, indorsements and renewals, see ante § 25.

¶ 476. An insured in a benefit order sent in his policy to be canceled in order that a new policy for a different amount might be issued. The by-laws of the order provided that all policies should be signed by the president and the secretary, and should take effect at 12 o'clock noon on the day of the date of the issue of the policy. The new policy was dated and signed on the day preceding the fire in question, and the records of the society showed that the earlier policy was canceled on that day and the new policy put in force. The new policy did not reach the hands of the insured until several days after the fire. Held, the old policy was canceled on the day before the fire; the new policy was in force on the same day; and the beneficiary must recover on the new, and not on the old, policy.—Allen v. Patrons' Mut. Fire Ins. Co. of Michigan, Ltd., 165 Mich. 18.

§ 118. Options, privileges, consents and permits.

Unauthorized indorsements and modifications by agent, see post § 198.

Necessity for indorsement of consent as to title change, see also post ¶ 711.

¶ 477. Where a policy declared on its face that "If, without written consent hereon, there is any prior or subsequent insurance, this policy shall be void," it was held that such consent, in the absence of evidence of facts dispensing with a signature thereto, must be signed by the person whose signature was declared necessary to the validity of the policy and its extensions.—Security Ins. Co. v. Fay, 22 Mich. 467.

¶ 478. Where an insurance policy stipulates that other insurance obtained without the consent of the company shall invalidate the policy, but contains the clause "$3,000 other insurance permitted," it is to be assumed that their consent to future insurance need not be in any more definite terms, as, for instance, by specifying by name the companies from which it might be obtained.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

¶ 479. A letter of reply written by the agent of the company to the insured, saying: "We will, of course, allow other concurrent insurance with the Allemania policy, and will also place you more insurance at same rate that we charged you before and do it in A1 company or companies. Trusting to hear from you at your earliest convenience, we remain," etc., held not to amount to a consent to any specific additional insurance, nor to meet the requirements of the policy, which became absolutely void at once upon the obtaining of additional insurance without consent.—Allemania Fire Ins. Co. v. Hurd, 37 Mich. 11.

¶ 480. Under a policy insuring property while in a certain building and providing that no permission or privilege affecting the insurance should be valid unless written upon or attached to the policy, a permit to remove the property to another building, asked over the telephone from the agent who agreed to give it, is valid if made out before the fire though the insured did not present the policy so as to have the permit attached until after the property was destroyed by fire, when the person who agreed to give it was no longer the agent of the company but who attached the permit to the policy.—Bennett v. Western Underwriters' Ass'n, 130 Mich. 216.

XI. ASSIGNMENT OR TRANSFER OF POLICY.

§ 119. In general.

Assignment to persons without insurable interest, see post § 120.

Consideration for assignment or transfer, see post § 121.

Assignment to secure or pay insured's creditors, see post § 122.

Assignment after loss, see post § 123.

Rights and liabilities of assignees, see post §§ 124-126.

Presumptions and evidence, see post § 127.

Changes of beneficiary, see ante IX.

General law of assignment, see Assignments.

Law governing assignment of life insurance policy, see Conflict of Laws, §§ 10, 21.

Assignment in foreign state of local insurance contract, which law governs, see Conflict of Laws § 21.

Necessity of stamping assignment of insurance policy as power of attorney, see Execution of Instruments ¶ 21.

What constitutes fraud in assignments, see Fraud, I.

¶ 481. Insurance is a personal contract and does not pass, merely by his conveyance, to a purchaser of the property insured.—Disbrow v. Jones, H. 48.

¶ 482. An insurance policy is a personal contract of indemnity, and is not assignable except with the insurer's assent.—Hall v. Niagara Fire Ins. Co., 93 Mich. 184.

¶ 483. A new contract of fire insurance is created where the insured assigns policies to a third person and the insurer consents to the making of such assignment.—Wilms v. New Hampshire Fire Ins. Co., 194 Mich. 656.

¶ 484. A wife's assignment of her interest in an insurance policy upon her husband's life does not bind her if procured without her intelligent assent for purposes not connected with her separate estate.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

§ 120. Assignment to persons without insurable interest.

Insurable interest in general, see ante IV.

¶ 485. An assignment of a life insurance policy made with the consent of the company to a party having no insurable interest and who paid the premiums after such assignment, was valid as against the administrator of the estate of the insured; there being neither a statute nor any provision in the policy or by-laws prohibiting such assignment.—Prudential Ins. Co. v. Liersch, 122 Mich. 436.

¶ 486. Where under the statute (How St. § 3949) and by its articles the object of a mutual benefit society is to secure "to the families or heirs of any member, upon his death, a certain sum of money," the assignment of a certificate by a member to a brother of his wife, the assignee having no insurable interest in the assignor's life, is void.—Michigan Mut. Ben. Assoc. v. Rolfe, 76 Mich. 146.

¶ 487. A certificate of a mutual benefit association is not assignable to any one who could not have been named therein as beneficiary.—Michigan Mut. Ben. Assoc. v. Rolfe, 76 Mich. 146.

§ 121. Consideration for assignment or transfer.

Assignment to insured's creditors, see post § 122.

Validity of transfer of life insurance made to avoid creditors, see Fraudulent Conveyances § 14.

¶ 488. The insured assigned to his fiancee a fully paid-up endowment insurance policy in consideration of the approaching marriage, which in due time took place.—Held, the assignment was supported by a valid consideration.—Graves v. Von Below, 160 Mich. 408.

¶ 489. An assignment, absolute in form, of a life insurance policy, and an agreement of even date by which, in consideration of said assignment, the assignee agrees to furnish the assignor a life support and all necessary medical attendance, and after his death a decent burial, and which provides that the present indebtedness of the assignor to the assignee is included in the consideration of the assignment, and canceled by it, are not conclusive that the assignment was absolute.—McDonald v. Birss, 99 Mich. 329.

§ 122. Assignment to secure or pay insured's creditors.

See also post ¶ 507.

¶ 490. An assignment of a life insurance policy to secure creditors is valid.—McDonald v. Birss, 99 Mich. 329.

¶ 491. An assignment of a policy to a bank for the husband's debt, which though joined in by him and his wife was invalid as to her because the debt had no relation to her separate estate, cannot be regarded as valid against a conflicting assignment by the husband to the wife made previously although no proof was offered by her that she had any interest by reason of an earlier assignment by him to her to support her joinder in the assignment. The taker of the joint assignment could not contend that it was unnecessary for her to join or that she had no interest, and thereby treat the joint assignment as tantamount to an assignment by the husband in which his wife joined unnecessarily.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

¶ 492. An assignment, by a member of a mutual benefit association to a person not interested in his life, of a benefit certificate is not validated by the fact that amended articles are subsequently filed by the society to conform, How. St. § 3960, wherein the object is stated to be "to secure to the family, heirs, creditors, or other persons having an insurable interest in the life of any member, upon his or her death, the payment of a sum of money," etc.—Michigan Mut. Ben. Assoc. v. Rolfe, 76 Mich. 146.

¶ 493. Where the assignee of a policy issued by a mutual benefit society was not eligible as a beneficiary, the assignment was held valid as security for the amount due her from the assignor.—Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584.

¶ 494. Where a certificate of a mutual benefit society is assigned by the insured to secure a creditor, who is ineligible to be beneficiary, such creditor can take only what is necessary to indemnify him, and the representatives of the insured are entitled to the balance.—Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584.

¶ 495. Whether an absolute assignment in payment of a debt would be valid as against other creditors where the amount of the policy is largely in excess of the amount of the debt, quære.—McDonald v. Birss, 99 Mich. 329.

§ 123. Assignment after loss.

¶ 496. A clause in an insurance policy providing for its forfeiture if assigned without the company's consent cannot prevent its assignment after the loss.—Roger Williams Ins. Co. v. Carrington, 43 Mich. 252.

¶ 497. An assignment of an insurance policy made before loss, but not delivered until afterwards, does not take effect until delivery, and then as an assignment of a money demand against the insurers.—Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co., 41 Mich. 131.

¶ 498. The interest of the beneficiary named in a mutual benefit certificate is not assignable until vested by the member's death.—Michigan Mut. Ben. Assoc. v. Rolfe, 76 Mich. 146.

§ 124. Rights and liabilities of assignees.

Effect of acts or admissions of assignors, see post § 125.
Equitable assignees, see post § 126.
Sufficiency of evidence as to rights and title of assignee, see post ¶ 1271.

¶ 499. One who accepts an assignment of a policy takes subject to all the invalidating clauses therein.—Ranspach v. Teutonia Fire Ins. Co., 109 Mich. 699.

¶ 500. The assignee of a policy of insurance, under an assignment made after a loss has occurred, stands in the shoes of the assignor, and takes the policy subject to any forfeiture incurred by a violation of its conditions by the assignors.—Bonenfant v. American Fire Ins. Co., 76 Mich. 653.

¶ 501. Where a life insurance policy is assigned by the insured and the beneficiary on a blank furnished by the company, the assignee cannot be divested of her right to collect the funds by a showing that she did not fully comply with her agreement to care for the insured.—Malburg v. Metropolitan Life Ins. Co., 127 Mich. 568.

¶ 502. Where a policy of insurance is transferred with the sale of a building which is destroyed before the assignment of the policy is approved by the secretary as required by the provisions of the policy, there can be no recovery even if the secretary approved such assignment with knowledge of all the facts.—Harper v. Michigan Mut. Tornado Cyclone & Windstorm Ins. Co., 173 Mich. 459.

¶ 503. Where defendant, living with complainants, her relatives, is unable to pay the assessments levied on a policy of insurance, and complainants pay the assessments for a number of years under a contract whereby defendant assigns to them all rights under the policy, the insurance company having arranged with defendant for a cash settlement complainants may have specific performance of the contract assigning all rights under the policy.—McBride v. Thompson, 175 Mich. 136.

¶ 504. How. St., § 4238, which protects the money payable on a life insurance policy taken out by a husband or father for the benefit of his wife or children from the claims of his creditors, does not cover the assignment to them of a policy payable to himself, his executors, administrators or assigns.—Ionia County Savings Bank v. McLean, 84 Mich. 625.

¶ 505. If the vendee in a land contract, obtains insurance without stating or being asked his interest, and subsequently sells the premises, the purchaser going into possession under a contract providing that in case of default his occupancy shall be that of tenant holding over without permission, and afterwards, with the insurer's assent, assigns his interest to a person, who, on default in payment by the then holder of the land contract proceeds to recover possession, pending which proceedings the premises still occupied by such holder are burned. The insurer's consent to the assignment made a new contract with the assignee and the latter having an insurable interest can recover under the policy.—Hall v. Niagara Fire Ins. Co., 98 Mich. 184.

¶ 506. A policy of insurance was made payable to the beneficiary, his executors, administrators, or assigns, in sixty days after due notice and proof of death of the assured. The assured, who was named in the policy as the beneficiary, assigned to his wife all rights thereunder, with a provision that, in case of her death before the policy should become "due," the proceeds should go to the heirs or assigns of the assured. Held, that the policy was not due, at the earliest, until sixty days after the death of the assured, and that, under the terms of the assignment, his heirs were entitled to the proceeds of the policy where the assignee died within such period, to wit, in a common disaster with her husband, the insured.—Northwestern Mut. Life Ins. Co. v. Greiner, 115 Mich. 639.

§ 125. ——Effect of acts or admissions of assignors.

¶ 507. Where the title to fire insurance policies is, after a fire, vested by assignment in creditors whose claims exceed the faces of the policies, the rights of such assignees cannot be defeated or impaired by any admission or confession made by the assignors, or any of them, in the absence, and without the consent, of the assignees.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

§ 126. ——Equitable assignees.

¶ 508. A lease provided that the lessee should keep the property insured and should assign the insurance policy to the lessor. Held, that in equity no formal written assignment was needed, and if there was none the stipulated insurance would be deemed to be held in trust.—Eberts v. Fisher, 54 Mich. 294.

§ 127. Presumptions and evidence.

¶ 509. Where an assignment of insurance policies to defendant was for her benefit and

interest, assent to the assignment and acceptance is presumed.—Kaufman v. State Sav. Bank, 151 Mich. 65.

¶ 510. On a bill by complainant to gain possession of an insurance policy held by defendant which complainant claimed had been assigned to him by his father, defendant refusing to deliver it on the claim that the assignment was a forgery, the evidence was held to sustain a finding upholding the validity of the assignment.—Kirchberg v. Union Trust Co., 179 Mich. 495.

XII. RESCISSION AND CANCELLATION, FORFEITURE AND AVOIDANCE.

A. IN GENERAL.

§ 128. Right to cancel and grounds for cancelling.

Necessity and sufficiency of notice of cancellation, see post § 129.
Cancellation through agents, see post § 130.
What constitutes cancellation, see post § 131.
Effect on rights of parties, see post § 132.
Necessity for refund of unearned premium on cancellation, see post § 212.
Right to forfeiture for nonpayment of assessment illegally levied, see ante ¶ 329.
Notice requisite to declaring of forfeiture for nonpayment of assessment, see ante ¶ 343.
Liabilities of withdrawing member for assessments of mutual company, see ante ¶¶ 314, 317.
Construction and interpretation of provisions of policy for forfeiture or avoidance, see ante § 67.
Validity of by-law of mutual company providing for cancellation when any risk considered unsafe, see ante ¶ 253.
Breach of warranty, misrepresentation, or breach of condition, as ground for cancellation or as working forfeiture, see post XII, B.
Jurisdiction of equity to compel surrender of policy for cancellation where fraudulently obtained, see Rescission.
Provision for cancellation of policy at request of insured, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

§ 511. Where an insurance agent in issuing a new policy to take the place of one issued by him for another company failed to call the attention of the insured to a clause taking away the right of cancellation which had been exercised under a former policy, but misled him by reference to another matter, held, that there was such concealment by the agent as avoided the cancellation clause.—Hartford Steam Boiler Inspec. & Ins. Co. v. Cartier, 89 Mich. 41.

¶ 512. In a manufacturers' mutual insurance company organized under Comp. L. 1883, Act No. 78 (How. St., chap. 134a) the corporation has no power to allow members to surrender their policies and withdraw from the company without further liability for losses; since the contract is not only with the corporation but also with each other policyholder.—Detroit Manufacturers' Mut. F. Ins. Co. v. Merrill, 101 Mich. 393.

¶ 513. A policy, having been left in force pending adjustment of a small claim for loss on a previous policy, may be canceled for failure of insured to appear and have such adjustment within a reasonable time only after notice of insured of intention to cancel.—Dove v. Royal Ins. Co., 98 Mich. 122.

¶ 514. The doctrine that losses by insurance companies through fire, accident or death cannot be avoided, under ordinary provisions, although due to want of care, is approved.—Courtemanche v. Supreme Court I. O. F. 136 Mich. 30.

§ 129. Necessity and sufficiency of notice of cancellation.

See also post ¶ 886.
Necessity for refund of unearned premium on cancellation, see post § 212.

¶ 515. A provision for the cancellation of an insurance policy by the company upon five days' notice to the insured cannot be made operative without such notice, or a waiver thereof.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

¶ 516. A notice of cancellation of employer's liability insurance must be according to the provisions of the policy, peremptory, explicit, and unconditional.—American Fidelity Co. v. R. L. Ginsberg Sons' Co., 187 Mich. 264.

¶ 517. A provision for five days' notice to cancel a policy may be waived by consent to an immediate cancellation.—Buick v. Mechanics' Ins. Co., 103 Mich. 75.

¶ 518. After a policy had been executed and delivered by the insurers' duly authorized agent, he and the insured signed a memorandum that the insurance should take effect "when approved by the general agent at Buffalo." Held, that the insurers were liable for a loss, although the insurance was disapproved by the general agent, who directed the agent to return the premium and cancel the policy; no notice of disapproval having been given to the insured till after the loss. Aetna Ins. Co. v. Webster, 6 Wall. (73 U. S.) 129, 18 L. ed. 888.

¶ 519. An insurer whose policy has replaced a canceled one issued for another company cannot complain that the former policy was canceled instanter by consent waiving the stipulated five days' notice. Its liability is not affected thereby.—Buick v. Mechanics' Ins. Co., 103 Mich. 75.

§ 130. Cancellation through agents.
Agents in general, see ante III.

¶ 520. An agent intrusted with the whole business of insurance for his principal, including the cancellation as well as the procuring of it, may bind the insurer by consenting to a cancellation, although the principal is not made acquainted with the fact of cancellation at the time.—Buick v. Mechanics' Ins. Co., 103 Mich. 75.

¶ 521. Authority on the part of an insurance agent to procure insurance for the insured does not imply authority to consent to cancellation, so as to bind the insured.—Buick v. Mechanics' Ins. Co., 103 Mich. 75.

¶ 522. An insurance broker, who merely places insurance, has no authority to receive notice of cancellation.—Snedicor v. Citizens' Ins. Co., 106 Mich. 83.

¶ 523. An insurance broker agreed to place a certain amount of fire insurance for plaintiff at a specified rate. The policies were accordingly procured, and delivered to plaintiff. One of the companies thereafter reduced the amount of its policy, and the broker thereupon obtained a policy from defendant, and delivered it to plaintiff, taking up the canceled policy. Held, that notice of cancellation given to the broker by defendant, with knowledge of the circumstances, did not bind plaintiff.—Snedicor v. Citizens' Ins. Co., 106 Mich. 83.

¶ 524. Where a fire insurance policy containing a provision for cancellation on five days' notice to the assured is delivered to the insurer's agent upon the understanding that it may be canceled and to enable him to get other insurance in case of cancellation, such agent does not become the agent of the assured so as to render notice to him of cancellation notice to such assured.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

¶ 525. An insurance agent to whom plaintiffs had long intrusted the entire subject of their insurance except as to amount, secured insurance for them in a Michigan company and delivered the policy to the insured, but receiving, fifteen days later, notice that the insurer desired to cancel the policy, he assented, and immediately replaced the insurance in a Pennsylvania company, mailing to the insured a letter which informed them of the cancellation of the first policy and requested the return thereof. The letter was burned, before being opened, by the same fire which destroyed the insured property. Thirty-seven days after the fire the agent paid the premium on the new policy. No premium was ever paid on the first policy, which at the time of the fire was, unknown to the insured, in their safe. Held, that the agent had, under the circumstances, authority to consent to the cancellation of the first policy, and that such waiver did not affect the libaility of the other company upon its policy.—Buick v. Mechanics' Ins. Co., 108 Mich. 75.

§ 131. What constitutes cancellation.
Cancellation by consent, see ante ¶ 517.
Cancellation for breach of warranty, representation or condition, see post XII, B.

¶ 526. A partner's consent to cancellation binds his firm, and a formal surrender of the policy is unnecessary.—Hillock v. Traders' Ins. Co., 54 Mich. 531.

¶ 527. A surrender of an insurance policy such as to discharge the insured from liability on a premium note, under an arrangement that upon surrendering the policy the note should be delivered up, must be accompanied by a dealing immediately and directly with the company or its agents; and a delivery to a stranger, with notice to the company, is not enough.—American Ins. Co. v. Woodruff, 34 Mich. 6.

¶ 528. The mere fact that a life insurance policy is returned to the general agent of the company, and by him to the company, for the sole purpose of changing the terms of the payment of the premiums and the beneficiary, does not operate to cancel the policy, or give the company the right to demand a new health certificate.—Krause v. Equitable Life Assur. Soc., 99 Mich. 461; same case, second appeal, 105 Mich. 329.

¶ 529. The plaintiff in an action on an insurance policy, which provides, among other things, that it may be canceled upon five days' notice to the assured, in which action the question is whether the policy was canceled, and it appears that effective cancellation depends largely on what this party's agents have done, may show the acts and declarations of such agents in the premises.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

¶ 530. A letter from the general state agents of an employers' liability insurance company claiming that the existing rate is insufficient and regretting the necessity of retiring the policy, but proposing a higher rate and offering to negotiate on such basis, and to take up the matter with the head office, or otherwise to give notice of cancellation, is insufficient to constitute a cancellation of the policy.—American Fidelity Co. v. R. L. Ginsberg Sons' Co., 187 Mich. 264.

§ 132. Effect on rights of parties.
Necessity for refund of unearned premium on cancellation, see post § 212.
Necessity for proof of loss after insurer asserts that policy has been canceled for breach of condition, see post ¶ 998.

¶ 531. The cancellation of an insurance policy has no effect, in itself, upon a right of action which has previously accrued under

the policy.—Baker v. Citizens' Mut. Fire Ins. Co., 51 Mich. 243.

B. FOR BREACH OF WARRANTY, REPRESENTATION OR CONDITION.

§ 133. In general.

Breach of warranty or representation, see post § 134.
Warranties pertaining to persons insured or family history, see post §§ 135-137.
Warranties pertaining to property insured, see post §§ 138-142.
Avoidance for omissions or concealments, see post § 143.
Fraud or false swearing, see post § 144.
Estoppel to deny warranty, see post § 145.
Breach of promissory or "continuing warranties," see post § 146.
Breach of conditions in policy, see post §§ 147-149.
Forfeiture for default in payment of premium or assessment, see post §§ 150-155.
Breach of conditions respecting person insured or his occupation or status, see post §§ 156-160.
Breach of conditions respecting property insured, see post §§ 161-171.
Avoidance against mortgagee or person in secondary interest, see post § 172.
Breach of marine conditions or policies, see post § 173.
Warranties, conditions and representations in general, see ante VIII.
Validity, propriety and reasonableness of conditions, see ante §§ 108, 109.
Misrepresentations as to immaterial matters, see ante § 106.
Necessity for refund of unearned premium on cancellation, see post § 212.
Representations in application as warranties, see ante §§ 105-107.
General principles of construction and interpretation of provisions of policy for forfeiture or avoidance, see ante § 67.
Forfeiture declared after loss, see post ¶ 589.
Right to cancel in general, see ante XII, A.
Burden of proof and presumptions as to breach of warranties, see post § 300.
Admissibility of evidence as to forfeiture for breach of condition or warranty, see post § 311.
Sufficiency of evidence of forfeiture or avoidance for breach of warranty or condition, see post § 323.
Forfeiture or avoidance for breach of condition or warranty as question of law or fact, see post § 334.

¶ 532. Laws 1897, Act No. 167, How. 2nd Ed., §§ 8348-8350, and the Standard Policy Act of 1905, Pub. Acts 1905, No. 277, How. 2nd Ed., §§ 8328-8333, were not designed to make forfeitures more available to insurance companies, but to curb the right to declare forfeitures.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 226.

¶ 533. Pub. Acts 1911, No. 128, § 1, How. 2nd Ed., § 8348, providing that no policy of fire insurance issued thereafter shall be declared void for the breach of any condition, where a loss has not occurred during such breach and by reason of such breach of condition must be construed as meaning that no forfeiture is to take effect if the insurer has not been injured by a breach of the condition, nor if the fire was not caused by a breach of the condition, even though the breach was existing at the time of the fire.—McPhee v. Millers' Nat. Ins. Co., 198 Mich. 215.

§ 134. Breach of warranty or representation.

¶ 534. Wherever in a policy of insurance there is a clear breach of the warranty contained therein, however immaterial it may be, the policy will be avoided.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 535. Unless the warranties in the application for an insurance policy are substantially true or their truth waived the policy issued thereon is void, and good faith is no defense to untruths appearing in the answers.—Perry v. John Hancock Mut. Life Co., 143 Mich. 290.

¶ 536. Where an applicant for insurance warrants the statements in his application to be true, the policy is invalidated by their falsity despite the fact that the statements may be of little importance to the company.—Bonewell v. North American Acc. Ins. Co., 160 Mich. 137.

¶ 537. The test as to whether a representation in the application as to previous employer's liability insurance is false so as to render the policy void from the beginning is whether there was, under all the circumstances at the time the policy was underwritten, a fair representation, or a concealment, fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run.—American Fidelity Co. v. R. L. Ginsberg Sons' Co., 187 Mich. 264.

¶ 538. A policy of accident insurance held not vitiated by the assured's denial in his application, that he had ever previously made a claim for or received indemnity for an accident, disease or illness, where he had been paid by another company for an injury to his knee which in no way contributed to the accident which caused his death.—Rathman v. New Amsterdam Casualty Co., 186 Mich. 115.

¶ 539. In order to invalidate a policy for accident insurance it is not necessary that either the insured or the agent be guilty of intentional fraudulent conduct, for if the misrepresentations contained in the application and warranty tend to induce the issuance of a policy which, had the facts been truthfully set forth, might not have been issued, these misrepresentations amount to constructive fraud upon the company.—Bone-

well v. North American Acc. Ins. Co., 167 Mich. 274.

§ 135. Warranties pertaining to person insured or family history.

See also ante ¶ 538.
Statements as to health, see post § 136.
Representations as to age, see post § 137.
False representation as to previous insurance made on advice of insurer's agent, see post ¶ 835.
Representations in application as warranties, see ante §§ 105-107.
Effect of falsity of statement in application for life or casualty insurance, see Pub. Acts 1917, No. 256, part III, chap. II, § 17.

¶ 540. Under a provision in a life insurance policy that, if statements of the insured were untrue in any particular which would have led to the insured's rejection had they been stated in accordance with the facts, whether intentionally or otherwise, the contract should be void; any material misrepresentations would avoid the contract.—New Era Ass'n v. Mactavish, 133 Mich. 68.

¶ 541. A statement that the death of a sister of the insured was due to kidney inflammation when in fact it was due to chronic pneumonia, which furnished no evidence of hereditary disease, was not regarded as a material misrepresentation, in the absence of testimony that information of such fact would have enhanced the premium or have led to a rejection of the risk by life insurance companies generally.—New Era Ass'n v. Mactavish, 133 Mich. 68.

¶ 542. Testimony tending to prove that the insured, a man 40 years of age and not living in the family of a sister having tuberculosis, would have been an acceptable risk in ordinary insurance companies notwithstanding the fact of the sister having such disease, authorized the assumption that a misrepresentation of the condition of health of the sister was immaterial, and did not avoid the contract.—New Era Ass'n v. Mactavish, 133 Mich. 68.

¶ 543. A representation in a life insurance application that the insured has not been attended by a physician is held not to include treatment for a temporary indisposition.—Blumenthal v. Berkshire Life Ins. Co., 134 Mich. 216.

§ 136. ——Statements as to health.

¶ 544. The insured stated in her application for insurance that she had been attended by a physician for la grippe three years previously, when in fact she had been so attended two years and nine months before making such application. Held, that there was not such a variance as would invalidate the policy for breach of warranty.—Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

¶ 545. A mere temporary ailment or indisposition, which does not tend to weaken or undermine the constitution of the assured at the time of taking membership, does not render a policy or certificate of insurance void by reason of a warranty by the assured that to the best of his knowledge and belief he was in good health at the time of application.—Hann v. National Union, 97 Mich. 513.

¶ 546. In order to defeat a recovery upon a life insurance policy for the breach of a warranty by the assured that, to the best of his knowledge and belief, he was in good health when the application was made, defendant must show that the applicant knew or had reason to believe that the warranty was untrue.—Hann v. National Union, 97 Mich. 513.

¶ 547. A mere temporary ailment or indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render a policy or certificate of insurance void on the ground of false statement in the application that insured was in sound health.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

§ 137. ——Representations as to age.

¶ 548. Representation as to age in an application for membership in a benefit association is a material warranty where person's age determines risk and measures membership dues, and where misrepresentation is made a ground of forfeiture.—Hunt v. Supreme Council of Chosen Friends, 64 Mich. 671.

¶ 549. A representation in an application for life insurance that the insured is in good health or has not been subject to illness is construed to mean that he has not suffered an illness of a serious and constitutional nature and that he is free from a disease that affects the general soundness of the system.—Blumenthal v. Berkshire Life Ins. Co., 134 Mich. 216.

¶ 550. The defendant, the sole beneficiary of an insurance policy, sued on the same as the executor of the estate of his father, the insured. The father made false statements in the application as to his age and his rejection by other companies. Held, that though the father made these statements in ignorance, and only as the weak tool of his son, equity would enjoin the defendant from suing on the policy.—Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114.

¶ 551. The insured made false statements in the application as to his age and his rejection by other companies. He kept the policy containing a copy of the application in his possession during his lifetime. Held, it was his duty to know whether his statements in the application were true, and his silence for many years was persuasive proof

of his fraudulent intent.—Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114.

§ 138. Warranties pertaining to property insured.

Warranties as to title or interest, see post § 139.
Warranties against incumbrances, see post § 140.
Overvaluation of property, see post § 141.
Representations as to other insurance, see post § 142.
Representations in application as warranties, see ante §§ 105-107.

¶ 552. Where an insured falsely represents in his application that the chimneys of the house covered by the policy are brick, he cannot recover for the goods contained in said house.—Benham v. Farmers' Mut. Fire Ins. Co., 165 Mich. 406.

¶ 553. Under Miller's Compiled Laws of 1897, § 5180, a fire insurance company is exempted from liability where the insured contrary to the express warranties of the application has stored the property involved nearer than five hundred feet to buildings which were "exposing buildings" at the time of the fire, although the company is not so exempted if said buildings, "exposings" at the time of placing the policy cease to be "exposing buildings" at the time of the fire.—Macatawa Transp. Co. v. Fireman's Fund Ins. Co., 168 Mich. 365.

¶ 554. Where an insured building is described as used for stores and a residence, the fact that it includes a bakery and a restaurant does not render the policy void.—Richards v. Washington Fire & Marine Ins. Co., 60 Mich. 420.

¶ 555. It was one of the conditions of the policy that the application should specify the situation of the building containing the insured property "with respect to contiguous buildings, and their construction and materials." The application contained the following question and answer: "Q. Describe all other buildings and how occupied, and all other exposures to fire, their distance from risk and from each other within one hundred and fifty feet. A. North, nothing within one hundred and fifty feet; east, fifty feet to small building; south, ninety feet to a cross street; west, sixty-six feet to brick hotel across street." Held, that as the company issued a policy upon this application, they must be deemed to have accepted this answer as a substantial compliance with the policy and conditions.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

§ 139. ——Warranties as to title or interest.

Conditions as to title or interest, see post § 162.
Omission in good faith to state condition of title, see also post ¶¶ 579, 580.

¶ 556. A fire insurance policy is not void because the insured life tenant stated in the application that she was "owner" where statements are not expressly made warranties and the agent of the company should have known or could easily ascertain the insured's interest.—Convis v. Citizens' Mut. Fire Ins. Co. of Calhoun County, 127 Mich. 616.

¶ 557. A warranty of unconditional and sole ownership by a vendor is broken, where the property is described as "his dwelling" and at the time it is occupied by the purchaser, though insured told the agent for insurer "that he thought he had a land contract out with some people," but they had abandoned it.—Hamilton v. Dwelling House Ins. Co., 98 Mich. 535.

¶ 558. The statement of an applicant for insurance, that he holds the property sought to be insured on contract, does not, in itself, amount to a misrepresentation of his interest, although the contract runs to himself and wife.—Miotke v. Milwaukee Mech. Ins. Co., 113 Mich. 166.

¶ 559. Where a fire insurance policy describes the property insured as contained in a "corrugated ironclad building," testimony that the structure was of brick, given in reply to a query as to whether it was a frame building is no evidence of misrepresentation by the insured.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 560. A policy contained a clause of forfeiture for the omission to state any material fact, and made the application of the insured a warranty. Held, that it was avoided by the statement of the insured that his title to the property was absolute, when in fact it was held by him and his wife under the same deed.—Aetna Ins. Co. v. Resh, 40 Mich. 241.

¶ 561. Where a policy requires that, if the title of the assured is anything less than a sole, unconditioned and entire ownership, the fact shall be stated—otherwise the policy shall be inoperative—and the only statement of the title in it is by the word "their" before the description of property, proof that assured had, at the time, contracted to sell the premises, and that their vendee had paid the entire purchase price, would defeat the policy.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 562. Where an insurance policy is issued as to an assignee the insurer is fairly put upon inquiry as to the conditions of the ownership of the property; and if the insurer makes no further inquiry, and there has been no deception or concealment, he must be presumed satisfied.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

§ 140. ——Warranties against incumbrances.

Breach of condition against incumbrance, see post § 168.

Omission in good faith to state amount of incumbrances, see post ¶ 578.

¶ 563. In an application for additional insurance, the answer to the question, "What encumbrance is there upon the property?" was recorded, "None." There was in fact a levy of $850, which existed at the time of filing the original application, and which was therein designated as a mortgage. It was claimed by the insured, in an action upon the policy, that both applications were written up for his signature by the company's secretary, who had the old application before him when he made out the new one, and that the answer "None" was not written in the new application when it was presented for his signature. Held, that the first application was properly admitted in evidence in support of the contention that the company knew of the incumbrance.—Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386.

¶ 564. The original application for insurance being in evidence to show that the insurer therefrom had knowledge of an incumbrance, described as "mortgage," but in fact a levy of execution, it was also proper to permit the insured to establish the identity of the levy with the "mortgage" by showing that the secretary was informed of the true character of the incumbrance designated by him as a "mortgage" at the time of filing the first application.—Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386.

¶ 565. A fire insurance policy provided that it should be void if the insured had misrepresented any material fact, or if his interest was not truly stated in the policy, or in case of any false swearing by the insured, or, unless otherwise provided, if the property was or should become incumbered by a chattel mortgage. Held, that a policy making the loss, if any, payable to J., as his chattel-mortgage interest might appear, was not invalidated because the mortgage was in fact made to D., the note which it secured having been indorsed to J., who was recognized by all parties to be the owner of the mortgage.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 566. An erroneous description as to the amount of a mortgage in a fire insurance policy will not avoid it where it appears that the applicant not being able to read had signed without having had the application read to him and defendant's agent had made out the application for him, and there was evidence that the amount had been correctly stated.—Baumler v. Farmers' Northern Mut. Fire Ins. Co., 148 Mich. 430.

¶ 567. Failure on owner's part to mention an incumbrance on the equity of insured and to write it in the policy, if not inquired about and no deceit practiced, is not a material misrepresentation of title.—Guest v. New Hampshire F. Ins. Co., 66 Mich. 98.

¶ 568. Where a fire insurance policy provides that it shall be void if the subject be personal property and it "be or becomes incumbered by chattel mortgage," the existence of a mortgage upon the property unknown to the insurer will defeat the policy.—Meech v. Citizens' Ins. Co., 147 Mich. 343.

¶ 569. Where the plaintiff insured had given a chattel mortgage as security to one for indorsing his note, which note was cancelled by the giving of a new one, but nothing further done with reference to the chattel mortgage, in view of the fact that the mortgage prima facie constituted security for renewals until the note had been paid in full, an insurance policy providing that it shall be void where the property becomes mortgaged is void, because a valid chattel mortgage existed unknown to the insurer.—Meech v. Citizens' Ins. Co., 147 Mich. 343.

§ 141. ——Overvaluation of property.

Principles of valuation in general, see Value.

¶ 570. Overvaluation in the application for insurance renders the policy void if the policy so provides.—Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52.

¶ 571. The rule that a noninjurious breach of condition in a policy shall not avoid it, as enacted by Pub. Acts 1897, No. 167, does ont change the rule that where valuation of property to be insured is made a warranty, a substantial overvaluation would avoid the policy, irrespective of motive.—Shelden v. Michigan Millers' Mut. Fire Ins. Co., 124 Mich. 303.

¶ 572. A warranty of the value in an insurance policy is not rendered immaterial by a provision in the policy that the insurer shall in no case be liable to pay more than the true cash value of the property insured.—Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52.

§ 142. ——Representations as to other insurance.

Conditions as to other insurance, see post § 163.

¶ 573. An insurance company will be considered satisfied with the answer to a question as to previous insurance if the answer is substantially true and it issues the policy and enters into contract for insurance.—Emery v. Mutual City & Village Fire Ins. Co., 51 Mich. 469.

§ 574. A man insured property in a company whose policy provided that further insurance without the company's consent would avoid it. He took a policy in another company, whose agent knew of the first, and, in

answer to a question as to what insurance there was already, he answered that there would be none after a particular date, being the time at which he supposed the first policy would run out, though it was, in fact, to be good for a year longer. Held, in an action on the latter policy, and in view of the clause of avoidance in the former one, that the former became void on getting the policy in suit, and the latter was therefore not void as for an untruthful answer.—Emery v. Mutual City & Village Fire Ins. Co., 51 Mich. 469.

¶ 575. At the time the policy sued upon was taken out the property was already insured in another company. Each of the policies contained a condition avoiding it upon other then existing or subsequent insurance being had, whether such insurance was valid or invalid. Held, that the condition in the earlier policy did ipso facto become a nullity upon the issue of the later, and the later policy was therefore open to the defense that it was void.—Keyser v. Hartford Fire Ins. Co., 66 Mich. 664.

¶ 576. In order to assert a forfeiture of the later of two fire policies issued on the same property, where, at the time of application therefor, notice of the first was withheld, such later policy must have been made to the same persons mentioned in the first and on the same interest in the same property.—Haire v. Ohio Farmers' Ins. Co., 93 Mich. 481.

§ 143. Avoidance for omissions or concealments.

Effect of omissions made in good faith, see ante § 107.

§ 577. Where the fact of a pending litigation, affecting premises insured, was not communicated to the insurer at the time of executing the policy, it was held that the omission to disclose did not vitiate the policy.—Hill v. Lafayette Ins. Co., 2 Mich. 476.

¶ 578. Where an insurance agent himself fills out a policy upon a mere oral application for insurance, and the applicant is not asked the amount of incumbrances, and does not know that it should be stated, his omission to state it is no defense to the payment of a loss, unless in cases involving unusual risk not likely to be contemplated by the insurer.—O'Brien v. Ohio Ins. Co., 52 Mich. 131.

¶ 579. Where an application for fire insurance is verbal and the applicant is not asked as to the state of the title, and he does not act fraudulently, he is not required to disclose the exact condition of the title.—Crossman v. American Ins. Co. of Newark, N. J., 198 Mich. 304.

¶ 580. An insurance policy containing a clause of avoidance for misrepresenting the interest of the insured covered an organ claimed by him but actually held under a contract of purchase, paid in part, but providing that title should not pass until it was fully paid. His equitable interest in the organ was insured for more than its value. Held, that the omission to state the facts as to the actual ownership invalidated this part of the insurance.—Agricultural Ins. Co. of Watertown v. Montague, 38 Mich. 548.

§ 144. Fraud or false swearing.

See also post ¶ 960.
Effect of fraud or false swearing in proof of loss, see post § 234.
Effect of fraud to make misstatements or omissions warranties, see also ante ¶ 436.
Admissibility of evidence as to false swearing and fraud, see post § 312.
Perjury as crime, see Crimes §§ 115, 116; Indictment §§ 43p, 324p, 455p.
General principles of fraud, see Fraud.
Provision in standard fire insurance form relative to invalidity for fraud or misrepresentation, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 581. Fraud or false swearing by an insured within a provision of a fire policy making the policy void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, whether before or after a loss, is a swearing to that which is false with fraudulent intent.—Barrett v. Connecticut Fire Ins. Co., 195 Mich. 209.

¶ 582. The defense of fraud or false swearing in the application for fire insurance must be based upon actual fraud, and requires proof of fraudulent intent.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

¶ 583. Where an agent of the insured, who had the entire management and control of the business, and who held a power of attorney from the insured authorizing him to settle for the loss, executed and delivered to the adjusters a false affidavit regarding the books of account which had been kept by him, it was held that the insured, if not a party to the deceit, and, if acting in good faith, was not precluded from recovering upon the policy under a clause therein providing that the same should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, whether before or after loss.—Metzger v. Manchester Fire Assur. Co., 102 Mich. 334.

¶ 584. A fire insurance policy provided that, in case of loss, the insured should submit to an examination under oath, if required by the insurer, and that any fraud or false swearing by the insured should avoid the policy. Upon an examination so had, the insured included in his statement of loss a sewing machine, which had not been destroyed. In an action on the policy, he testified that, at the time of making such affidavit, he thought that the machine had burned, but

that he afterwards ascertained to the contrary. The machine was subsequently discovered in an out-building, underneath some wood, admitted to have been drawn and piled by the insured the day before the fire. Held, that an instruction that the policy was avoided by the false statement of the insured was properly refused.—Knop v. National Fire Ins. Co., 107 Mich. 323.

§ 145. Estoppel to deny warranty.

Estoppel or waiver of right to avoid or cancel for breach of warranty, see post XII, C.
General principles of estoppel, see Estoppel.

¶ 585. In an action on a life insurance policy, where the applicant, upon his attention being called to the alleged falsity of certain representations, gave explanations upon which the company relied, the warranties could be insisted upon, in the event of the explanations proving untrue.—Moore v. Mutual Reserve Fund Life Ass'n, 133 Mich. 526.

§ 146. Breach of promissory or "continuing warranties."

See also post ¶¶ 693-695.
Breach of conditions, see post § 147 et seq.

¶ 586. A question in the application for fire insurance "Do you agree to keep a watchman on the premises when not in use?" answered affirmatively and incorporated in the policy as a "continuing warranty," but not included among the many causes expressed for avoiding the policy does not avoid liability by the company for loss of a building by fire during the absence of a competent watchman who has gone home on account of the serious illness of his wife without the knowledge of his employers, the insured. Grant, J., dissents.—McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636.

§ 147. Breach of conditions in policy.

Notice or knowledge of conditions, see post § 148.
Necessity that breach caused or contributed to loss, see post § 149.
Forfeiture for default in payment of premium or assessment, see post §§ 150-155.
Breach of conditions respecting person insured or his occupation or status, see post §§ 156-160.
Breach of conditions respecting property insured, see post §§ 161-171.
Burden of proof and presumptions as to breach of conditions, see post § 301.
Validity, propriety and reasonableness of conditions, see ante §§ 108, 109.
Breach of promissory or "continuing warranties," see ante § 146.
Validity, propriety and reasonableness of conditions, see ante §§ 108, 109.

¶ 587. Any attempt to defraud insurers by not complying with the conditions of the policy will prevent recovery.—Security Ins. Co. v. Fay, 22 Mich. 467.

¶ 588. A notice given to an indemnity insurance company three months after knowledge of an accident is not made within a reasonable time, as required by the terms of a policy providing for "immediate written notice" as a condition precedent to liability. Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74.

¶ 589. Forfeiture of insurance cannot be declared nunc pro tunc after the loss if the policy was in force when the loss took place.—Olmstead v. Farmers' Mut. Fire Ins. Co., 50 Mich. 200.

¶ 590. Forfeitures for breach of condition cannot be established except for the violation of the precise condition made.—Bates v. Detroit Mut. Ben. Ass'n, 51 Mich. 587.

§ 148. ——Notice or knowledge of conditions.

¶ 591. The insured is held to a knowledge of the conditions of his policy in the absence of any fraud in the making of the same.—Cleaver v. Traders' Ins. Co., 65 Mich. 527.

¶ 592. Conditions and restrictions in insurance policies, to be binding upon the insured, must be inserted without fraud, misrepresentation or concealment.—Hartford Steam Boiler Inspect. & Ins. Co. v. Cartier, 89 Mich. 41.

¶ 593. An insured person is held to a knowledge of the conditions of his policy as in the case of any other contract, and the fact that he has never seen his policy does not excuse a want of such knowledge any more than would his failure to read it, unless it was kept from him by fault or fraud.—Cleaver v. Traders' Ins. Co., 71 Mich. 414.

¶ 594. Whether a condition in a policy precluding any waiver or evasion of any of its terms or conditions as printed and contained in the application or in the policy is not to be construed as referring to terms, etc., in the policy alone from the time when it was received, instead of being made to operate by relation from the date of the application, quære; it not appearing that any conditions other than those named in the application were then brought to the knowledge of the applicant.—Michigan State Ins. Co., v. Lewis, 30 Mich. 41.

¶ 595. In order to charge the insured with the duty of an examination of his policy with reference to new matter introduced into it, he must be left free to discharge that duty unaffected by the company's representations, and not be led to neglect it by the conduct of the company itself.—Hartford Steam Boiler Inspec. & Ins. Co. v. Cartier, 89 Mich. 41.

¶ 596. Where no written application for insurance is made, or any terms of the policy

agreed upon by parol except the amount of the insurance, the insured is chargeable with knowledge that the policy he receives contains the contract binding upon him as well as the insurer, and that it contains the usual terms of such instruments.—Wierengo v. American Fire Ins. Co., 98 Mich. 621.

§ 149. ——Necessity that breach caused or contributed to loss.

¶ 597. Comp. L. 1897, § 5180, providing that no policy of fire insurance shall hereafter be declared void for breach of conditions where such breach did not contribute to the loss, applies to losses on policies issued subsequent to the act whether standard or not.—McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636.

¶ 598. Under Comp. L. 1897, § 5180, providing that no policy of fire insurance shall hereafter be declared void for breach of conditions where such breach did not contribute to the loss, a policy is not voided by failure to keep a watchman on the premises during the day on Sunday where the loss does not occur during such time or by reason of such failure.—McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636.

¶ 599. Laws of 1897, No. 167, as amended by Laws of 1911, No. 128, How. St., 2nd Ed., § 8348, providing that no policy of fire insurance shall be declared void by the insurer for breach of any condition in the policy if the insured has not been injured by such breach or where a loss has not occurred during such breach, and by reason of such breach of condition construed as declaring that no forfeiture is to take effect if the insurer has not been injured by a breach of condition, nor, if the fire was not caused by a breach of condition, even though the breach was existing at the time of the fire.—Lagden v. Concordia Mut. Fire Ins. Co., 188 Mich. 689. (Ostrander, Stone and Steere, JJ., dissenting.)

¶ 600. A fire insurance policy issued upon a manufacturing plant, before the taking effect of Comp. L. 1897, § 5182, requiring the insertion after the clause containing the conditions for breach of which, without consent of the company, the policy is declared void, a proviso that a loss shall occur while such breach of condition continues or is a primary or contributory cause of the loss; such policy was rendered void, where the plant, contrary to a prohibition in the policy, was idle for more than ten consecutive days although it was in operation within ten days immediately preceding the fire.—Cronin v. Fire Ass'n of Philadelphia, 123 Mich. 277.

¶ 601. Comp. L. 1897, § 5180, limiting the defense of breach of condition to losses caused thereby, has no application where loss under an insurance policy occurred during a breach of a condition in the policy which rendered it wholly void.—A. M. Todd Co. v. Farmers' Mut. Fire-Ins. Co. of Allegan & Ottawa Co., 137 Mich. 188.

§ 150. Forfeiture for default in payment of premium or assessment.

Necessity and sufficiency of demand, see post § 151.
Note for premium not paid at maturity, see post § 152.
Right to charge against cash surrender value, see post § 153.
Rights under charter and by-laws of mutual companies, see post § 154.
Excuses for nonpayment generally, see post § 155.
Premiums and assessments in general, see ante VI.
Waiver of nonpayment of premium or assessment, see post §§ 188, 189.
Validity, propriety and reasonableness of conditions in general, see ante §§ 108, 109.
Forfeiture for nonpayment of premium as jury question, see post § 336.
Actions for premium or assessment, see ante §§ 89-94.

¶ 602. Nonpayment of the premium at the time of loss does not invalidate a policy prepared in blank and left for delivery in anticipation of renewal and by mutual understanding renewed but not manually delivered, the law treating it as delivered in effect, and where an attempted cancellation by the insurer was abortive because notice thereof did not reach insured until after the fire.—Lum v. United States Fire Ins. Co., 104 Mich. 397.

¶ 603. Where a policy of insurance provides that in case of default in paying in advance the annual instalments of a note given for the whole premium, the policy shall be null and void until payment is made, the insurance is not to be construed as for a term of years, but as an annual insurance renewable every year for a period not exceeding such term.—American Ins. Co. v. Stoy, 41 Mich. 385.

¶ 604. There is an indefinite extension of time for payment of premium under a policy containing a clause for avoidance of the premium be not paid when due, where a solicitor, authorized to collect the premiums and deliver the policy, delivered another policy on payment but responded to an offer to pay for the policy in question by telling the holder to let it rest until the insurer decided whether or not it would cancel the policy.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

¶ 605. Plaintiff's decedent was a member of defendant mutual insurance company, and there was an arrangement whereby the railway company in whose employment decedent was, should deduct the premiums from the member's pay each month. The insured drew a fixed salary but through misapprehension the premiums were not deducted therefrom.

The decedent paid no premiums. Held, it being decedent's duty to pay the premiums, and having knowledge that they had not been deducted, he had forfeited his policy.—Geddes v. Ann Arbor Railroad Employees' Relief Ass'n, 178 Mich. 486.

¶ 606. An assured, having failed to pay a quarterly life insurance premium due August 1st, wrote on October 27th to know how much was due. The company answered on October 31, stating that the amount of the past due premium with interest, which assured remitted November 4th and the company receipted for November 7th. Held, in an action on the policy that the fact that the company received and retained the remittance of November 4th was not a waiver of the forfeiture occurring by reason of the nonpayment of the premium due November 1st.—Jewett v. Northwestern Nat. Life-Ins. Co., 149 Mich. 79.

§ 151. ——Necessity and sufficiency of demand.

Sufficiency of notice for assessment which does not comply with by-laws of mutual company, see post ¶¶ 615, 617-619.

¶ 607. Where assurances made by an insurance agent charged with the duty of collecting premium amount to an indefinite extension of time for payment, the insurer must show a demand for payment and failure to respond before it can take advantage of an original nonpayment.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

§ 152. ——Note for premium not paid at maturity.

Payment of premium by note, see ante § 86. General principles governing promissory notes, see Negotiable Instruments.

¶ 608. The premium on a policy was paid by note, and the policy contained a clause that, if the note should not be paid at maturity, the premium should be considered as earned, and the policy become void while the note remained overdue and unpaid. The note was not paid when due; a loss occurred, and the note was paid afterwards. Held, that the condition was valid; that its effect was to defeat any recovery for a loss while the note remained overdue and unpaid, and that a subsequent payment of the note would only revive the policy for the remainder of the term.—Williams v. Albany City Ins. Co., 19 Mich. 451.

¶ 609. Where an insurance company takes a note when a premium falls due, and gives therefor renewal receipts, the policy continues in force, and the company cannot afterwards insist upon its forfeiture as for nonpayment.—Michigan Mut. Life Ins. Co. v. Bowes, 42 Mich. 19.

¶ 610. Where an insured person gives a premium note in payment of his policy he is bound to attend to its payment himself at maturity, and is not excused by the nonpresentation of the note, especially if it specifies no place of payment.—McIntyre v. Michigan State Ins. Co., 52 Mich. 188.

¶ 611. A stipulation in an insurance policy that the company shall not be liable for any loss or damage sustained while any premium note remains past due and unpaid (said condition appearing also in the note) is one which the company has a right to make, and, if inserted without any fraud, misrepresentation or concealment, is binding upon the insured, and its violation will cause the policy to lapse.—Robinson v. Continental Ins. Co., 76 Mich. 641.

¶ 612. Relator's life insurance premium becoming due on December 21, 1910, he gave two promissory notes payable respectively April 25, 1911, and May 23, 1911. The notes stated that they were not given as payment of premium and that the nonpayment of either of them at maturity should ipso facto lapse the policy. Relator did not pay the note due April 25th on time, but paid same on May 2, 1911. Respondent accepted the money on the condition that the relator furnish a health certificate, which he failed to do. Act No. 187, Pub. Acts of 1907, provides that a grace period of one month for the payment of premiums must be granted. Held, the policy lapsed and relator was not entitled to compel defendant by mandamus to treat the same as in force since said statute did not contemplate the granting of a second period of grace upon the falling due of the notes.—Schmedding v. Northern Assur. Co., 170 Mich. 528.

¶ 613. An oral agreement of the agent of an insurance company that the applicant for fire insurance would be notified when to pay his note given in part payment for the premium, does not make the company liable for loss to the beneficiary on the policy, where payment of the note was not tendered until after maturity and after a fire had occurred to the property insured, where it was stipulated in the policy and also in the note that the company would not be liable under the policy for loss or damage to the property insured while any premium or note or obligation given for the premium, or part thereof, remained unpaid.—Robinson v. Continental Ins. Co., 76 Mich. 641.

§ 153. ——Right to charge against cash surrender value.

¶ 614. A provision in a life insurance policy to the effect that upon default in premium payments, the insured may, upon request made within the month allowed by other provisions in the policy for the payment of arrears, have his arrears charged as an indebtedness against his policy for the payment of accruing premiums to the extent permitted by the cash surrender value, thus avoiding a default and keeping the policy alive, is not obnoxious to the statute (Act

No. 187, Pub. Acts 1097, § 1, subd. 8) securing to the policyholder upon default, a stipulated form of insurance the net value of which shall be at least equal to the reserve at the date of default, less certain specified deductions, although, in case the interest of the insured should be exhausted, he will have received a smaller value under this loan provision than under provisions conforming to the statute.—Mutual Ben. Life-Ins. Co. v. Commissioner of Insurance, 151 Mich. 610.

§ 154. ——Rights under charter and by-laws of mutual companies.

¶ 615. No forfeiture for nonpayment of assessments can be based upon a notice which fails to comply with the by-laws in that it does not contain a list of the deaths or notify the members assessed of the amount due by them to the benefit fund.—Miner v. Michigan Mut. Ben. Ass'n, 63 Mich. 338.

¶ 616. The charter of a mutual insurance company provided that if a member did not pay his assessment within thirty days after demand his insurance might be suspended by the secretary or board of directors; but if suspended by the secretary appeal might be made to the board of directors when in session. Held, that such forfeiture could not properly be imposed as an ex parte result of mere default in payment, and without giving the assured an opportunity for hearing.—Olmstead v. Farmers' Mut. Fire Ins. Co., 50 Mich. 200.

¶ 617. The articles and by-laws of a mutual benefit association required that assessments be made by the secretary, and the certificates of membership provided that assessments be payable within thirty days after notice from the secretary. Held, that the notice contemplated was notice of the assessment; and that insurance was not forfeited by neglect to pay assessments that were not imposed by the secretary or by the trustees, but only, if at all, by persons claiming to be managers, and where the only notice from the secretary was a notice of forfeiture.—Bates v. Detroit Mut. Ben. Ass'n, 51 Mich. 587.

¶ 618. The charter and by-laws of a mutual fire insurance company provided that when the board of directors ordered an assessment the secretary should prepare it and it should be signed by him and a majority of the board. Held, that an unsigned and uncertified paper containing no headings to explain the figures set down in it could not be treated as an official assessment for the purpose of forfeiting the policy of one who had not paid the amount of his assessment until after the expiration of the period fixed by notice to him.—Baker v. Citizens' Mut. Fire Ins. Co., 51 Mich. 243.

¶ 619. The charter of a mutual insurance company provided that members should be notified of assessments by circular or orally, and that if they did not pay within a fixed time they would forfeit protection through their policy. Held, that such a personal liability could not attach from merely mailing the notice, if it was not actually received.—Castner v. Farmers' Mut. Fire Ins. Co., 50 Mich. 273.

§ 155. ——Excuses for nonpayment generally.

Defenses in action for premium or assessment, see ante § 94.

¶ 620. The failure by the holder of a life policy to make a monthly payment cannot work a forfeiture, when he has relied on the agent's statement, on the issuing of the policy, that the company's collector would call, and has kept the money on hand awaiting such call having received no counter directions.—Henderson v. Grand Rapids Accident & Health Ins. Co., 150 Mich. 105.

¶ 621. A policy of insurance does not lapse because of delay in making payments by the insured where the agent informed such insured that a collector would call for the money at his residence, and where no notice was given that the dues should be paid elsewhere, and where the beneficiary promptly tendered dues on learning that the insurer had an office in the city.—Baker v. Michigan Mut. Protective Ass'n, 118 Mich. 431.

§ 156. Breach of conditions respecting person insured or his occupation or status.

Condition against death by violence or design, see post § 157.

Condition against suicide or self-destruction, see post § 158.

Intoxication, intemperance or vice as contributing cause, see post § 159.

"Voluntary exposure to unnecessary danger," see post § 160.

Validity, propriety and reasonableness of conditions in general, see ante §§ 108, 109.

¶ 622. Recovery for the death of an insured under a benefit certificate policy, occurring in an affray in which it was claimed that he was the aggressor, was not precluded under a by-law providing that no benefit shall be paid for the death of a member while violating the laws of the land; where the question as to who was the aggressor was in dispute.—Payne v. Union Life Guards, 136 Mich. 416.

¶ 623. A provision in an accident policy that it shall be void as to all accidents occurring to the insured when "engaged in any profession, employment, or exposure" not rated as preferred does not apply to the casual performance of an act pertaining to an excepted risk, if in the particular case it pertains only incidentally and not intrinsically to the regular employment of the insured.—Hess v. Preferred Masonic Mut. Acc. Ass'n, 112 Mich. 196.

¶ 624. It cannot be said, as a matter of law, that the person insured as secretary of a mercantile corporation "engages" in a more hazardous occupation and changes his occupation to farming by returning to his farm before the expiration of his contract with his city employers, on account of their disposing of their business; or that he thereby limits his recovery upon the policy, for injuries received a week later from being tossed by a bull, to the amount of indemnity which the premium paid by him would have purchased at the rates fixed for the increased hazard.—Johnson v. London Guarantee & Acc. Co., 115 Mich. 86.

¶ 625. One having recently had regular clerical employment in a city, which has not yet been changed, and whose home is upon a farm, where he spends his Sundays and one night in each week, the management of which farm is, in his absence, entirely in the hands of men hired by him for the purpose, is not a "farmer," within the terms of an accident insurance policy classing farming as a hazardous employment.—Johnson v. London Guarantee & Acc. Co., 115 Mich. 86.

¶ 626. An exception in an accident policy of death or injuries resulting directly or indirectly from poison extends to cases where the poison is administered through the mistake of a druggist or physician.—Early v. Standard Life & Acc. Ins. Co., 113 Mich. 58.

§ 157. ——Condition against death by violence or design.

When policy covers death, injury or disability caused by criminal, illegal or violent acts, see ante § 101.

¶ 627. A soldier whose life was assured by an accident policy providing that the insurance should not extend to any case of death unless the claimant establish by direct and positive proof that it was caused by external violence and accidental means, and was not the result of "design, either on the part of deceased or any other person," deserted and was shot by an officer instructed to arrest him; but the evidence was conflicting as to whether the officer knew at the time of the shooting that the person shot was the deserter, and as to whether the killing was in self-defense. Held, that if the officer did not know that the person he fired at was the deserter, and did not intend to kill the deserter, it could not be said that deceased lost his life by the officer's design; and that the case was for the jury.—Utter v. Travelers' Ins. Co., 65 Mich. 545.

¶ 628. Where an insured soldier having deserted is shot by a sheriff seeking to arrest him as a deserter, but he was not then in the act of deserting or not shot because of that but because the officer feared he would shoot, it cannot be held as matter of law that he was engaged in an unlawful act within the meaning of a provision in a policy of insurance that no claim shall be made when the death has happened while the assured was engaged in or in consequence of any unlawful act.—Utter v. Travelers' Ins. Co., 65 Mich. 545.

§ 158. ——Condition against suicide or self-destruction.

Burden of proof and presumptions as to insanity, see post ¶¶ 1174, 1175.

Validity of condition as to effect of insanity in case of suicide, see also ante ¶ 446.

When policy covers death or disability caused by or as result of insanity or temporary derangement, see ante § 100.

When policy covers death caused by criminal, illegal or violent acts, see ante § 101.

Burden of proof and presumptions as to suicide, see post § 302.

Admissibility of evidence as to cause of death of insured, see post § 315.

¶ 629. A condition forfeiting a life insurance policy for suicide must be strictly construed, being in the nature of a penalty or a forfeiture.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

¶ 630. In a life insurance policy a condition against suicide cannot be construed to cause a forfeiture for acts involving no evil will, such as self-slaughter by an insane person.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

¶ 631. The act of self-killing as a cause of forfeiture being classed in an insurance policy among others involving such wrongful conduct as death by dueling, by the hands of justice, or in the violation of the laws, or conduct impairing health by vice or intemperance, it is to be inferred that it is regarded as ejusdem generis and depending on the same reasons.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

¶ 632. A clause in a policy avoiding it "if the insured shall die by his own hand, sane or insane," covers an act done for the purpose of self-destruction; it matters not that the insured had no knowledge of the wrong involved in its commission.—Streeter v. Western Union Mut. Life & Accident Soc. of United States, 65 Mich. 199.

¶ 633. An insurance policy limiting the payment, in cases of insane suicide, to the legal reserve, is valid if not prohibited by law, and if the reserve is ascertainable, even though the policy does not declare what such reserved sum shall be.—Frey v. Germania Life Ins. Co., 56 Mich. 29.

¶ 634. Where a mutual benefit certificate is issued under provisions prohibiting payment of any benefit upon the death of a member who commits suicide, whether sane or

insane at the time, there can be no recovery in a case where a member employs a rope, adjusts it, and commits suicide by hanging.—Sabin v. Senate of National Union, 90 Mich. 177.

¶ 635. Suicide by a person non compos mentis does not come within the forfeiture clause of an accident insurance policy providing that no claim shall be made thereunder when death or injury has been caused by suicide.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

§ 159. ——Intoxication, intemperance or vice as contributing cause.

Burden of proof to prove insured died of delirium tremens, see post ¶ 1185.
Waiver by agent's knowledge that insured was intemperate, see post ¶ 856.
Question as to whether intemperance caused death as one for jury, see post ¶ 1370.

¶ 636. Where an accident insurance policy contains a condition against recovery for a death resulting from intoxication, it is proper to show the condition of the insured when he received the injuries, and for this purpose witnesses may be asked whether he impressed them as being intoxicated, whether he was drunk or sober at the time, and whether in their judgment he was in as good a condition to take care of himself as though he were sober.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

§ 160. ——"Voluntary exposure to unnecessary danger."

See also post ¶ 904.
Increase of risk or voluntary exposure to danger, as jury question, see post § 337.

¶ 637. The term "voluntary exposure to unnecessary danger," as used in an accident insurance policy exempting the insurer from liability for injuries caused by such exposure, means a conscious or intentional exposure, involving gross or wanton negligence on the part of the insured.—Johnson v. London Guarantee & Accident Co., 115 Mich. 86.

¶ 638. The term "voluntary exposure to danger" as used in an accident insurance policy means a realization that an accident will in all probability result and an injury follow, from the action about to be taken. The danger of injury must be obvious.—Hunt v. United States Accident Ass'n, 146 Mich. 521.

¶ 639. A clause in an accident insurance policy exempting from liability in case of either voluntary or unnecessary exposure to danger limits the exception to cases of exposure to recognize dangers and does not exempt the company from liability for death caused by mere thoughtlessness on the part of the insured. The word "exposure" is coupled with "voluntary" sufficiently to require an intentional act.—Irwin v. Phoenix Accident & Sick Ben. Ass'n, 127 Mich. 630.

¶ 640. A bank cashier cannot be said, as a matter of law, to have been engaged in an exposure not incident to his employment, where he had gone to a planing mill to show how work was to be done, and had operated a saw, and then while waiting slipped and cut off his hand; and whether he thereby voluntarily exposed himself to unnecessary danger is also for the jury to determine.—Hess v. Preferred Masonic Mut. Accident Ass'n, 112 Mich. 196.

¶ 641. A person playing indoor baseball in a gymnasium who broke his ankle by putting out his foot to prevent running against a wall is entitled to recover on an insurance policy although he had agreed that the benefits under the policy "shall not extend to or cover * * * voluntary or unnecessary exposure to danger," inasmuch as a jury would be justified in finding that he had no anticipation of accident and did not realize there was any danger, and it was error to direct a verdict for the defendant.—Hunt v. United States Accident Ass'n, 146 Mich. 521.

¶ 642. In a suit upon an accident insurance policy, it appeared that the insured, who was a traveling salesman, was injured by jumping from a passenger train after it had left a station, and when it was running at the rate of from one to six miles per hour, he having at the time a satchel weighing from forty to fifty pounds in each hand, and that death resulted from the injury. The policy provided that the insurance should not cover any injury resulting, either directly or indirectly, from voluntary or unnecessary exposure to danger or to obvious risk of injury. No necessity for decedent's jumping from the train was shown. Held, that decedent voluntarily exposed himself to "obvious risk of injury," within the meaning of the policy.—Smith v. Preferred Mut. Accident Ass'n, 104 Mich. 634.

§ 161. Breach of conditions respecting property insured.

Breach of condition as to sole and unconditional ownership, see post § 162.
Condition against other insurance, see post § 163.
Change in location of property insured, see post § 164.
Conditions against vacancy of fire risks, see post § 165.
Introduction or use of prohibited articles in buildings, see post § 166.
Want of watch or protection service, see post § 167.
Incumbrance on property, see post § 168.
Change of title or possession, see post § 169.
Levy of attachment or execution, see post § 170.
Foreclosure or execution sale, see post § 171.
Burden of proof and presumptions as to breach of conditions, see post § 801.
Validity, propriety and reasonableness of conditions in general, see ante §§ 105, 109.

¶ 643. A policy that is to be void on a certain contingency cannot be regarded, where that occurs, as existing for any purpose; and whether ended by agreement or lapse of time or breach of condition is to be considered as no policy.—Emery v. Mutual City & Village Fire Ins. Co., 51 Mich. 469.

¶ 644. A provision in an insurance policy for avoidance thereof "if the title or possession be now or hereafter involved in litigation" is not violated by a proceeding brought to recover possession from a purchaser under contract of sale who has defaulted in payment and whose occupancy after such default is that of tenant without permission.—Hall v. Niagara Fire Ins. Co., 93 Mich. 184.

¶ 645. A provision in the by-laws of an insurance company that notice of other insurance, of increased hazard by mortgage, and of whatever else affects the rights of the parties, must be made to the secretary, and that his approval must be indorsed, is not necessarily to be construed as providing for the avoidance of the policy if such notice is not given.—Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306.

¶ 646. Painters are not "mechanics," within the meaning of that term as used in a fire insurance policy providing that it shall be void "if mechanics be employed in building, altering, or repairing the premises for more than 15 days" without the consent of the insurer.—Smith v. German Ins. Co., 107 Mich. 270.

¶ 647. Using a stove in a room that has no chimney does not release an insurance company from liability to pay a loss by fire resulting therefrom, if the premises are not within corporate limits or if the charter or by-laws of the company do not furnish a basis for refusing to pay.—Castner v. Farmers' Mut. Fire Ins. Co., 50 Mich. 273.

¶ 648. The failure to observe that part of the "iron-safe rider" of an insurance policy requiring the keeping of the books of the assured in an iron safe or in another building not exposed to the hazard of a fire in the building of the assured, rendered the policy void; and prevented recovery for loss by fire of the property insured, occurring during such breach, even though the insured was not injured thereby, Comp. L., § 5180, not applying to such case.—King v. Concordia Fire-Ins. Co., 140 Mich. 258.

¶ 649. The filing of a telegram at 8:30 a. m. which was not transmitted until 11:52 a. m., giving a live stock insurance company notice of the illness of a horse, which was first observed at 10:30 p. m. of the preceding day, is a sufficient compliance with a requirement of an insurance policy that notice of the illness of the animal should be given the insurer "forthwith by registered mail or telegraph."—Simmons v. National Live Stock Ins. Co., 187 Mich. 551.

§ 162. ——Sole and unconditional ownership.

See also ante ¶¶ 432, 439, 557, 561; and post ¶ 708.

Warranties as to title or interest, see ante § 139.

Burden of proof as to breach of condition respecting ownership, see post ¶ 1201.

Waiver by agent's knowledge of title or condition of property, see post § 204.

Omission in good faith to state condition of title, see also ante ¶¶ 579, 580.

Avoidance for representation of sole ownership where held under deed to insured and his wife, see also ante ¶ 560.

Waiver of forfeiture for breach as to title, ownership or condition of property, see post § 190.

¶ 650. In an action upon an insurance policy issued upon plaintiff's dwelling-house and household effects, it was insisted that under a clause in the policy which provided that it should be void "if the interest of the insured be other than unconditional and sole ownership," inasmuch as plaintiff held under a land contract, he could not recover. Plaintiff made no written application, nor any representations as to ownership. Held, that such a condition will not invalidate the policy in such a case.—Knop v. National Fire Ins. Co., 101 Mich. 359.

¶ 651. The owner of lumber has unconditional ownership of lumber covered by a fire insurance policy where he has no knowledge of the mixing of a small amount of lumber wrongfully taken by trespass with his own until after a fire, and the value of his own timber exceeded the amount of the policy.—First Nat. Bank of Sault Ste. Marie v. Aetna Ins. Co., 188 Mich. 251.

¶ 652. A Michigan standard fire insurance policy issued on a verbal application, with nothing said at the time of the issuance of the policy relative to the title or interest of the insured in the building, accepted by the president of the insured without reading or examining it, placed in his safe and retained without his knowledge of the contents is void where the insurance company has no knowledge of the fact that the ownership was not in the insured.—Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440.

¶ 653. The provision that the policy "shall be void * * * if the interest of the insured be other than unconditional and sole ownership" does not avoid a policy issued to a conditional seller in whom title was reserved covering the amount of its interest in the property, which was described as "their saloon furniture and fixtures," the only outstanding interest having been that of the conditional buyers.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 142 Mich. 29.

¶ 654. Where plaintiff in an action upon a policy of insurance had sold the property insured, retaining a lien thereon, and the

policy recited the fact that the property was purchased upon contracts, defendant company has sufficient notice of the interests of both parties, and its claim that the policy is void for the reason that plaintiff was not the sole and unconditional owner of the property insured is untenable.—O'Neill v. Northern Assur. Co. of London, England, 155 Mich. 564.

¶ 655. A provision in an insurance policy that the policy shall be void if the insured is not the sole and unconditional owner of the property, or if any building intended to be insured stands on ground not owned in fee-simple by the insured, unless the insurer's consent is indorsed in writing on the policy, does not apply to the condition of the property at the time the policy is issued, but only to such changes as arise after its execution.—Hall v. Niagara Fire Ins. Co., 93 Mich. 184.

¶ 656. The omission of the owner of the equitable title to state the nature thereof will not avoid a policy of insurance, under a condition forfeiting the insurance if the interest of the insured is other than the entire, unconditional and sole ownership, if the fact is not so represented to the company.—Dupreau v. Hibernia Ins. Co., 76 Mich. 615.

¶ 657. A vendee legally in possession under a part-paid land contract, who is legally obligated to pay the balance of the purchase price, and to keep the buildings on the land insured in favor of the vendor, may be said to be the entire, unconditional and sole owner within the meaning of a policy providing for such ownership as a condition to the validity of the policy.—Dupreau v. Hibernia Ins. Co., 76 Mich. 615.

¶ 658. A fire insurance policy stipulated that it should be void if the interest of the assured were other than "the entire, unconditional, free and unencumbered ownership." The applicant for insurance had only an undivided half interest in the property, having transferred the other half to his son, who had mortgaged it to his mother, and afterwards assigned it for the benefit of creditors. The applicant went to the assignee and to the mortgagee to obtain their interests, and they told him orally that he could have them, and upon these assurances he had the property insured. Held that, as no consideration appeared for the transfer of their interests, the policy was void.—Miller v. Amazon Ins. Co., 46 Mich. 463.

¶ 659. Where an insurance policy is declared to be void "if the subject of insurance be a building on ground not owned by the insured in fee simple" ownership of an equitable title is a sufficient compliance with the representations and the agreement in the policy.—Maas v. Anchor Fire Ins. Co. of Cincinnati, Ohio, 148 Mich. 432.

§ 163. ——Condition against other insurance.

See also ante ¶¶ 435, 645.
Admissibility of evidence as to other insurance, see post § 308.
Waiver by agent's knowledge of other insurance, see post § 203.
Waiver of condition against additional insurance by representations of agent, see post ¶ 833.
Effect of misstatement of insurer's agent relative to other insurance, see post ¶ 822.
Sufficiency of permit for other insurance, see ante ¶¶ 477-479.
Representations amounting to warranties respecting other insurance, see ante § 142.
Waiver of breach as to other insurance, see post §§ 191, 192.

¶ 660. Breach of a condition in an insurance policy that it shall be void if additional insurance on the property is procured, renders the policy not voidable simply, but wholly void.—A. M. Todd Co. v. Farmers' Mut. Fire-Ins. Co. of Allegan & Ottawa Co., 137 Mich. 188.

¶ 661. That a vendee in a land contract insures the property which is the subject of the contract without vendor's knowledge and with knowledge that the vendor holds a policy on the property upon which the vendee has paid the premium, will not invalidate the contract of insurance between vendor and his insurer.—Smith v. American Ins. Co., 177 Mich. 123.

¶ 662. A policy of insurance which provides that it shall be void if the insured now has, or shall hereafter "make or procure, any other contract of insurance, whether valid or not," is voided by a subsequent insurance, even though it may not be binding and enforceable, because it contains the same words.—Donogh v. Farmers' Fire Ins. Co., 104 Mich. 503.

¶ 663. Where an insurance policy contains a provision of avoidance if other insurance on the property is effected without notice to the insurer, such provision is not violated by insurance placed without the knowledge of the insured or notice to the insurer by the partner of the insured, who has an undivided interest in the property.—Hall v. Concordia Fire Ins. Co., 90 Mich. 403.

¶ 664. Insurance against fire, procured by a widow for the benefit of minor heirs, is not forfeited by reason of her subsequently procuring insurance of her dower interest in the same property.—Haire v. Ohio Farmers' Ins. Co., 93 Mich. 481.

¶ 665. The clause against additional insurance without consent, etc., is not violated by the fact that the insured has a prior policy in another company, the existence of which was known to both parties when the policy in suit was negotiated, it being understood between them that it was to be can-

celed if the second policy was taken, and it being in fact canceled, if not actually before the manual reception of the second policy, at least contemporaneously with its complete delivery.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 666. Insurance obtained by a mortgagee to cover his interest, without the mortgagor's knowledge or consent, is not "other insurance" such as avoids a policy issued to the mortgagor.—Carpenter v. Continental Ins. Co., 61 Mich. 635.

¶ 667. Subsequent insurance obtained by a mortgagee is not such "additional" insurance as vitiates a policy taken out by the mortgagor.—Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98.

§ 164. ——Change in location of property insured.

See also ante ¶ 395.

¶ 668. If household goods, insured as goods contained in a dwelling-house, are burned while stored in a barn on the same premises there can be no recovery of insurance.—English v. Franklin Fire Ins. Co. of Philadelphia, 55 Mich. 273.

¶ 669. A mutual insurance company organized under How. St., ch. 132, is allowed to insure "live-stock, wagons, carriages, harness," etc., "being upon farms as farm property." The by-laws of a certain company did not allow it to insure village property that was within one hundred feet of other buildings, and provided for cancelling the policy if the situation of insured property was so changed as to increase the risk. Held, that the company would not be liable for a horse, harness, cushion and blanket insured as "personal farm property in buildings and on farm," but destroyed by fire while in the barn of a village hotel that stood within one hundred feet of other buildings.—Wildey v. Farmers' Mut. Fire Ins. Co. of Van Buren County, 52 Mich. 446.

¶ 670. A shingle-mill company which has insured, under a blanket policy, its shingles then piled upon five docks near its mill, and has warranted that a continuous clear space of one hundred and fifty feet shall be maintained between the insured property and the mill, the insurance rate being much less where the designated space was maintained, and the company having paid that rate of premium violates its contract by having shingles then piled on two of the docks within twenty-five or thirty feet of the mill, and such violation, since the warranty was one in futuro, renders the policy void.—Michigan Shingle Co. v. London & Lancashire F. Ins. Co., 91 Mich. 441.

¶ 671. The general rule is that place is of the essence of the risk; and a permanent removal of the property from the place where insured withdraws it from the protection of the policy; so held, where insurance had been effected upon a barn and its "contents" without specifically describing the latter, and where such contents, without notice to the insurer, were removed to another barn subsequently erected, and were burned.—Benton v. Farmers' Mut. Fire Ins. Co., 102 Mich. 281.

§ 165. ——Conditions against vacancy of fire risks.

Validity of condition against vacating, see ante ¶ 444.

Waiver of condition against vacancy, see also post ¶ 774.

Vacancy of premises as question of law and fact, see post § 338.

¶ 672. Vacancy of insured premises is not such an increase or change of risk as to forfeit a fire insurance policy thereon, without express agreement.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103; Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610.

¶ 673. A house occupied by a tenant was insured. The tenant moved out and the landlady at once moved her own things in and began to clean up, meaning to live there herself, but the next day she had to go away for three days' absence. While cleaning the house she did not eat or sleep there, and after a few days she went off again on a business trip. While she was gone the house was burned. Held, that the policy had not become void on the ground that the premises were vacant.—Shackelton v. Sun Fire Office of London, Eng., 55 Mich. 288.

¶ 674. Where an insurance policy is subject to forfeiture if the property be left vacant for more than thirty days, or if it be levied upon, it seems that there must be proof of a continuous vacancy of more than thirty days, and that the levies must be after the date of the policy and under valid proceedings.—Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co., 48 Mich. 148.

¶ 675. A clause avoiding an insurance policy in case the premises should "become vacant or unoccupied" did not apply where a man and his family left home for twelve days to visit a sick daughter, and engaged a person to go to the house daily to look after it.—Stupetski v. Transatlantic Fire Ins. Co., 43 Mich. 373.

¶ 676. A house is not vacant within the terms of a policy during the temporary absence of the occupants.—Stupetski v. Transatlantic Fire Ins. Co., 43 Mich. 373.

¶ 677. During the onset of a forest fire, insured plowed furrows around his premises and then while numerous persons remained there fighting fire, took his wife and belongings to a place of safety, and her thence to a nearby village because of her

physical condition; whereupon he returned to assist in fighting the fire. The policy sued upon contained the following provision: "Any member vacating insured premises, and not placing some one else in charge of the same, shall bear his own risk for such time as such premises are vacant. * * * Temporary absence, like on a visit, does not create vacant property." Held, that there was no vacation of the premises in question, within the meaning of the policy.—Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386.

¶ 678. The seller of property by a conditional sale does not, by taking a chattel mortgage to secure the purchase price, waive title so as to prevent him from maintaining a suit on a fire insurance policy covering the property thus sold.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 150 Mich. 311.

¶ 679. A dwelling-house from which a tenant has removed without intention to return, although he has left there some goods not then needed for housekeeping in his new quarters, and which remains unoccupied, is "vacant" within the meaning of the provision declaring the policy void if the premises become "vacant or unoccupied."—Richards v. Continental Ins. Co., 83 Mich. 508.

¶ 680. Occupancy implies the actual use of a house as a dwelling place, and the insurer has a right to the care and supervision involved in such occupancy, under a policy forfeitable if the building shall be or become vacant or unoccupied without the consent of the company; and leaving some one to look after the property when vacated by the assured will not prevent such forfeiture. —Bonenfant v. American Fire Ins. Co., 76 Mich. 653.

¶ 681. Where at the time of insuring a farm barn it was occupied by a tenant who lived on another farm and used the barn for the storage of produce until sold, of which facts the agent of the company had notice,—the application being an oral one, and the policy being silent as to occupancy, —the cessation of such occupancy by the tenant, after which an agent of the owner of the barn went to the premises frequently to see that the doors were fastened, etc., will not avoid the policy.—Fritz v. Home Ins. Co., 78 Mich. 565.

¶ 682. In determining whether a condition against vacancy has been broken so as to avoid the insurance the intent of the parties to the insurance policy in respect to occupancy is to be gathered from the usual and ordinary use of the premises for the purposes to which they are devoted.—Fritz v. Home Ins. Co., 78 Mich. 565.

¶ 683. The shutting down of a shingle-mill for forty-two days for want of logs which were in transit, and detained by reason of low water, but which were daily expected to arrive, and which began to be delivered the day the mill was burned, will not avoid a policy of insurance providing for forfeiture in case "the mill shall cease to be operated" without notice to or the consent of the insurance company.—City Planing & Shingle Mill Co. v. Merchants' M. & C. Mut. Fire Ins. Co., 72 Mich. 654.

¶ 684. On the question whether an insured mill "ceased to be operated" it is proper for insured to show that a planing-mill owned by it, and distant from the shingle-mill about one hundred and twenty-five feet, and connected with it by cable power which operated both mills, was kept in operation, and that other mills were shut down the same season on account of low water, thus showing that such stoppages were incident to and to be expected in that locality.—City Planing & Shingle Mill Co. v. Merchants' M. & C. Mut. Fire Ins. Co., 72 Mich. 654.

¶ 685. A dwelling-house, occupied by the assured when the policy was written, does not become vacant or unoccupied, within the meaning of a clause voiding the policy if the building "be or become vacant or unoccupied, and so remain for 10 days," by reason of the temporary absence of the assured in a neighboring city, without any intention on her part of giving up her home or residence, she leaving all of her household goods in the house, as also a quantity of provisions, and a horse in the barn, and engaging a neighbor and his wife to care for the house and horse during her absence, which they do for about two months, and up to the time of the fire.—Hill v. Ohio Insur. Co., 99 Mich. 466.

§ 166. ——Introduction or use of prohibited article in building.

See also post ¶¶ 780, 853.
Waiver by agent's knowledge that illuminating gas was generated on insured premises, see post ¶ 859.
Instruction as to increase of risk, see post § 347.

¶ 686. Insurance is not recoverable where, contrary to a prohibition in the policy against keeping gasoline on the premises, the insured placed a can of gasoline for use as fuel in a stove, in a building in the rear of that described in the policy but used in connection therewith, without obtaining the consent of the company, though the can was found empty by the firemen and the goods in the front store were a total loss while those in the rear store were not injured, there having been little fire in that portion of the building.—Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455.

¶ 687. The keeping of gasoline in the insured premises without written consent of insurer contrary to a condition avoiding the policy for such cause is not a breach of con-

dition which is prevented from having its effect, though it did not contribute to the loss, under Comp. L. 1897, §§ 5180-5182, where the loss occurred during the breach of the policy and while its terms were being violated.—Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455.

¶ 688. A provision in a fire insurance policy that benzine, gasoline, naphtha, or other explosives shall not be "kept, used, or allowed" upon the premises insured is to be understood as prohibiting only the habitual keeping, using, or allowing of these articles on the premises, and not their occasional introduction for some temporary purpose connected with the occupation of the premises, such as making ordinary or necessary repairs. Thus, the keeping of a five-gallon can of gasoline in the building for several weeks, from which to supply torches used in removing old paint from the outside of the building preparatory to repainting it, does not constitute a violation of this provision of the policy.—Smith v. German Ins. Co., 107 Mich. 270.

¶ 689. A fire insurance policy insuring property in a three-story building, described by its street number, includes a one-story building in the rear, where both buildings were used as one at and prior to the issuance of the policy, and a prohibition against the keeping of gasoline applies to both buildings.—Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455.

¶ 690. A fire insurance policy will be forfeited for drawing kerosene in a manner prohibited by the policy, although the latter specifically covered a stock of merchandise in a village hardware store, including "paints, oils," etc.—Vandervolgen v. Manchester Fire Assur. Co., 123 Mich. 291.

¶ 691. Fire insurance cannot be recovered where contrary to a prohibition in the policy against keeping gasoline without consent on the premises, the insured kept a gallon of gasoline in a can in a building in the rear of premises specifically described in the policy, but used in connection therewith.—Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455.

¶ 692. Keeping gasoline on insured premises, contrary to a provision in the policy, does not prevent plaintiff from recovering in a suit on the policy, unless it be proved that the gasoline caused the fire which destroyed the property.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 150 Mich. 311.

§ 167. ——Want of watch or protection service.

Promise to furnish watch or protection service as "continuing warranty," see also ante § 146.

¶ 693. A condition in a policy insuring a saw-mill that "a watchman shall be employed about the premises night and day," cannot be said not to have been complied with where it appears that the assured was operating another mill from 425 to 450 feet distant, the space between the two being open and used for piling lumber and where the assured's foreman, who had charge of piling the lumber testified that he watched the mill every day down to the time of the fire, and that the yard men under him also watched it.—Spies v. Greenwich Ins. Co., 97 Mich. 310.

¶ 694. An application for insurance of mill property contained an agreement on the part of the insured to keep a watchman on the premises at all times when the mill was not in operation, and the policy provided that, if the insured should fail to keep any of the agreements therein contained, the company should not be liable in case of loss under the policy; which forfeiture clause is construed as though the words "during such failure" followed the word "policy," so far as the agreement to keep a watchman is concerned.—Au Sable Lumber Co. v. Detroit Manufacturer's Mut. Fire Ins. Co., 89 Mich. 407.

¶ 695. The temporary absence of a watchman on saw-mill premises, for the purpose of obtaining a padlock and key which he had left at the boarding house three hundred feet from the mill, and which he desired to use on the premises, cannot be regarded as a violation of an agreement on the part of the mill-owners in an insurance application to keep a watchman on the premises at all times when the mill was not in operation.—Au Sable Lumber Co. v. Detroit Manufacturers' Mut. Fire Ins. Co., 89 Mich. 407.

§ 168. ——Incumbrance on property.

See also ante ¶¶ 433, 434, and post ¶¶ 773, 821.

Effect of parol waiver as to condition against other insurance, see post ¶ 847.

Validity of condition against incumbering, see ante ¶¶ 444, 450.

Omission in good faith to state amount or fact of incumbrance, see ante ¶ 578.

Mortgage incumbrances in general, see Mortgages; Foreclosure; and Chattel Mortgages.

¶ 696. A mortgage on a homestead being void if not signed by the wife constitutes no incumbrance, whatever the parties may have intended; and does not, therefore, avoid the condition in an insurance policy against subsequent incumbrances.—Watertown Fire Ins. Co. v. Grover & Balser Sewing Mach. Co., 41 Mich. 131.

¶ 697. An insurance policy is not rendered void by the fact that the applicant incumbered the property insured without notice to or the consent of the company, where there is nothing contained in the by-laws or contract of insurance making void the policy

under such circumstances.—Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306.

¶ 698. The execution by one partner of a chattel mortgage upon the firm property to secure his individual debt so changes the interest of the firm as to avoid a policy of insurance that stipulates for avoidance if any change other than by the death of the insured takes place in the "interest, title or possession" of the property.—Olney v. German Ins. Co., 88 Mich. 94.

¶ 699. A policy insured plaintiff to a specified amount in a certain building without stating her interest, which was in fact that of the vendee in a land contract. Held, that a prohibition in the policy against changes in the title without the insurer's consent would not operate to avoid the policy where the property was mortgaged not by the insured but by the person in whom the legal title stood.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 700. Chattel mortgages on growing crops are not to be regarded as increasing the hazard of insurance until the crops are harvested.—Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306.

§ 169. ——Change of title or possession.

Validity of condition against change of title, see ante ¶ 444.

¶ 701. Where possession and control of the property and an insurable interest are retained by the insured under a fire policy, an executory agreement for its sale does not so violate the spirit of the conditions of the policy respecting the transfer of said property as to render the policy void.—Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555.

¶ 702. Defendant fire insurance company issued a policy on a dwelling house to the "estate of Katherine Munson, deceased," while said estate was in the process of administration. Shortly thereafter the administrator made an executory contract for the sale of said house to a third person to be paid for in instalments. Prior to the completion of said instalments and before said vendee was entitled to specific performance, said dwelling house burned. The administrator had all the time remained in possession and control thereof. The policy contained the condition making the same void if any change should take place in the interest, title or possession of the property. Held, said policy was not voided by the said contract of sale.—Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555.

¶ 703. A policy of insurance provided that it should be void if the insured was not the sole and unconditional owner, or if the property should be conveyed without the defendant company's consent. One Pfunter owned a piece of land and contracted to build a brick plant on the same, and convey the land and building to a brick company, a corporation. He placed the above policy of insurance on the brick plant after its completion, and conveyed the plant and the land to the brick company, assigning the policy to plaintiff, Dull, as trustee for the corporation. Held, in a suit on the policy that it was void.—Dull v. Royal Ins. Co., 159 Mich. 671.

¶ 704. The mixing of lumber, wrongfully taken by trespassing upon other lands with lumber belonging to a person, and covered by a fire insurance policy, without his knowledge or consent, does not increase the moral hazard where the insured does not know of the claim of the owner of the timber wrongfully taken until after the fire and the value of the timber owned by the insured exceeds the amount of the policy.—First Nat. Bank of Sault Ste. Marie v. Aetna Ins. Co., 188 Mich. 251.

¶ 705. In an action on an insurance policy the court properly directed a verdict for the defendant where it appeared that one partner had executed a chattel mortgage upon the firm property to secure his individual debt, and the policy specifically provided that it should be void if any change other than by the death of the insured takes place in the "interest, title or possession" of the property.—Olney v. German Ins. Co., 88 Mich. 94.

¶ 706. A fire insurance policy voidable for change of title was not avoided by a transfer from a husband to his wife recorded by him for the sole purpose of having the record title appear out of his name so as to ward off an unjust claim, and not with the intention of having the title pass.—Hogadone v. Grange Mut. Fire Ins. Co., 133 Mich. 339.

¶ 707. Under the provisions of a Michigan standard policy against change of interest or title, the policy in question was avoided, where at the time of the issuance of the policy the premises were held under a part-paid land contract from W., and where subsequently W. agreed to purchase the plant and the contract was reassigned to him, and where the insured had been paid a large part of the purchase price and held a note for the balance, and such note was paid within 20 days of the fire.—Excelsior Foundry Co. v. Western Assur. Co., 135 Mich. 467.

¶ 708. A policy of insurance, one of the conditions of which is that, "in case of any sale, transfer or change of title in the property insured, such insurance shall be void and cease," is avoided by a conveyance which is absolute in form, though given as security for a debt merely.—Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279.

¶ 709. Where the insurance is upon a single building, and the conveyance is of an

undivided interest only, the conveyance avoids the whole policy, notwithstanding the interest of the insured remaining unconveyed is shown to exceed in value the sum insured.—Western Massachusetts Ins. Co., v. Riker, 10 Mich. 279.

¶ 710. Where a loss under an insurance policy is made payable to a mortgagee as his mortgage interest may appear, the death of the insured cannot make the policy void under the provision that it shall become so if any change takes place in title or possession. Whether it would have that effect in any case, quære.—Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

¶ 711. Where, on an oral application for insurance, the agent was informed that the applicant held under a land contract, and where the policy merely stated that the assured was insured to a certain amount on the property against loss not exceeding her interest, without stating what such interest was, a clause requiring indorsement of the consent of the company on the policy if the building insured stood on ground not owned in fee-simple by the assured was held to apply also to changes in ownership arising after its delivery and acceptance.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 712. Where a fire insurance policy provided that it should be void "if the interest of assured in said property now is or shall become any other or less than a perfect legal and equitable title," it was not forfeited by the fact that after a loss by fire the grantor of the insured executed a quitclaim deed to the insured to correct an erroneous description in the previous deed to him.—Diehlman v. Dwelling-House Ins. Co., 78 Mich. 141.

¶ 713. The sale by contract of land, the buildings upon which are insured under a policy forfeitable if the assured sells or transfers the insured property without the indorsed consent of the company, will not avoid the policy where the agent who wrote the insurance had full knowledge of such sale, and made indorsements on the policy referring thereto, and to the interest of each party in case of fire; and, even if such a sale had that effect, such action of the agent would operate as a waiver.—Bonenfant v. American Fire Ins. Co., 76 Mich. 653.

¶ 714. The conveyance of land to a vendor on default by a vendee in a contract of sale is not a change of title or interest in the property which is within a condition of a policy of fire insurance issued in the name of the vendee, with a loss payable clause in favor of the vendor, that any change of the interest of the insured in the property should avoid the policy unless the change should receive the written assent of the insurer. (Affirmed by equally divided court.)—Gourlay v. Insurance Co. of North America, 181 Mich. 286.

¶ 715. Where the insurance company has notice when the policy is taken out that the property has been sold under a contract by the insured, there is no breach of a condition that notice must be given of the transfer of the interest in the insured property when the contract of sale is forfeited by the purchaser who quitclaims his equitable interest to the insured and no notice thereof is given to the company.—Foiles v. Detroit Fire & Marine Ins. Co., 175 Mich. 716.

¶ 716. The receipt of two small payments by an assured, after the issuance of a policy of fire insurance on lumber, to apply on a contract of sale thereof, of which the insurer's local agent had knowledge, did not effect such a change of the title or interest of the assured as to avoid the policy.—Fuhrman v. Sun Ins. Office of London, 180 Mich. 439.

§ 170. ——Levy of attachment or execution.

General law of attachment, see Attachment.
General law of executions, see Executions.

¶ 717. Where a policy provides for its avoidance if the property shall be levied on, levies to work forfeiture must be made after the date of the policy and under valid proceedings.—Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co., 48 Mich. 148.

¶ 718. The levying of a writ of attachment upon land, the buildings appurtenant being insured, there being no change of possession, is not such a change in interest or title as avoids the policy of insurance.—O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187.

§ 171. ——Foreclosure or execution sale.

Validity of condition avoiding for commencement of foreclosure proceedings, see ante ¶ 443.
Execution sales, see Executions, VII.
General law of foreclosure, see Foreclosure.

¶ 719. Conditions of avoidance for false representations of the condition, situation or occupancy of the property, or for omission to make known any fact material to the risk, or for such use of the premises as to increase the risk, refer to the representations and concealments attending the inception of the policy, and to the increased risks arising from changed physical conditions; they do not include the subsequent commencement of a foreclosure of a mortgage that was known to the insurer.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 720. Insurer had actual notice of the existence of a mortgage on the insured property, and the policy provided that it should be void upon the passing or entering of a decree of foreclosure. Held, that the policy was not annulled by the mere commencement of foreclosure proceedings.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 721. Foreclosure of a mortgage upon insured property is not such a sale by the assured as will forfeit the policy, so long as the period of redemption has not expired.—Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co., 48 Mich. 148.

¶ 722. Notwithstanding that an insurance policy may expressly become void on the beginning of proceedings to foreclose a mortgage on the premises, if, to the knowledge of the insurer's agent when issuing the policy, the mortgage was long over due, and this agent neglected to make the policy payable to the mortgagee, and the insured, being ignorant of English, relied upon the agent, the beginning of foreclosure proceedings will not avoid the policy.—Butz v. Ohio Farmers' Ins. Co., 76 Mich. 268.

¶ 723. Where a policy contained the general condition that if any proceedings for the sale of the insured property be "had, commenced or taken," the policy shall be void, the words quoted, on being applied to the foreclosure of a mortgage by advertisement, were held satisfied by confining them to the actual offer of the premises for sale at the time specified in the notice. Where insurance is taken on such a condition on property covered by an overdue mortgage of which the insurer has notice, the mere commencement of adverse foreclosure proceedings will not be held to annul the policy if such an intent is not most clearly expressed in the language of the condition. Whether such a condition as applied to steps to be taken by the insured himself would not include a mere advertisement or offer to make a sale in the future, or a mere effort to find a purchaser, or would be limited, especially in a contract drawn by the insurer, strictly to the entering upon the final consummation of the sale, quære.—Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

¶ 724. Under a policy providing that if any proceedings are "had, commenced or taken" for the sale of the property without the consent of the company, the policy shall be void, the failure of the insured to notify the company of adverse proceedings against him would not alone operate to defeat the policy until after the lapse of a reasonable time for that purpose; what would be such reasonable time is left to the jury.—Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

§ 172. Avoidance against mortgagee or person in secondary interest.

¶ 725. Where an insurance policy is issued to the owner of the property, the contract being with him alone and he alone being liable for the premiums, there is no contract with a mortgagee of the property, though it had indorsed thereon "Loss if any payable to E * * *, mortgagee, as his interest may appear," and where the policy is avoided by breach of a condition therein by the owner, it is also void as to the mortgagee.—Jaskulski v. Citizens' Mut. Fire-Ins. Co., 131 Mich. 603.

¶ 726. If a policy sued on by insured owner was in fact based upon a written application, the fact that the mortgagee supposed that it was issued upon his oral application only, and that he was thereby misled to his prejudice, would not deprive the insurer of the right to avail itself, by way of defense, of a misrepresentation in the written application, in an action for the mortgagee's benefit brought in the name of the insured; and if the mortgagee had any remedy it would be in equity or by action on the case.—Cronin v. Fire Assoc., 112 Mich. 106.

§ 173. Breach of marine policies or conditions.

See also ante ¶ 437.
Shipping law in general, see Shipping.
Extent of loss under marine policy and abandonment to insurer, see post §§ 223-227.
Custom against law of navigation, see Customs ¶ 27.

¶ 727. A provision in the application of a marine insurance policy covering a gasoline launch, to the effect that the insured would keep said boat five hundred feet from "exposing buildings," refers not to all buildings, but only to such as would tend to increase the risk of fire by their proximity.—Macatawa Transp. Co. v. Fireman's Fund Ins. Co., 168 Mich. 365. (Ostrander and McAlvay, JJ., dissenting.)

¶ 728. In the survey of a fire policy the insured was asked to describe fully the building in which the boat would be contained while laid up, and the answer was, "In water at Macatawa Bay." The policy contained the warranty that the boat "shall be safely stored at outside," and contained privilege "to lay up either afloat or ashore." Held, the insured was privileged to store said boat in a boathouse fifteen feet from the shore and in comparatively deep water.—Macatawa Transp. Co. v. Fireman's Fund Ins. Co., 168 Mich. 365.

¶ 729. The exception of losses occasioned by unseaworthiness is in effect a warranty that a loss should not be occasioned, and it is immaterial whether the fact of unseaworthiness was known or unknown.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 730. If there were any defects in the compass rendering it unsafe or unsuitable for use, and the stranding of the vessel was caused by or consequent upon such defects, the vessel was not seaworthy and thereby the policy was avoided.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 731. If the peril to an insured vessel in stranding was occasioned by negligence or

unseaworthiness, notwithstanding it was the fog that prevented the land from being seen, the negligence or unseaworthiness was the efficient and proximate cause and avoid the policy.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

C. ESTOPPEL OR WAIVER OF RIGHT TO AVOID OR CANCEL.

§ 174. In general.

See also ante ¶ 430, and post ¶ 807.

Sufficiency of notice to ground estoppel, see post §§ 175-177.

Waiver by misleading advertisement or proposal to insurer, see post § 178.

Waiver by delay in claiming forfeiture, see post § 179.

Recognition of policy after knowledge of breach of condition, see post §§ 180-184.

Denial of liability on specific grounds as waiver of other grounds, see post § 185.

Waiver of one condition or warranty as waiver of others, see post § 186.

Waiver of charter or by-laws of mutual association, see post § 187.

Waiver of nonpayment of premium or assessment, see post §§ 188, 189.

Waiver as to title, ownership or condition of property, see post § 190.

Waiver as to additional insurance, see post §§ 191, 192.

Misstatements or omissions in application prepared by agent of insurer, see post §§ 193-195.

Waiver of warranty or condition by agent, see post §§ 196-201.

Waiver or estoppel by knowledge of agent or officer, see post §§ 202-206.

Estoppel to assert or deny agent's authority, see ante § 30.

Estoppel arising from proof of loss, see post § 239.

Waiver or estoppel to deny reinstatement, see post § 209.

Waiver of time limitation to bring action or estoppel to assert, see post § 276.

Waiver of notice or proof of loss, see post §§ 241-244.

Waiver of defects in proof of loss, see post § 238.

Estoppel of insured to avoid liability, see ante § 88.

General principles of construction and interpretation of provisions of policy for forfeiture or avoidance, see ante § 67.

Burden of proof and presumptions as to waiver of forfeiture, see post § 303.

Admissibility of evidence as to waiver of conditions, see post § 313.

Sufficiency of evidence of waiver of forfeiture, see post § 324.

Waiver of warranties or forfeitures as question of law and fact, see post § 339.

General principles of estoppel, see Estoppel.

General law of waiver, see Election and Waiver.

Waiver of condition on which risk is to take effect, see also Contracts ¶ 989.

Condition in standard fire insurance form prescribing and limiting mode of waiver of provisions of policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 732. The conduct of an insurer, knowing the facts, may be such as to estop him from insisting on the conditions of a policy or indicate a waiver of them, when it is inconsistent with any intent to rely on them.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 733. Mere knowledge on insurer's part of violation of policy does not operate as an estoppel so as to revive the contract.—New York Central Ins. Co. v. Watson, 23 Mich. 486.

¶ 734. A mutual fire insurance company may waive a forfeiture of its policy if its assumed action is taken by those authorized to act for it, and with full knowledge of the facts.—Towle v. Ionia, Eaton & Barry Farmers' Mut. F. Ins. Co., 91 Mich. 219.

¶ 735. The conditions of an insurance policy may be waived by the company, not only by express agreement, but by conduct which amounts to an estoppel.—Miotke v. Milwaukee Mech. Ins. Co., 113 Mich. 166.

¶ 736. An insurance company, in issuing a second policy upon a life, is not bound to take notice of the answers made to the same questions in the application for the first policy, and is not precluded thereby from showing the untruth of the answers in the first application.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 737. While a knowledge of facts brought home to an insurance company at the time its policy is extended by renewal may operate as a waiver of some of the provisions of the policy, it cannot operate to incorporate new provisions into the contract.—Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

§ 175. Sufficiency of notice to ground estoppel.

Notice to agent as notice to insurer, see post § 176.

Facts stated in previous application as notice to insurer, see post § 177.

Necessity and sufficiency of notice of cancellation, see ante § 129.

Sufficiency of knowledge to ground estoppel, see also ante ¶ 733.

¶ 738. The mailing of a notice to a fire insurance company, of the taking out of additional insurance is not notice to the company unless the notice is received.—Shelden v. Michigan Millers' Mut. Fire Ins. Co., 124 Mich. 303.

§ 176. ——Notice to agent as notice to insurer.

See also post ¶¶ 810, 811, 818.

Waiver or estoppel by knowledge of agent or officer, see also post §§ 202-206.

Effect in general of notice to or knowledge of agent of insurer, see ante § 29.
Misstatements or omissions in application prepared by agent of insurer, see post §§ 193-195.
Waiver or estoppel by knowledge of agent or officer, see post §§ 202-206.
Notice to principal to or through agent, see Agency, II, D.

¶ 739. The rule which holds that notice to the agent is notice to the principal in insurance cases, applies in Michigan to cases arising under fire insurance policies where the agent has authority to countersign and issue the policy, or where the insured is ignorant of or misled as to misrepresentations contained in his application.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 740. A statement by insured to an agent of the insurer, made some two or three years before the issuance of the policy, as to unpaid taxes which he expected to pay on the property to be insured, is no notice to the insurer of the state of the title with reference to taxes on the subsequent issuance of the policy.—Kennedy v. London & L. Fire Ins. Co., 157 Mich. 411.

¶ 741. Notice to the agent or collector, who is also a director of a mutual fire insurance company raising its funds by assessments, is not notice to the company.—Kamm & Schellinger Brewing Co. v. St. Joseph Co. Village Fire Ins. Co., 168 Mich. 606.

¶ 742. Whether notice by letter to an agent of an insurance company that additional insurance had been obtained, and the fact of subsequent conversations between the insured and the agent in which it was mentioned without the agent's objecting to it, would estop the company from defending on the basis of the clause in their policy against additional insurance, quære.—Sun Ins. Co. v. Earle, 29 Mich. 406.

¶ 743. Where an insurance policy provided that it should be void if the ground on which the insured building was located was not owned by the insured, and the agents of the company had been notified that the insured had a mere interest under an executory contract for the purchase of the fee, the company must be held to have waived a provision of the policy requiring indorsement thereon of such fact.—Bryant v. Granite State Fire Ins. Co., 174 Mich. 102.

¶ 744. Where, in an application for accident insurance, the insured makes false statements relating to the refusal of insurance to him by other companies and to the receipt by him of indemnity for accident, and is immediately advised of the erroneous statements by his perusal of the application before signature, he is not entitled to recover despite such false statements and warranties on the ground that notice to the agent is notice to the principal, where the authority of the state agent is limited to taking the application and forwarding it to the home office of the company.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 745. The liability of a fire insurance company does not cease because an insured stock of goods is removed to a new location without consent being indorsed on the policy as provided by its terms, where the insured notified the agent from whom he procured the insurance, the agent acquiesced and notified the agent of the insurance company, this being exchange insurance placed through that agent, and no steps were taken by the company either to give its written consent or to cancel the policy.—Pollock v. German Fire Ins. Co., 127 Mich. 460.

§ 177. ——Facts stated in previous application as notice to insurer.

See also ante ¶ 736.

¶ 746. The fact that a true state of affairs appeared in the records of an insurance company in a previous application for insurance which had been postponed is not notice to the company so as to prevent the defense of breach of warranty as to good health.—Rhode v. Metropolitan Life Ins. Co., 129 Mich. 112.

§ 178. Waiver by misleading advertisement or proposal to insure.

¶ 747. Defendant accident insurance company's advertisement of its post card policies posted in a depot contained no limitations as to age of the insured. The post card itself in fine print limited the age to sixty-five. Defendant, sixty-six years old, who might have seen the advertisement, purchased a policy of the railroad agent and was not informed by the latter and did not know about the age limit. Held, the condition limiting the age at which the policies would be valid was waived and the beneficiary might recover.—Hause v. Standard Acc. Ins. Co., 172 Mich. 59.

§ 179. Waiver by delay in claiming forfeiture.

See also post ¶ 807.
Delay in claiming forfeiture for nonpayment of premium or assessment, see also post ¶ 793.

¶ 748. In an action for loss under a fire insurance policy, the defendant does not waive its defense that the policy was voided by the taking out of other insurance, by its failure to deny liability on that ground at once upon receiving a letter from plaintiff stating that the representative of another company had already been to see him, and by making inquiry as to the other insurance in its reply.—Shelden v. Michigan Millers' Mut. Fire-Ins. Co., 124 Mich. 303.

¶ 749. Where a mortgagee undertook to get insurance for his own benefit and paid for it,

but the local agent had the owner sign the application and the policy issued in the name of the owner, with loss payable to the mortgagee, and where the company until after suit was brought always treated the mortgagee as the party interested in the insurance, and where after it knew the nature of plaintiff's claim and of a conveyance by the mortgagor to his wife, it did not treat the policy as forfeited but called for further proofs, it waived the special defenses that there was no privity between plaintiff and the company and that the conveyance to the mortgagor's wife, without notice to the company, voided the policy.—Granger v. Manchester Fire Assur. Co., 119 Mich. 177.

¶ 750. In a correspondence over an adjustment of insurance losses, the fact that the company fails in its first letter to stand on a forfeiture does not amount to a waiver of the conditions of the policy, where the first letter does nothing to induce the holder of the policy to do or fail to do anything to his detriment.—Dull v. Royal Ins. Co., 159 Mich. 671.

¶ 751. Waiver of forfeiture for nonoccupancy and cessation of operations of a mill is properly found, where defendant's president was speedily notified of the loss, where one of its members said, in reference to the condition, that the company did not intend to stand on technicalities, and where no intention of resisting payment was shown until six months after the loss.—City Planing & Shingle Mill Co. v. Merchants' M. & C. Mut. Fire Ins. Co., 72 Mich. 654.

¶ 752. Defenses based upon breaches of warranty and consequent forfeiture are waived if the insurer, with full knowledge of the facts, remains silent as to such matters until the trial, and puts the assured to the cost and trouble of perfecting proofs of loss. —Marthinson v. North British & M. Ins. Co., 64 Mich. 372.

§ 180. Recognition of policy after knowledge of breach of condition.

Imposition of expense on insured or beneficiary, see post § 181.
Participation in adjustment of loss, see post § 182.
Offer of compromise, settlement or arbitration, see post § 183.
Agreement or order to pay loss, see post § 184.

¶ 753. An insurance company is estopped from claiming that the right of a policyholder is already suspended if it recognizes its continued existence by notifying him that "it is now liable to immediate suspension unless he gives prompt attention to the notice." —Olmstead v. Farmers' Mut. Fire Ins. Co., 50 Mich. 200.

¶ 754. A condition in a mutual fire insurance policy, requiring the clearing of logs and all brush 100 feet all around a house in question and to notify the company of the doing thereof, was waived by the making of an assessment and subsequently taking a new application on a barn and accepting premium and fees thereon, after the agent of the company had been on the ground and seen the condition of the premises when the barn was built, thereby indicating the company's satisfaction with what had been done and leading the nonresident plaintiff to so understand.—Duby v. Farmers' Mut. Fire Ins. Co., 133 Mich. 661.

¶ 755. The assumption of the burden of a defense by an indemnity insurance company in an action against insured for damages for personal injuries does not constitute a waiver of want of immediate notice as required by the policy where the insurer thought that insured had just learned of the accident and did not know that insured obtained such information three months before giving notice of the accident.—Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74.

¶ 756. The provision in a policy that "if at any time during the continuance of this policy * * * the insured property * * * shall become vacant or unoccupied" the insurer shall be absolved from all liability does not apply to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact; the issue or renewal of the policy with such knowledge waives the provision.—Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

¶ 757. Insurer's knowledge that household goods insured as being in a dwelling-house were in fact stored in a barn does not waive the condition of the policy requiring the goods to be kept in a dwelling-house.—English v. Franklin Fire Ins. Co., 55 Mich. 273.

¶ 758. Where premises are vacant at the time of solicitation of fire insurance to the knowledge of the company and are vacant for several months before the loss the company is precluded from availing itself of a provision in the policy rendering it invalid where a loss occurs after the premises have been vacant for more than 10 days, and it is immaterial that the premises were occupied within 10 days from the date of the policy, as the controlling consideration is whether there is a change in condition of the premises from the condition known when the risk was accepted.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 226.

¶ 759. The general statement appended to blank proofs of loss reserving a right to insist upon a breach of condition cannot be held to reserve a defense known to the insurer at the time the blanks were furnished. —Burnham v. Interstate Casualty Co., 117 Mich. 142.

¶ 760. The fact that a mutual company defends against a claim for loss on the ground

of a violation by the insured of certain by-laws, the penalty for which does not forfeit the policy, but only the right to recover for a loss thereunder, is not inconsistent with the action of the board of directors in treating the policy as in force by assessing it after such loss.—Towle v. Ionia, Eaton & Barry Farmers' Mut. Fire Ins. Co., 91 Mich. 219.

¶ 761. Where a mutual fire insurance company knowing of prior insurance does not, until after suit, disclaim liability, but orders an assessment for, and promises to pay, the loss, it waives any breach of warranty by reason of such other insurance.—Eddy v. Merchants' M. & C. Mut. Fire Ins. Co., 72 Mich. 651.

¶ 762. In a suit upon an insurance policy containing a provision against other insurance it appeared that, in the first conversation had by the agent of defendant with plaintiff's agent, the defense growing out of a violation of said provision was clearly foreshadowed, and that afterwards, in a letter acknowledging the receipt from plaintiff's agent of formal notice of the loss, the general agent of defendant declined to adjust the loss and forecast "such action as the facts demand," if claim should be made. Held, that plaintiff's contention that defendant waived said condition by inviting proofs of loss in said letter is untenable, it appearing that all that was promised was that, if plaintiff saw fit to furnish such proofs, defendant would take such action as the facts demanded, but that plaintiff was appraised in the same letter that the loss could not be adjusted for the reason that other insurance, provided against in the policy, existed.—Donogh v. Farmers' Fire Ins. Co., 104 Mich. 503.

§ 181. ——Imposition of expense on insured or beneficiary.

See also ante ¶ 752.

¶ 763. Where an insurance policy had been forfeited by revoking a submission to arbitration, such forfeiture was waived by the company's subjecting the assured, two months after the revocation, to the additional expense of an examination under oath.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 764. Forfeiture because of additional insurance taken contrary to conditions of policy is waived where the insurer, with full knowledge of the facts, and without notifying the insured as if they intended to pay the loss forfeiture, leads him to spend time and money in informing it as to the extent and amount of the loss.—Cleaver v. Traders' Ins. Co., 71 Mich. 414.

¶ 765. Where after full knowledge of grounds of forfeiture of a mutual policy the officers of the company continue to deal with insured as if they intended to pay the loss and permit him to go to the expense of the employment of an attorney to attend meetings of the board of directors of the company, they cannot set up such ground of forfeiture in an action on the policy.—Reimold v. Farmers' Mut. Fire Ins. Co., 162 Mich. 69.

¶ 766. An insurance company which, in compliance with a request for blank forms for proofs of death, furnishes such blanks, but fails to disclose a defense that would render such proofs unavailable, and thus puts the beneficiary to expense and trouble, it waives such defense.—Burnham v. Interstate Casualty Co., 117 Mich. 142.

¶ 767. The fact that the information upon which defense is based—e. g., that deceased did not notify defendant of other insurance—was not derived from the beneficiaries does not affect the waiver of such defense by furnishing the insured claim blanks and putting him to expense without disclosing a defense.—Burnham v. Interstate Casualty Co., 117 Mich. 142.

¶ 768. "Other insurance," as a cause of forfeiture, is waived if the insurer, having knowledge thereof, does any act recognizing the existence and validity of its contract, or puts the assured to inconvenience, cost or expense under circumstances that recognize its continued liability.—Carpenter v. Continental Ins. Co., 61 Mich. 635.

¶ 769. Forfeiture of a policy for additional insurance is waived where the adjusting agent, with knowledge of such insurance, puts the insured to the expense of making up proofs of loss and requires him from time to time to correct them, without giving him to understand that the company will rely upon the forfeiture.—Pennsylvania Fire Ins. Co. of Philadelphia v. Kittle, 39 Mich. 51.

¶ 770. A fire insurance company may investigate the circumstances attending a loss by an adjuster, or other agent, even if the insured is thereby put to some expense or is delayed, and may have an appraisal of values made, without waiving its rights under the policy.—Wilms v. New Hampshire Fire Ins. Co., 194 Mich. 656.

¶ 771. A defense of a refusal of the insured to submit to an examination under oath as provided by the policy is waived when negotiations for a settlement are renewed causing the insured to expend time and money to effect the settlement.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

§ 182. ——Participating in adjustment of loss.

Adjustment of loss in general, see post XVI.

Acknowledging receipt of notice of loss or furnishing forms for proofs of loss as no waiver of insurer's rights, see Pub. Acts 1917, No. 256, part III, chap. II, § 18.

¶ 772. Where an independent insurance adjuster sends on proofs of loss to the com-

pany, and thereafter learning of the existence of a chattel mortgage making void the policy inquires of the insured concerning said mortgage, and advises company to await an investigation before making payment, the insured, even assuming said adjuster to be defendant's agent, cannot recover upon the theory that the adjuster and himself reached a settlement of the policy.—Moloney v. Germania Fire Ins. Co., 168 Mich. 269.

¶ 773. The insured at the time of taking out a policy of fire insurance had a chattel mortgage on the premises, which fact rendered the policy void under the terms of said policy. Defendant had no knowledge of the existence of said mortgage until after the fire occurred. An independent adjuster sent on the proofs of loss to the company, the evidence being disputed as to whether he had, at the time of sending same, knowledge of the existence of the mortgage. Held, even assuming said adjuster to be the agent of defendant, his course did not result in reviving the policy, which was void from the date of placing same.—Moloney v. Germania Fire Ins. Co., 168 Mich. 269.

§ 183. ——Offer of compromise, settlement or arbitration.

Adjustment of loss in general, see post XVI.

¶ 774. Where circumstances constituting vacancy of insured premises, contrary to the policy, were, after a fire, stated to the insurer's adjuster, who replied with an offer of compromise which plaintiff declined to accept, held no waiver of the defense of vacancy.—Richards v. Continental Ins. Co., 83 Mich. 508.

¶ 775. A waiver of a provision, that action must be brought within three months after the cause of action shall accrue on a sick benefit policy, is not shown by evidence that insured sent in a proof of disability whereon the claim was rejected on the ground that there was no liability under date of January 7th, and that on July 15th an offer of a stated sum was made "for the sole purpose of avoiding litigation and attendant expenses thereof" followed three days later by another letter emphasizing that the offer was made solely for the purpose stated; and where the insurer never receded from its original position that there was no liability.—Cooper v. Phoenix Accident & Sick Ben. Ass'n, 141 Mich. 478.

¶ 776. Where an insurance policy provided that, in case differences should arise concerning the amount of any loss, arbitrators should be appointed at the request of either party, and their award shall be binding as to the amount of loss, but they should not decide the company's liability under the policy,—one-half of the appraiser's fee to be paid by the assured,—and the insurer requested such arbitration, this was not a waiver of a forfeiture on the ground of overvaluation.—Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52.

(5 Mich. Dig. 15)

¶ 777. Where defendant insurer tenders the amount upon which it would have been liable had insured died of ordinary sickness in the classification in which he was insured, and contends that insured's death was not the result of accident, it cannot afterwards claim that death resulted from sickness while insured was employed in a different classification.—Thompson v. Loyal Protective Ass'n, 167 Mich. 31.

§ 184. ——Agreement or order to pay loss.

¶ 778. Where the by-laws of an insurance company provide that there shall be no waiver of the terms of the policy without the concurrence of the secretary of the company, indorsed or specifically acknowledged, it was held that if the secretary signed orders for payment, on the adjustment of the loss, it should be regarded as a very conclusive waiver in writing if he knew all the facts.—Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289.

¶ 779. If the directors of a mutual insurance company, knowing that the insured included in his proof of loss property belonging to other members of his family, gave orders for the payment of the policy, they thereby waived any condition for forfeiture on which they might have insisted to avoid the policy, in so far as the condition concerned the matters within their knowledge.—Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289.

§ 185. Denial of liability on specific grounds as waiver of other grounds.

Waiver of one condition or warranty as waiver of others, see post § 186.

Denial of liability on other grounds as waiver of filing proof of loss, see post § 243.

¶ 780. Where an insurance company, with knowledge of all of the circumstances attending a loss, undertakes to notify the insured of its specific reasons for denying liability (keeping gasoline), it cannot, when sued upon the policy, set up any additional grounds of defense (repairing without consent).—Smith v. German Ins. Co., 107 Mich. 270.

¶ 781. An insurance company, by placing its refusal to pay a loss solely upon the ground that the policy had been canceled, waives its right to assert as a defense to an action thereon that the insured had not submitted his claim to arbitration, that he was not the owner of the property insured, or that he had failed to disclose incumbrances.—Douville v. Farmers' Mut. Fire Ins. Co., 113 Mich. 158.

¶ 782. A general reference to other possible defenses does not prevent the waiver thereof which follows from the insurer's action in pointing out defects in proofs of loss.—Marthinson v. North British & Mercantile Ins. Co., 64 Mich. 372.

¶ 783. Setting up of grounds of defense by a life insurance company, consistent with its primary liability upon the policy in question, did not constitute a waiver of others which were stated, for breach of warranties.—Moore v. Mutual Reserve Fund Life Ass'n, 133 Mich. 526.

¶ 784. A fire insurance company, on being sued for a loss, cannot defend on the ground that the risk was increased by a neighboring dry-house which was not described in the application for insurance, where, in fact, the proof of loss showed its position, and the notice of refusal to pay treated it as included in the policy, but not properly heated, and did not rely upon undue concealment of its proximity.—Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15.

¶ 785. Where a fire insurance company, in acknowledging receipt of an affidavit setting forth that the fire in question was caused by the breaking of a lighted lamp as the insured was drawing oil from a tank in the nighttime, denied liability by reason of the use of coal oil instead of referring to kerosene oil, such error did not waive a defense on the ground of breach of a condition by drawing kerosene oil in a manner prohibited by the policy.—Vandervolgen v. Manchester Fire Assur. Co., 123 Mich. 291.

¶ 786. Where an insurance company, with full knowledge of the facts afterwards relied upon in support of its claims of forfeiture for the alleged false swearing of the insured in making out proofs of loss, and for the violation of one of its by-laws, bases its refusal to pay the loss solely upon the failure of the insured to state in his application for insurance the true condition of the title to the property, after which he is subjected to loss of time in trying to adjust the loss, and incurs the expense of bringing suit for its recovery, the company is estopped from asserting such claims of forfeiture as a defense in said suit.—Towle v. Ionia, Eaton & Barry Farmers' Mut. Fire Ins. Co., 91 Mich. 219.

¶ 787. An accident insurance company which, before the expiration of the time allowed for furnishing the company with proof of the duration of disability, refuses absolutely to pay any amount, on the ground that immediate notice of the injury was not given, cannot deny the right of the insured to recover for the full time of disability on the ground that less time was claimed in the proof of disability furnished.—Hohn v. Inter-State Casualty Co., 115 Mich. 79.

¶ 788. In garnishment against a life insurance company as the creditor of a beneficiary in one of its policies, where the disclosure in its first answer unqualifiedly denied indebtedness to the beneficiary, and in a subsequent answer, filed before the trial pursuant to a showing under oath that it was unable to make a full showing at the time of filing the first answer by reason of matter then being under investigation, fully set up the breaches relied upon to defeat the policy; such acts did not constitute a waiver of the defenses by a failure to seasonably rely upon them.—Moore v. Mutual Reserve Fund Life Ass'n, 133 Mich. 526.

§ 186. Waiver of one condition or warranty as waiver of others.

Denial of liability on specific grounds as waiver of other grounds, see ante § 185.

¶ 789. The waiving of certain warranties in an application for life insurance, known to have been false, did not operate as a waiver of others shown to have been false, which were never brought to the knowledge of the company and were never directly or by inference waived.—Moore v. Mutual Reserve Fund Life Ass'n, 133 Mich. 526.

§ 187. Waiver of charter or by-laws of mutual association.

¶ 790. The officers of a mutual fire insurance company cannot waive any of the provisions of the charter or by-laws.—Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties, 192 Mich. 230.

¶ 791. A farmers' mutual fire insurance company is not estopped to deny liability for loss by fire to property not insurable by the company under its charter, by the fact a policy was issued by the president of the company insuring such property, even though there is evidence tending to show that the president knew at the time the character of the property sought to be insured.—Geraghty v. Washtenaw Mut. Fire-Ins. Co., 145 Mich. 635.

¶ 792. Where the application for insurance in a mutual fire insurance company, limited by How. St., § 4247, to insure building that constitutes detached risks "in villages and cities," located the building in the "town of Sumpter," and the word "village" was substituted in the policy at the home office, the company was estopped in an action upon such policy, from denying that the place described was a village because neither platted nor incorporated as such.—Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407.

§ 188. Waiver of nonpayment of premium or assessment.

Waiver of notice of assessment, see ante § 82.

By acceptance and retention after default, see post § 189.

Forfeiture for default in payment of premium or assessment, see ante §§ 150-155.

¶ 793. The fact that a fire insurance company made no further demand or other move for more than a year after the insured was in default in his assessment does not constitute a waiver of a provision that the in-

sured shall have no claim for losses while in default.—Hill v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 129 Mich. 141.

¶ 794. The right to forfeit a policy of accident insurance is waived by the insurer where the assured, who gave orders on his employer for the payment of the premiums, left his employment before the payment of the first premium, but having earned and left with his employer more than enough to pay such premium, and died before notice of forfeiture was given.—Johnson v. Fidelity & Casualty Co. of New York, 184 Mich. 406.

¶ 795. Waiver of forfeiture for nonpayment of assessment within the time limited in a life insurance certificate, by the filing of a health certificate approved by the company's physician, is not avoided by inducing the physician subsequently to indorse on the health certificate that he could not recommend insured as a good risk.—Jones v. Preferred Bankers' Life Assur. Co., 120 Mich. 211.

§ 189. ——By acceptance and retention after default.

¶ 796. Collecting and retaining assessments on an insurance policy does not constitute waiver of breach of a condition in the policy against additional insurance, where the company had no knowledge of the additional insurance until after the fire, and when it learned thereof it disclaimed liability, and no demand was made for the return of the premiums and the company never refused to return them.—A. M. Todd Co. v. Farmers' Mut. Fire Ins. Co. of Allegan & Ottawa Co., 137 Mich. 188.

¶ 797. Where the insurer with full knowledge of the facts retains assessments paid after the claimed forfeitures occurred until after suit is brought on the policy, the grounds of forfeiture are waived.—Reimold v. Farmers' Mut. Fire Ins. Co., 162 Mich. 69.

¶ 798. Defendant benefit fire insurance company organized under Act No. 262, Sess. Laws 1895, provided in its membership articles that insurance against fire would be accorded to members in good standing. After plaintiff received his policy and some two or three years before the fire he took a demit or withdrawal card from his local grange and did not present same to any other grange or pay his grange dues. He did, however, pay his insurance assessments up to and after the fire, to defendant, and the jury found that when defendant was accepting said assessments, its secretary had knowledge of the plaintiff's status and did not cancel his policy. Defendant retained all of said assessments, except one received after the fire, which it tendered back. Held, the verdict and judgment for plaintiff should stand.—Laxton v. Patrons' Mut. Fire Ins. Co. of Michigan, Ltd., 168 Mich. 448.

¶ 799. A fire insurance company is not estopped to defend an action upon a policy, on the ground that plaintiff wilfully burned the property insured, by the fact that one of its officers made a criminal complaint against plaintiff for such burning, and that plaintiff was discharged upon the examination, or by the fact that, with knowledge of all the circumstances, it demanded and collected an assessment from him for the loss of his property.—Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247.

¶ 800. Where a mutual insurance company imposes forfeiture in case a loss occurs while its assessments are still unpaid, but its local agent receives past-due assessments with knowledge of a loss, and forwards them to the company without notifying them of it, and they receive them, and two or three weeks afterward order the loss to be paid when adjusted, they cannot afterward refuse payment on the ground of the delay in paying the assessments, since they have waived that by receiving them when overdue and ordering payment.—Farmers' Mut. Fire Ins. Co. v. Bowen, 40 Mich. 147.

¶ 801. Agent's knowledge of situation of insured lumber, held, in connection with acceptance of premium and omission to cancel insurance, to be a waiver of warranty in policy of certain clear space between lumber and "any woodworking or manufacturing establishment."—Michigan Shingle Co. v. Pennsylvania Fire Ins. Co., 98 Mich. 609.

¶ 802. By taking the premium and issuing the policy, the insurer must be regarded as having waived the condition which prohibited gunpowder being kept.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 803. The payment of a past due assessment to a fire insurance company after loss by fire and the receipt by the treasurer does not constitute a waiver of a provision that the insured shall have no claim for losses while in default where the payment was promptly returned by the treasurer.—Hill v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 129 Mich. 141.

¶ 804. By retaining the order on his employer, given by the insured for the payment of instalments of premium on his policy of insurance, and neglecting to give notice of nonpayment, the insurance company, it seems, waived the forfeiture of the policy, which would result from nonpayment.—Lyon v. Travelers' Ins. Co. of Hartford, Conn., 55 Mich. 141.

¶ 805. The provision of a policy of life insurance, that no obligation is assumed unless at the date thereof the assured is in sound health, is waived by the collection of premiums thereon after an inspector of the company, authorized to "lift" the policies of people who were not in sound health when

their policies issued, and pay them back their money, learned of the sickness of the assured at the time the policy was issued, notwithstanding a further provision that "its terms cannot be changed except by a written agreement signed by the president or secretary of the company."—Hilt v. Metropolitan Life Ins. Co., 110 Mich. 517.

§ 190. Waiver as to title, ownership or condition of property.

Forfeiture for breach of condition as to sole or unconditional ownership, see ante § 162.

¶ 806. A fire insurance company will be held to have insured the interest of a tenant by the entirety in property, where it issues a policy of insurance to such tenant on an application containing a question as to the tenant's title which is answered by the word, "deed," as the answer given does not convey any information upon the question of the estate conveyed, but is a representation of the applicant's possession of a deed to the entire parcel of land, and when the agent as well as the insurance company knew of such fact, the policy will not be held void because of a misrepresentation of the plaintiff's title. Whenever the writings constituting such a contract show an express waiver, or facts putting the company upon inquiry in relation to the title, it is not unreasonable to say that there is a waiver.—Clawson v. Citizens' Mut. Fire Ins. Co., 121 Mich. 591.

§ 191. Waiver as to additional insurance.

Other insurance with insurer, see post § 192.
Forfeiture for breach of condition as to other insurance, see ante § 163.

¶ 807. Where an insured wrote the insurance company that he had taken out additional insurance and that he did not remember the terms of the policy which was in a bank, and stated that "if there is anything that conflicts with your policy, please advise me," and the company received the letter but did not reply, it is estopped to set up that the taking of additional insurance avoided the policy.—Rauch v. Michigan Millers' Mut. Fire Ins. Co., 131 Mich. 281.

¶ 808. Other insurance being, in fact, obtained, if the first insurer, on being afterward informed of it, raises no objection further than to ask why it was not obtained from him, and otherwise treats it as a matter of course, he estops himself from repudiating his liability for loss that occurs after his conduct has induced the assured to rest satisfied with his policies.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

§ 192. ——Other insurance with insurer.

¶ 809. An accident insurance company cannot question the validity of either of two policies issued by it, because of a printed statement in the last application to the effect that the insured had no other insurance in the company, where it knew at the time of the issue of the second policy that such statement was untrue.—Emlaw v. Travelers' Ins. Co., 108 Mich. 554.

§ 193. Misstatements or omissions in application prepared by agent of insurer.

See also ante ¶ 566.
Contradiction or disregard of applicant's statements, see post § 194.
Applications signed in blank by applicant, see post § 195.
Misstatements or omissions in proof of loss prepared by agent of insurer, see post ¶ 949.
Misstatements of matters agent of insurer assumes to know, see also ante ¶ 440.
Misstatements in application prepared by agent of insurer as defense in action for premium, see ante § 94, ¶ 391.
Notice to agents as notice to insurer, see ante § 176.

¶ 810. Where an agent, having full power to issue policies, and knowing the amount of incumbrances upon property sought to be insured, misstates such amount in an application for insurance filled out by himself and signed by the assured without being read, the agent stating that the application is all right and that the assured is fully protected, the insurer is liable notwithstanding a condition against misstatements; the agent's knowledge being the insurer's.—Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514.

¶ 811. An insurance agent with authority not limited by the application, who makes out an application stating the applicant to be the owner in fee of the premises and that no other person is interested therein, though he had been informed that the property had been sold on a land contract, and that the insurance was designed to protect both vendor and vendee, binds the company in that respect, since the agent's information was that of the company, and the latter cannot avoid the policy, or limit recovery thereunder to the applicant's insurable interest.—Crouse v. Hartford Fire Ins. Co., 79 Mich. 249.

¶ 812. The owner of a factory situated on leased ground orally applied for additional insurance to an agent who knew the facts, and at whose instance defendant's local agent (who did not know them) wrote part of such insurance in a policy providing that it should be void—unless otherwise stated or indorsed—if the insured property were on ground not owned by insured. Held, that the policy was valid.—Ahlberg v. German Ins. Co., 94 Mich. 259.

¶ 813. False answers written in an application for life insurance by the insurer's agent in reliance upon his own knowledge will not avoid the policy, where the application was signed by the insured after answering other questions, and without knowing that the former answers were contained

therein.—Van Houten v. Metropolitan Life Ins. Co., 110 Mich. 682, 111 Mich. 160.

¶ 814. Where an application for life insurance is filled out by the agent without knowledge of its contents by the applicant, who supposes that the agent has acted honestly, a recovery may be had on the policy though certain representations are materially false.—Temmink v. Metropolitan Life Ins. Co., 72 Mich. 388.

¶ 815. Where an insurance agent knowing of a mortgage on the premises makes out an application without asking the applicant about incumbrances, and states therein that there is no incumbrance, he acts as the company's agent, and the insurance is not avoided for misrepresentation.—Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407.

¶ 816. Where one who applied for insurance under a policy that required a statement of the whole amount of incumbrance on the property did in good faith apprise the insurer's agent of all the facts regarding a mortgage upon which considerable interest had accrued, and the agent prepared the application with a statement of the incumbrance at its original amount in round numbers, held, that the applicant had a right to assume that the agent had set forth the amount of the mortgage with such accuracy as his principal deemed important. Also, that a company which issued its policy on such an application with full notice of the facts, and received the applicant's money under circumstances leading him to suppose he was receiving in consideration thereof a valid contract of indemnity, was estopped from afterward repudiating the contract for such an understatement of the incumbrance.—Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

¶ 817. Where an insurance company employs, as a solicitor of insurance, a foreigner who is not possessed of a sufficient knowledge of the English language to enable him to fill the blanks in his daily report, and the solicitor, having secured the application of a foreigner of a different nationality, with whose language he is likewise unfamiliar, leaves blank the space designed to show the holding of the applicant, being advised by his superior that, if the blanks are not filled, he will "fix it over," and the company accepts the consideration and issues the policy, it will be estopped to assert, after a loss, that it took it for granted that the blank indicated title in the applicant by deed, and will be held to have contracted to insure the interest which the applicant actually had, notwithstanding a provision in the policy that it should be void if the interest of the insured were other than unconditional and sole ownership.—Miotke v. Milwaukee Mech. Ins. Co., 113 Mich. 166.

§ 194. ——Contradiction or disregard of applicant's statements.

See also ante ¶ 391.

¶ 818. In making an oral application for insurance the applicant told the agent that there was a mortgage upon the property, and the agent in reporting to the company stated that there was no mortgage. Held, that the agent's knowledge was the company's, and that the policy was not void for misrepresentations.—Gristock v. Royal Ins. Co., 84 Mich. 161.

¶ 819. Where an agent, whose authority is confined to soliciting applications, the form of which provides that the company shall not be bound by any act done or statement made by or to any agent or other person not contained in the application, is correctly informed of the amount unpaid on a land contract under which the applicant holds, and by mistake or otherwise inserts a less sum in the application, which he fills out, and the applicant without carelessness on his part, and in reliance upon the acts and conduct of the agent in preparing the application, signs it without reading it or having it read to him, and without notice or knowledge of such misrepresentation, which application is not attached to the policy, the company cannot avoid liability under a provision of the policy that by its acceptance the assured covenants that the application shall form a part of the policy, and a warranty by the assured.—Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.

¶ 820. One who truthfully states to an agent all of the essential facts required by an application for insurance is not bound by an application which he signed without knowledge of its contents, where the agent had materially altered the facts therein recited.—Simmons v. National Live Stock Ins. Co., 187 Mich. 551.

¶ 821. An oral application for insurance mentioned a mortgage on the property, but the company's agent filled out and signed an application declaring the property to be unincumbered. Held, that the company was liable on the policy, although it contained provisions exempting the insurer from liability in case of misrepresentations.—Baker v. Ohio Farmers' Ins. Co., 70 Mich. 199.

¶ 822. Where in an action on an insurance policy it appears that defendant's local agents had also placed other insurance upon the property, that their clerk wrote out the application and at the time was informed by the plaintiff of such other insurance, and nevertheless failed to incorporate a statement thereof in the application, the policy is not avoided as for a representation in the application that there was no other insurance.—Steele v. German Ins. Co., 93 Mich. 81.

¶ 823. Where the secretary of a mutual accident insurance company, after being informed by a solicitor that a prospective applicant is carrying other insurance which,

with that he proposes to take out, will exceed the limit prescribed by the company, and that he has agreed with the solicitor to drop such prior insurance at its expiration, sends the solicitor to take the application, and he, in answer to a question in the application whether the applicant is carrying other insurance, writes in a negative answer, the knowledge of the secretary and the solicitor is that of the company, and it will be held to have waived the right to insist upon a forfeiture of the policy on account of the prior insurance.—Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289.

§ 195. ——Applications signed in blank by applicant.

¶ 824. Where it had been shown that an application for insurance was signed by the applicant and afterwards filled out by the agent, it was proper to show that the answers made by deceased were incorrectly filled in by the agent, or that answers were filled in that had not been made.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 825. An insurance agent told the person whose insurance he was soliciting to sign an application, and said he would fill it out at his office, he having asked her some questions; held, that such conduct of the agent would not preclude the insurer from defending on the ground of false statements in the application, unless it appeared that none of the false answers was made in answer to the questions actually asked.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

§ 196. Waiver of warranty or condition by agent.

Provisions in policy prohibiting waiver by agent, see post § 197.
Unauthorized indorsements and modifications, see post § 198.
False statements included by suggestion or advice of agent, see post § 199.
Effect of agent's mistakes or omissions, see post § 200.
Efficacy of parol waiver, see post § 201.
Authority of agents in general, see ante §§ 23-25.
Limitations on agent's authority, see ante §§ 26, 27.
Authority of agent to waive proof of loss, see post § 242.

¶ 826. Where the conduct of an insurance agent in giving a policy has misled parties into making applications or accepting conditions, under a misapprehension as to their literal accuracy, the company is estopped by his action.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

¶ 827. Where additional insurance is taken with the consent of the insurer's agent in a manner outside of his authority, forfeiture is not precluded by the fact that such agent had authority to consent in a certain way and manner to the taking of such insurance and had done so in other cases.—Cleaver v. Traders' Ins. Co., 71 Mich. 414.

¶ 828. An insurance company is bound by oral statements made to its agent, and upon which it issues a policy and receives the premium; and it cannot repudiate in such policy the authority of the agent, or responsibility for his acts.—Hoose v. Prescott Ins. Co., 84 Mich. 309.

¶ 829. Where a submission to arbitration of loss under a policy has been revoked by the assured under circumstances that constitute such revocation a forfeiture of the policy, the subsequent silence of the company's adjuster is not an acquiescence in the revocation; the company not being called upon to speak or act until affirmative action by the assured.—Morley v. Liverpool, etc., Ins. Co., 85 Mich. 210.

§ 197. ——Provision in policy prohibiting waiver by agent.

See also post ¶ 844.
Provisions in policy limiting authority in general, see ante § 27.

¶ 830. A provision in an accident insurance policy that none of the company's agents can waive any of the conditions therein is valid.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

¶ 831. The customary provision that no agent has power to waive any provision of the policy except by writing indorsed thereon, does not prevent an adjuster from waiving proofs of loss, since the company can only act by agents and has power to waive them.—Young v. Ohio Farmers' Ins. Co., 92 Mich. 68.

¶ 832. The conditions prescribed by an insurance policy as to the payment of a premium note cannot be waived by an insurance agent if the policy expressly stipulates that they shall not be.—McIntyre v. Michigan State Ins. Co., 52 Mich. 188.

¶ 833. Where an insurance policy prohibited the company's agent from waiving or modifying any of its conditions the company is not estopped by his representations from setting up a breach of the conditions against additional insurance.—Cleaver v. Traders' Ins. Co., 65 Mich. 527.

§ 198. ——Unauthorized indorsements and modifications.

Changes and substitutions in subject-matter, policy or rights, see ante X.

¶ 834. Plaintiffs applied for insurance on their mill to insurance agents, who, being unable to place the entire amount in their own companies, asked defendant's agent to write the excess, which he did. On examining the policy the agents first mentioned called the attention of defendant's agent to

the fact that the mill was subject to a mortgage in process of foreclosure, and asked that the policy be indorsed accordingly, to which he replied that it was contrary to his orders to write upon mortgaged mill property, but in answer to their question whether he could not make an explanation and get the company to carry the risk, he replied that he would submit the matter to the company; and thereupon he indorsed the policy and delivered it to the agents, who delivered it to plaintiffs. The latter had no notice of the conversation, and paid the premium to said agents. The second day after the policy's delivery the mill was burned. Notice of the loss was telegraphed to defendant, which on the same day wrote to its agent directing cancellation of the policy. The policy provided that in any matter relating to the procuring of the insurance covered by it no person, not duly authorized in writing, should be deemed defendant's agent. Held, that plaintiffs were not chargeable with notice of the want of authority on the part of defendant's agent to make the indorsement.—Miller v. Scottish Union & Nat. Ins. Co., 101 Mich. 49.

§ 199. ——False statements induced by suggestion or advice of agent.

¶ 835. An applicant for an accident policy stated to the agent taking the application that he had been before insured in the Iowa State Traveling Men's Association. The agent told him that he need not so state in answering the question in the application as to whether he had been previously insured, since the said association was really not an insurance company. Applicant followed this advice, knowing his statement to be untrue. The applicant warranted the truth of his statements in the application. By the terms of the policy the agent had no authority to waive its terms. Held, in a suit on the policy, that it was invalidated by the applicant's false statement.—Bonewell v. North American Acc. Ins. Co., 160 Mich. 137.

§ 200. ——Effect of agent's mistakes or omissions.

¶ 836. Where the agent of an insurance company had full knowledge of the existence of an overdue mortgage upon property, and issued a policy thereon, from which a clause making the loss, if any, payable to the mortgagee, was omitted by his own mistake, the insured being ignorant of the English language and relying upon such agent in the premises, the mere commencement of foreclosure proceedings upon said mortgage will not avoid the policy under a clause providing for such a result in case proceedings were taken to foreclose any lien upon the property.—Butz v. Ohio Farmers' Ins. Co., 76 Mich. 263.

¶ 837. Where at the time of issuing a policy of fire insurance, the assured informed the agent that the insured building was used for purposes other than as a dwelling, and by mistake, without the knowledge of the assured, the policy issued covered a dwelling only, the insurer is estopped from denying liability on the ground that the policy did not cover the property destroyed.—Simpson v. Ohio Farmers' Ins. Co., 184 Mich. 547.

¶ 838. Where a policy conditioned against liability in case of an incumbrance without written notice to and indorsed permission of the insurer was delivered to the assured without indorsement of permission and without calling his attention to such condition—although he had told the agent (there being no written application) that there was a mortgage on the premises,—held, that the condition was waived.—Gristock v. Royal Ins. Co., 87 Mich. 428, on rehearing affirming 84 Mich. 161.

¶ 839. A stipulation that other insurance shall render the policy void unless indorsed thereon is waived where the agent receives a fire insurance policy with the request to fix it for that purpose and returns it saying that he had so arranged it.—Kotwicki v. Thuringia Ins. Co., 134 Mich. 82.

¶ 840. Under a condition in a policy that it should be void if the property insured was vacant for more than 10 days, and that no agent should have power to waive any conditions unless the waiver was written on or attached to the policy, an insurance company cannot set up the vacancy of the property as a defense to its liability where insured applied to the local agent, and paid for, a permit to leave it vacant and the agent forwarded the policy to the company and told insured that the permit was attached, though in fact the policy was marked canceled.—Morgan v. Illinois Ins. Co., 130 Mich. 427.

¶ 841. A condition avoiding a fire policy for want of indorsed consent to chattel mortgages covering the insured property is waived—notwithstanding a further condition against waiver by agent—where the insurer's agent (being also the assured's legal adviser and knowing the condition of the property) has full power to issue policies, and has filled out the application for insurance, procured and advised the placing of such mortgages, and omitted to indorse the consent.—Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514.

§ 201. ——Efficacy of parol waiver.

¶ 842. A provision in an insurance policy against an oral waiver by agents of conditions in policy must be presumed to have been known to the insured.—Gould v. Dwelling-House Ins. Co., 90 Mich. 302.

¶ 843. Where the applicant for life insurance has agreed to be governed by the company's regulations, among which is one prohibiting agents from waiving forfeitures, and from receiving premiums on lapsed policies except in connection with an application for revival, which shall not become operative

until officially accepted by the company at its home office, the beneficiary cannot set up or rely upon an agent's saying that payment of past-due premium on a future day "would be all right."—Mallory v. Metropolitan Life Ins. Co., 97 Mich. 416.

¶ 844. A provision in a policy of insurance that the same shall be void, unless otherwise provided by agreement indorsed thereon, if the property become incumbered by a chattel mortgage, may be orally waived by the agent who issued the policy, although the policy provides that "no officer, agent, or other representative" of the insurer shall have power to waive any provision thereof except in writing.—Rediker v. Queen Ins. Co., 107 Mich. 224.

¶ 845. As the terms of a Michigan standard policy cannot be waived except by writing, and as the insurer's local agent cannot waive the provisions of the policy except as the policy provides, conversations with such an agent showing waiver of proofs of loss must be excluded.—Wadhams v. Western Assur. Co., 117 Mich. 514.

¶ 846. Where the holder of a fire insurance policy applied to the local agent of the company for a vacancy permit, and was informed by such agent that the company had instructed him not to grant the permit, a waiver of the condition avoiding the policy for vacancy cannot be shown. It makes no difference that he had oral permission from the agent that the premises remain vacant, and that he was not asked to surrender the policy, and that no tender of the unearned premium had been made.—Sutherland v. Eureka Fire & Marine Ins. Co., 110 Mich. 668.

¶ 847. The insurer was estopped from claiming forfeiture by reason of additional incumbrance under the provision of the policy "if the property, or any part thereof, shall be * * * incumbered by mortgage or otherwise," then "this policy shall be absolutely void," where an agent who had authority to make and deliver policies, and who knew of an existing incumbrance and of the intent to incumber further, agreed with the applicant that she might incumber to a given amount, and that he would indorse such agreement upon the application, even though he failed to make such indorsement.—Copeland v. Dwelling-House Ins. Co., 77 Mich. 554.

¶ 848. A condition, voiding a fire insurance policy in the event of the commencement of foreclosure proceedings with the knowledge of the insured, was waived by the action of the company's agent in telling the mortgagee to go on with the proceedings, upon being informed that they were in contemplation and being asked to fix the policy.—Cronin v. Fire Ass'n of Philadelphia, 119 Mich. 74.

§ 202. Waiver or estoppel by knowledge of agent or officer.

Agent's knowledge of other insurance, see post § 203.

Agent's knowledge of title or condition of property, see post § 204.

Knowledge of brokers and subagents, see post § 205.

Effect of applicant's want of good faith, see post § 206.

See also ante ¶¶ 733, 734.

Notice to agent as notice to insurer for purpose of grounding estoppel, see ante § 176.

¶ 849. The agent's knowledge of situation of insured lumber and that the stipulated clear space did not and could not exist, in connection with acceptance of premium and omission to cancel insurance, to be a waiver of warranty in policy that certain clear space should be maintained between lumber and "any woodworking or manufacturing establishment."—Michigan Shingle Co. v. State Investment & Ins. Co., 94 Mich. 389.

¶ 850. Where a decedent's widow procuring insurance for the benefit of the heirs represents the property to be unincumbered, whereas, as is fully known to the insurer's agent at the time he issues the policy and accepts the premium, she has a dower interest therein, the policy is not avoided.—Haire v. Ohio Farmers' Ins. Co., 93 Mich. 481.

¶ 851. A mutual fire insurance company is estopped from avoiding payment of a policy on the ground of fraud of the insured in making false answers to an application where its duly authorized agent has knowledge of the falsity of the answers at the time they are made.—Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589.

¶ 852. The assured under a fire policy may insist on estoppel based on the agent's actual knowledge had at the time of the applicant notwithstanding the statement in the application that the applicant warrants his answers are true, and that no statement contradictory thereof was made to or by the insurer's agent, and that such declaration shall form part of the contract of insurance.—Robison v. Ohio Farmers' Ins. Co., 93 Mich. 533.

¶ 853. The policy provided that the keeping of gunpowder "without written permission in the policy" should render it void. It was held that if the agent taking insurance on a stock of goods knew that gunpowder was kept and to be kept, the keeping it would not render the policy void, whether permission to keep it was indorsed or intended or neglected to be indorsed or not.—Peoria Marine & Fire Insurance Co. v. Hall, 12 Mich. 202.

¶ 854. A fire insurance company is estopped from asserting a breach of warranty because of the failure of the insured to keep a clear space between property insured, where the agent is fully informed of the situation before the policy is written.—Collins v. North British & Mercantile Ins. Co., 118 Mich. 281.

¶ 855. Knowledge of an agent of a fire insurance company at the time of delivery of the policy that the factory in question was being operated at night, was the knowledge of the company, and waived a condition in the policy against operating after ten o'clock at night, notwithstanding that the policy contained a clause providing that no agent had the power to waive any provisions or conditions unless in a writing attached to the policy; as under the circumstances the right to run after that hour became part of the contract itself.—Improved Match Co. v. Michigan Mut. Fire Ins. Co., 122 Mich. 256.

¶ 856. Where an accident insurance policy provides that none of the company's agents can waive or alter any of the conditions therein, it cannot be claimed that a condition against recovery for a death resulting from intoxication was waived by knowledge on the part of the agent, who received and filled out the application for the policy, that the applicant was an intemperate man, though the application stated that the habits of the applicant were correct and temperate.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

¶ 857. The clause in a fire insurance policy that the insured should "keep his books and inventory in an iron safe at night, or at some place secure against fire in another building," was not waived by knowledge of the soliciting agent that the insured did not have an iron safe; since the insured remained bound to keep his books in another building.—King v. Concordia Fire-Ins. Co., 140 Mich. 258.

¶ 858. The clause in a fire insurance policy that the insured should "keep his books and inventory in an iron safe at night, or at some place secure against fire in another building," was not waived because there was no other building in town safer than that of the insured; since the purpose of such clause, i. e., the preservation of the best evidence of the amount of the loss of the insured in the event of the destruction of the insured goods by fire, would be accomplished if such books were placed in a building not exposed to the hazard of the fire which might endanger such goods; even though the assured did not own an iron safe in which to keep such books.—King v. Concordia Fire-Ins. Co., 140 Mich. 258.

¶ 859. Where a policy of fire insurance contained a provision that, no agreement to the contrary being indorsed thereon, the policy should be void "if illuminating gas or vapor be generated in the described building or adjacent thereto for use therein," and the insurer's agent knew of the existence of a system for lighting by gas generated by gasoline known as a hollow wire gasoline lighting system, in which gasoline was carried to burners in a hollow copper wire and gas generated at the burners, at the time of the issuance of the policy, such condition was waived when the policy was issued, and it is immaterial that a change of the system was made without the knowledge of the agent whereby gasoline was forced from a tank to a generator, where it was generated by heat into gas, the gas being then forced through galvanized iron pipes to the burners.—Marx v. Williamsburgh City Fire Ins. Co., 192 Mich. 497.

§ 203. ——Agent's knowledge of other insurance.

¶ 860. There is no implied waiver of a stipulation in a policy that it shall be void if other insurance is taken on the property without the written consent of the first insurer, from the fact that the agent of the first insurer read a second policy which was shown to him, and did not object to it.—Robinson v. Fire Ass'n of Philadelphia, 63 Mich. 90.

§ 204. ——Agent's knowledge of title or condition of property.

¶ 861. Where an applicant for fire insurance discloses the exact condition of his interest in the property insured in a verbal application to the agents of the insurer the latter cannot claim a breach of condition so as to work a forfeiture of the contract and render it void from the beginning on the ground that insured was not the sole and unconditional owner of the property.—Crossman v. American Ins. Co. of Newark, N. J., 198 Mich. 304.

¶ 862. Where the agent who takes the application and issues the policy is fully cognizant of the state of the title, and where the assured accepts the policy after a full statement to him and under his advice, the assurer is estopped from asserting that it was misled by statements in the application to the effect that the assured have absolute title in fee, whereas one of them has merely a life estate.—Robison v. Ohio Farmers' Ins. Co., 93 Mich. 533.

¶ 863. A condition in a policy of fire insurance that it shall be void if the building insured "be or become vacant, and so remain for 10 days," is not waived by the fact that, at the time an agent of the company consents to an assignment of the policy, he is informed that the building is then unoccupied.—Ranspach v. Teutonia Fire Ins. Co., 109 Mich. 699.

¶ 864. An insurance policy contained a clause of forfeiture for vacancy of the prem-

ises. The applicant, before taking it, told the insurance agent that he expected to leave his house vacant a year or more, and was informed it would make no difference. During the vacancy the place was burned. Held, that the company was not estopped from relying on the clause of forfeiture.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

§ 205. ——Knowledge of brokers and subagents.

¶ 865. An insurance company is not bound by the knowledge of the facts possessed by the persons taking the application where at the time the insured communicates the information to them, they are acting as insurance brokers, and not as agents for the company.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 866. Where the insured communicates information, in applying for his policy, to the persons taking the application in their capacity as brokers, the company does not become bound by such information by reason of the fact that said persons at the time of the renewal of the policy have become state agents for the company.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 867. Defendant fire insurance company's authorized agency for a county was located at Sault Ste. Marie. At Brindely, in the same county, one Miller delivered to the insured a policy, collected the premiums, notified said agency of the fire loss in question, received a reply, and gave the reply to the insured. At the time the policy was placed Miller knew of a chattel mortgage on the premises. The policy contained no waiver with respect to said mortgage. Miller's connection was solely with said agency, defendant knowing nothing thereof. Held, Miller's part in the transaction did not amount to a waiver by defendant of the condition against incumbrances contained in said policy.—Moloney v. Germania Fire Ins. Co., 168 Mich. 269.

¶ 868. One Pfunter contracted to build a brick plant on a certain piece of land owned by him, and to convey the land and building to a brick company, a corporation. One Beiderman solicited Pfunter to take a policy of tornado insurance on the building, and the checks in payment of premiums were made out to Beiderman and indorsed by nim to defendant's agency. The policy of insurance provided that it should be void if the insured was not the sole and unconditional owner, or if the property should be conveyed without the defendant company's consent. Beiderman was a stockholder and officer of the brick company. Held, his supposed knowledge in such capacity of the facts with regard to the ownership of the property insured would not be imputed to defendant company so as to hold it to have waived the conditions of the policy.—Dull v. Royal Ins. Co., 159 Mich. 671.

§ 206. ——Effect of applicant's want of good faith.

¶ 869. A life insurance company is not estopped from denying the truth of the answers given by an applicant for insurance to questions concerning his health in the past, in an action on the policy, by the facts that both the agent who took the application and the physician who conducted the medical examination knew the answers were false, where it appears that such applicant intentionally falsified in such answers; since good faith is always essential to an estoppel.—Mudge v. Supreme Court I. O. F., 149 Mich. 467.

¶ 870. Where the beneficiary of a life insurance policy procured such policy knowing that the insured, his wife, had a disease of the heart, and would die suddenly from it, he will not be heard to assert that the company is estopped from setting up the defense that the policy was obtained under false representations as to the health of the insured because of the fact that the company's agent was informed of the true condition of her health.—Haapa v. Metropolitan Life-Ins. Co., 150 Mich. 467.

¶ 871. An insurer is not bound by statements contained in the application when both the agent and the insured know they are untrue and calculated to deceive, and where the application is to be forwarded to the insurer as the basis of its action.—Ketcham v. American Mut. Acc. Ass'n, 117 Mich. 521.

D. REINSTATEMENT.

§ 207. In general.

See also post ¶ 1031.
Authority of agent to reinstate, see post § 208.
Waiver or estoppel to deny reinstatement, see post § 209.
Remedies and actions for reinstatement, see post § 210.
Reinstatement of insured as jury question, see post § 340.
Right to cancel policy where reinstatement fraudulently obtained, see Rescission.

¶ 872. A policy of insurance that has become void by a violation of one of its conditions cannot be revived by anything short of a new contract, or by such conduct as, by misleading the insured to his prejudice, operates as an estoppel. Mere knowledge of the violation, without other action of the insurance company, is of no account.—New York Central Ins. Co. v. Watson, 23 Mich. 486.

¶ 873. The mere deposit of money with the local agent of a life insurance company, to be applied to the payment of premiums on a lapsed policy in case an application for its revival should be approved at the home office, which, by express stipulation, alone has authority to revive policies is insufficient

to effect a revival of the policy.—Clark v. Metropolitan Life Ins. Co., 107 Mich. 160.

¶ 874. The fact that a life insurance company, in reply to a letter written on behalf of the wife of a policyholder, apprising it of the latter's disappearance, suggesting the inadvisability of her continuing the payment of premiums, and inquiring whether, in case the policy should lapse, the insured could be reinstated upon his return, or would be obliged to apply anew, wrote advising the cancellation of the policy, and stating that, in the event of his return, it would do whatever was right in regard to a new policy, after which no further premiums were paid, will not, in the absence of fraud, entitle the wife to a reinstatement of the policy, where the husband died without having returned.—Mosser v. Knight Templars & Masons Life Indemnity Co., 115 Mich. 672.

¶ 875. A delinquent member of an insurance association who has done all that the law requires of him to procure reinstatement after failure to pay assessments within time limited in his certificate, may rest upon his rights and the fact that he took no further steps to secure reinstatement is no evidence of acquiescence in a forfeiture set up by the insurer.—Jones v. Preferred Bankers' Life Assur. Co., 120 Mich. 211.

§ 208. Authority of agent to reinstate.

Limitations on agent's authority in general, see ante §§ 26, 27.

¶ 876. An agent of an insurance company cannot revive a canceled policy already rejected by the company, unless he has its authority to rescind or revoke its action, and that, too, in the specific case; this authority cannot be presumed.—Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

§ 209. Waiver or estoppel to deny reinstatement.

General law of estoppel, see Estoppel.

¶ 877. An insurance company is estopped from refusing to reinstate a delinquent member who is in good health, where its conduct clearly indicates that it does not insist upon a forfeiture of a member under similar circumstances, and the member knows of this and relies upon it.—Jones v. Preferred Bankers' Life Assurance Co., 120 Mich. 211.

¶ 878. An understanding between the managing officer of an insurance company and a certificate holder that the only thing necessary for him to do to be reinstated after forfeiting his rights by nonpayment of an assessment within the time limited, was to file a certificate of health in accordance with the usage of the company, is sufficient to establish a waiver of the forfeiture upon compliance with such condition, express waiver not being necessary.—Jones v. Preferred Bankers' Life Assur. Co., 120 Mich. 211.

¶ 879. Revival of policy, forfeited by breach of condition, cannot be effected by any act of waiver or estoppel unless done upon full knowledge of the facts. To constitute an estoppel there must be such conduct on the part of the insurers as would otherwise operate as a fraud on the insured, who, in reliance on it, had taken some action to his own prejudice. Where nothing has been done by their authority, express or implied, or where no act has been done by the insured in honest reliance on such waiver, there can be no estoppel.—Security Ins. Co. v. Fay, 22 Mich. 467.

¶ 880. Forfeiture for nonpayment of assessment within the time limited in a life insurance certificate is waived where the manager of the company informs the insured that he will have to furnish a health certificate from the company's physician a blank for which is handed to him, and which he promptly returns properly filled out and indorsed by the physician.—Jones v. Preferred Bankers' Life Assur. Co., 120 Mich. 211.

§ 210. Remedies and actions for reinstatement.

Equitable relief of beneficiary to revive policy surrendered because of insurer's fraud, see post ¶ 1081.

Actions on policy in general, see post XX.

Reinstatement of insured as jury question, see post § 340.

¶ 881. A life insurance agent by false representation that a policy had become forfeited, and by great urgency, persuaded the insured, who was too feeble to withstand his arguments, and whom he would allow no time for consultation, to give up his policy, which was for the benefit of his wife, and accept instead a policy for its surrender value. The wife was not consulted as if she had any rights, and the husband died soon afterwards. Held, that a bill seasonably brought as here, within two months, by the wife to compel the re-establishment of the policy, should be sustained.—Tabor v. Michigan Mut. Life Ins. Co., 44 Mich. 324.

¶ 882. In a suit to revive a policy the surrender of which has been procured by false representations, it is not a defense that a premium which fell due after the surrender has not been paid or tendered; the insurer's action in procuring the surrender being equivalent to a declaration that the premium if tendered would not be received.—Heinlein v. Imperial Life Ins. Co., 101 Mich. 250.

¶ 883. Where, prior to the surrender of an insurance policy and to the maturity of a premium thereon the insurer has sent to the insured a written notice that the premiums on her policy will thereafter be collected at the home office instead of at a certain bank, and that she will receive due

notice of the day when a premium becomes due, failure to pay or tender a premium falling due of which notice is not given will not defeat a suit to revive the policy.—Heinlein v. Imperial Life Ins. Co., 101 Mich. 250.

E. UNEARNED PREMIUMS AND SURRENDER VALUES.

§ 211. In general.

See also ante ¶¶ 335, 336.

Necessity for refund of unearned premiums on cancellation, see post § 212.

Surrender values and privileges, see post § 213.

Right to charge premium in default against cash surrender value, see ante § 153.

Premium or assessment in general, see ante VI.

¶ 884. In case of loss under an absolute insurance for a term of years, the company need not return anything as "unearned premium," and may recover on an unpaid note given for the premium. But where the insurance is on the instalment plan, and the policy is to be void so long as there is any default in the advance payment of an instalment, it cannot recover on a note given for successive instalments of the premium.—American Ins. Co. v. Stoy, 41 Mich. 385.

¶ 885. An insurance policy purporting to be for five years stipulated that the company might at any time cancel it on returning the unexpired premium pro rata, and permitting the assured to have it canceled on paying the customary short rate for the period expired; it also provided that in case of loss the company might deduct any note or instalment thereof given as a consideration for the policy. An instalment note given on the policy provided that, in case of the nonpayment of any instalment at maturity, the policy should be void until revived, and the whole amount of instalments remaining unpaid on said policy should be considered earned. Held, that these provisions distinguished the policy from one under which there was no absolute insurance for the whole period for which it was taken.—Cauffield v. Continental Ins. Co., 47 Mich. 447.

§ 212. Necessity for refund of unearned premiums on cancellation.

Right to set off unearned premiums in action for special assessment, see ante ¶ 389.

¶ 886. The insurer cannot cancel the policy without notifying the assured and refunding, or offering to refund, the unearned premium.—Home Ins. Co. of Columbus, Ohio v. Curtis, 32 Mich. 402.

¶ 887. An insurance company which has taken up, because there was no medical examination, a policy procured by a daughter on her father's life, cannot retain both the policy and the premiums which she has paid, there having been no fraud on her part in procuring the insurance; and is liable for the premiums in assumpsit.—Frain v. Metropolitan Life Ins. Co., 67 Mich. 527.

¶ 888. The actual tender of unearned premium is unnecessary to the cancellation of an insurance policy if the minds of the parties have met on the point that the policy is to be canceled; and if the insured directs the insurance agent to procure other insurance for him, it is presumable that he means him to use for the purpose the money that he would have to return, and the direction would be a waiver of such tender.—Hillock v. Traders' Ins. Co., 54 Mich. 531.

¶ 889. One sentence in a clause of a fire insurance policy provided that the company might cancel it at any time by giving five days' notice. The next sentence stated that after cancellation by the company the insured should be entitled to the return of the unearned premium, upon surrender of the policy. Held, the return by the company of the unearned premium was not a condition precedent to its right of cancellation.—Webb v. Granite State Fire Ins. Co., 164 Mich. 139.

§ 213. Surrender values and privileges.

Statutory provision for surrender value, see Pub. Acts 1917, No. 256, part III, chap. II, § 2.

¶ 890. A provision in an insurance policy that if a policy for its surrender value is taken it must be demanded within one year from the time an accrued premium falls due refers to an accrued premium for the nonpayment of which the company can determine the policy.—Michigan Mut. Life Ins. Co. v. Bowes, 42 Mich. 19.

XIII. REINSURANCE AND CONCURRENT INSURANCE.

§ 214. Reinsurance.

Concurrent or other insurance on risk covered, see post § 215.

Coinsurance, see post § 216.

Insured as coinsurer, see post § 217.

Authority of insurance companies to reinsure, see Pub. Acts 1917, No. 256, part III, chap. I, § 2.

Right of reinsurance belonging to fire, marine and automobile insurance companies, see Pub. Acts 1917, No. 256, part IV, chap. I, §§ 7, 10.

¶ 891. A reinsurance contract is not within the provisions of Comp. L. 1897, § 7217, How. 2nd Ed., § 8151, providing that life insurance companies shall not make any insurance contract with any citizen of the state which shall not state distinctly the amount of life benefits, manner of payment, period of continuance and amount of premiums, and that any person who may have paid money therefor may recover same back at any time within six years from date of payment.—

Warren v. Federal Life Ins. Co., 198 Mich. 342.

¶ 892. Even if a reinsurance contract is within the provisions of Comp. L. 1897, § 7217, How. 2nd Ed., § 8151, providing that life insurance companies shall not make any insurance contract with any citizen of the state which shall not distinctly state the amount of life benefits, manner of payment, period of continuance, and amount of premiums, and that any person who may have paid money may recover back same, it complies with such statute where the original policy states not only the amount of insurance, but the monthly premium, and the insurer assumed all obligations of the policy, subject to the terms of a reinsurance contract between it and a third insurance company with which the risk had been previously reinsured.—Warren v. Federal Life Ins. Co., 198 Mich. 342.

§ 215. Concurrent or other insurance on risk covered.

Provision in standard fire insurance policy for pro rata liability where concurrent insurance, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 893. The pro rata insurance clause in a Michigan standard policy, providing that the company shall not be liable for a greater portion of any loss than the amount insured shall bear to the whole insurance, whether valid or not, permits the insurer to prorate the insurance in case another policy had been written on the property at the time of the second policy, although such first policy is rendered void by the making of the second.—Webb v. Concordia Fire Ins. Co., 167 Mich. 144.

§ 216. Coinsurance.

Anti-coinsurance act as public regulation, see ante § 5.

¶ 894. All persons issuing policies on the same property are known as coinsurers, and they are never jointly liable, but their proportion of liability depends on the amount which each insures.—Chesbrough v. Home Ins. Co., 61 Mich. 333.

¶ 895. Where a fire insurance policy, issued to a firm, provided that, in case of other insurance, the amount recoverable upon it should be no greater proportion of the loss than the amount thereby insured should bear to the whole amount insured thereon, "without reference to the date of the different policies or their invalidity," etc., it was held that, in determining the amount recoverable upon such policy, a policy in another company covering the same property should be treated as liable to contribute, though it had been issued to one of the plaintiffs individually, and was claimed to have been forfeited by change in the ownership of the property by reason of the insured having taken in the other plaintiff as a partner, though after the loss it had been assigned to other companies, insurers of the same property, on payment of their full share of the loss, and under an arrangement that they should prosecute it for their benefit.—Liverpool, L. & G. Ins. Co. v. Verdier, 33 Mich. 138; Liverpool, L. & G. Ins. Co. v. Verdier, 35 Mich 395.

§ 217. ——Insured as coinsurer.

Anti-coinsurance act as public regulation, see ante § 5.

Limitations upon and prohibitions against requirement of coinsurance, see Pub. Acts 1917, No. 256, part IV, chap. II, §§ 9, 10.

Standard fire insurance form for rider clause for coinsurance, see Pub. Acts 1917, No. 256, part IV, chap. II, §§ 9, 10.

¶ 896. An insurance policy provided that the assured should maintain insurance on the property to the extent of four-fifths of its cash value and in case of failure to do so should be a coinsurer to the extent of such deficit. Held, that the assured was bound either to procure from others, or to carry himself, insurance to the extent, with this policy, of four-fifths of the value of the property, and to contribute ratably in case of loss.—Chesbrough v. Home Ins. Co., 61 Mich. 333.

XIV. AMOUNT OF INSURANCE, EXTENT OF LOSS AND ABANDONMENT TO INSURER.

§ 218. Life, accident and disability insurance.

Disability or sickness, see post § 219.

Reductions for negligence or misconduct, see post § 220.

Instructions as to amount or extent of loss, see post § 349.

Burden of proof and presumptions as to amount of loss or benefit payable, see post § 304.

Admissibility of evidence as to amount of insurance, extent of loss or abandonment, see post § 316.

Sufficiency of evidence of amount and extent of loss, see post § 327.

Accrual and amount of benefits in fraternal society, see Fraternal Associations, VI.

¶ 897. Under a provision in an accident policy requiring notice of disability for which claim is made to be given within ten days after the disability, insured is entitled to receive indemnity for disability continuing after the date of notice, although the notice is not given within ten days of the time the disability begins.—Miner v. National Casualty Co., 166 Mich. 669.

§ 219. ——Disability or sickness.

¶ 898. A barber insured against accidents by a policy providing that if the injuries, independent of all other causes, shall "im-

mediately, continuously, and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation," the company will pay a specified indemnity during the continuance of such "total disablement," is not prevented from recovering for an accident as for a total disablement because he goes to his place of business for several days after the accident, where he is practically unable to perform any work while there because of his injuries, and after a few days is forced to remain at home for several weeks.—Hohn v. Inter-State Casualty Co., 115 Mich. 79.

¶ 899. The disability of a banker and real estate dealer resulting from the dislocation of his shoulder in an accident is not, as matter of law, partial only, so as to deprive him of the right to recover the indemnity provided by an accident policy insuring against loss resulting from injuries which "immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation," where, although he goes to his office every day, he is practically unable to do any kind of work.—Turner v. Fidelity & Casualty Co., 112 Mich. 425.

¶ 900. Insured was not "necessarily, entirely and continuously confined to the house" within the terms of an indemnity against disability, where he occasionally went out for an airing though disabled to do any manual labor because of a felon and amputations occasioned thereby.—Cooper v. Phoenix Accident & Sick Ben. Ass'n, 141 Mich. 478.

¶ 901. "Loss" of a member of the body insured against in an accident policy means the destruction of the usefulness of the member, but the rule is otherwise where the word loss is eliminated and the insurance is against "an injury that shall have caused the amputation of a limb (whole hand or foot)".—Fuller v. Locomotive Engineers' Mut. L. & A. Ins. Ass'n, 122 Mich. 548.

¶ 902. Under a by-law of a mutual accident insurance association providing for payment of the full amount of the policy to a member receiving injuries "which alone shall cause amputation of a limb (whole hand or foot)," a member suffering amputation of one third of a foot from the toe down and rendering the foot useless for the performance of its natural functions, was not entitled to recover.—Fuller v. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n, 122 Mich. 548.

¶ 903. Under an accident and sick benefit policy providing for payment of a stated sum per month while the insured was wholly incapacitated from transacting any and every kind of work or business and entirely confined to the house or bed, etc., a member was not entitled to sick benefits after such time as he went to his store and sat around for several hours a day and then went there every day and did some work.—Shirts v. Phoenix Acc. & Sick Ben. Ass'n, 135 Mich. 439.

§ 220. ——Reductions for negligence or misconduct.

Condition against "voluntary exposure to unnecessary danger," see ante § 160.

¶ 904. In an action on an insurance policy containing a clause for a reduction of the insurance in the event death results from "unnecessary exposure to obvious risk of injury or obvious danger" the test of the insured's conduct is whether he was guilty of gross or wanton negligence.—Walter v. People's Health & Accident Ins. Co., 173 Mich. 581.

§ 221. Property, casualty and liability insurance.

Measure of value of property insured, see post § 222.

Prorating loss where other insurance on risk, see ante ¶ 893.

Sufficiency of evidence of amount and extent of loss, see post § 327.

¶ 905. Under a Michigan standard fire insurance policy limiting insurer's liability in case of total loss to what it would then cost the insured to replace the property with material of like kind and quality, the insured can recover the market value of the property at the time of the fire.—Mitchell v. St. Paul German Fire Ins. Co., 92 Mich. 594.

¶ 906. Where, in an action upon a policy of insurance, two different appraisals constitute the only evidence as to the amount of loss, the jury are bound to adopt one or the other, and a verdict consistent with neither of them will be set aside.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

§ 222. ——Measure of value of property insured.

¶ 907. Under a provision in an insurance policy that damages for loss shall not exceed the actual cost of producing the lumber destroyed, the assured, if he bought the logs, can recover the price paid, with interest from date of purchase, and cost of manufacturing and storing; if he bought the stumpage, his recovery is limited to the price paid, with like interest and costs; and if he owned the land from which the logs were cut he can recover the fair value of the stumpage, with interest and the other costs added.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 908. Where the property was lumber, and where the insured were the owners of a large quantity of standing timber, the proper measure of insurance at actual cash value not beyond cost of replacement was the

actual cash value at the time of loss, and not the cost of manufacturing at their own mill a like quantity of lumber from their own timber.—Mitchell v. St. Paul German Fire Ins. Co., 92 Mich. 594.

¶ 909. An insurance company is liable for the full value of a residence where it is insured by the life tenant rather than for the value of the life tenant's interest alone.—Convis v. Citizens' Mut. Fire Ins. Co., of Calhoun County, 127 Mich. 616.

§ 223. Marine losses generally.

See also ante ¶¶ 216, 218.
Abandonment for total loss, see post § 224.
Sufficiency and form of notice or deed of abandonment, see post § 225.
Acceptance of abandoned vessel, see post § 226.
Effect of abandonment, see post § 227.
Breach of marine policies or conditions, see ante § 173.
Disability to insure vessel subsequent to its loss where loss known to owner, see ante ¶ 178.
Conditional contracts for insurance, see ante § 55.
General shipping law, see Shipping.

¶ 910. The cost of removing part of a cargo of coal from a stranded vessel in order to float it, is not "expense incurred on account of the cargo" so as to exclude it from consideration in determining whether the loss exceeds one-half of the valuation, since such expense is for the benefit of the vessel.—Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601.

§ 224. ——Abandonment for total loss.

¶ 911. There is no right to abandon where the loss is the result of a peril not insured against.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 912. Under a policy providing for abandonment to the underwriter as total loss where the loss exceeded one-half the value, and silent as to the time for such abandonment, the owner has a reasonable time within which to act, and where a vessel was aground and later was floated and repaired, an abandonment within 60 days is reasonable since it was not readily determined whether the loss exceeded one-half the value.—Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601.

¶ 913. To reinstate an abandonment of a steamer to the underwriters as a total loss it is a prerequisite that the underwriters have whatever advantage there can be obtained from the transfer to them of the vessel.—Loud v. Federal Ins. Co., 195 Mich. 60.

§ 225. ——Sufficiency and form of notice or deed of abandonment.

¶ 914. No particular form is necessary to an abandonment of the vessel insured, and, unless required by the policy, it need not be in writing.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214.

¶ 915. No particular form of notice of abandonment is necessary, and, unless required by the policy, it need not be in writing.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214; Richelieu & O. Nav. Co. v. Thames & Mersey M. Ins. Co., 72 Mich. 571.

¶ 916. A notice that an insured vessel is ashore at a stated place and that the owners abandon the boat and claim a total loss, with request to the agent to whom the notice is directed to inform the underwriters, is a sufficient notice of abandonment.—Richelieu & O. Nav. Co. v. Thames & Mersey Ins. Co., 72 Mich. 571.

¶ 917. That the vessel had to be beached in a harbor during a storm, on the 12th of November, and was remaining there, notwithstanding efforts to get her off, on the 13th of December following, is a sufficient statement of cause of abandonment in an action upon a policy of marine insurance.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214.

¶ 918. Where the policy of marine insurance requires an abandonment to be in writing, and that it must be sufficient, if accepted, to vest in the insurer an unincumbered title to the vessel, a notice of abandonment signed by the president of the corporation owners, who was himself a mortgagee of the vessel, must be construed so as to be effectual, if accepted, and to operate as a discharge of the mortgage by way of estoppel.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214.

¶ 919. A deed of abandonment is not essential to the rights of either party, as the title passes, and the property vests in the insurer, immediately on abandonment.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214; Richelieu & O. Nav. Co. v. Thames & Mersey M. Ins. Co., 72 Mich. 571.

¶ 920. Upon abandoning a vessel to the underwriter as a total loss, the owner must convey a perfect title to such share of the vessel as is covered by the policy, and hence must convey such proportion as the amount of the policy bears to the value as expressed in the policy.—Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601.

§ 226. ——Acceptance of abandoned vessel.

¶ 921. On receiving notice of abandonment the underwriters have a right to refuse acceptance until they can inquire whether the accident was occasioned by a cause which their liability does not cover, but they cannot accept the vessel and defer inquiries until after suit is brought, and then

for the first time claim that their acceptance is not conclusive.—Richelieu & O. Nav. Co. v. Thames & Mersey M. Ins. Co., 72 Mich. 571.

¶ 922. Where, upon receiving notice of the abandonment of a vessel by the owners, the insurers take her in charge, put her in the dry-dock, and cause her to be repaired at an expense exceeding one-half of her value, and do not return, or offer to return, the vessel to the owners, these acts amount to an acceptance, and the title passes to the insurers. —Richelieu & O. Nav. Co. v. Thames & Mersey M. Ins. Co., 72 Mich. 571.

¶ 923. Any act of an underwriter in consequence of an abandonment, that could be justified only under a right derived from it, may be decisive evidence of an acceptance.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 924. Any act done for the purpose of making the most of the property to whomsoever it may prove to belong ought not to be construed against the party who thus seeks the common interest.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 925. Notwithstanding a provision in a policy of marine insurance that acts of the insurer or insured in recovering, saving or preserving the property in case of disaster should not be considered a waiver or an acceptance of abandonment, yet if the insurer, after notice of abandonment, and after suspension of previous efforts for recovery, proceeds to take possession, or if he proceeds for the first time to recover the property after abandonment, such acts tend to signify an acceptance of the abandonment.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214.

¶ 926. Under a policy of marine insurance providing that if the insured should neglect to take measures to recover the vessel, or to repair it when recovered, then the insurer might recover and repair it, for account of the insured, held, that the insurer's neglect to cause repairs to be made was evidence from which an acceptance by it of an abandonment might be found.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214.

§ 227. ——Effect of abandonment.

¶ 927. An abandonment once made and accepted fixes the rights of the parties, and renders the insurers liable as for a total loss. —Richelieu & O. Nav. Co. v. Thames & Mersey M. Ins. Co., 72 Mich. 571.

¶ 928. By an abandonment and acceptance of a vessel insured the title passes to the insurer, and if the loss turns out to be less than the proportion stipulated in the policy, that fact does not retransfer the title.—Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 214.

¶ 929. Where there is no acceptance of an abandonment the captain in placing his vessel in a dry-dock and repairing her does not act as the insurer's agent; it is only after an actual abandonment and the passage of the title that the captain becomes such agent. Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 930. Where the owner of a hired vessel, the substantial ownership of which he had transferred for the time being to the charterer, formally abandoned its wreck to the underwriters, his action had no effect either to adopt a certain indebtedness contracted by the vessel master in the charterer's interest, or to affect the rights and liabilities of the charterer himself, without whose consent such abandonment was res inter alios.—Hinman v. Eakins, 26 Mich. 83.

¶ 931. An abandonment relates back to the time of the disaster, and the underwriters are treated as in possession from that time, and any expenses incurred in endeavoring to save from the wreck are considered as incurred in their behalf.—First Nat. Bank of Marquette v. Stewart, 26 Mich. 83.

¶ 932. An act of abandonment of a vessel, under a policy of marine insurance, when accepted, has all the effect that a full assignment could accomplish.—Northwestern Transp. Co. v. Thames & Mersey Ins. Co., 59 Mich. 214.

XV. NOTICE AND PROOFS OF LOSS, DEATH OR CASUALTY.

§ 228. Notice of loss in general.

Time for notice and proof, see post §§ 229, 230.

Persons entitled to furnish notice and proof of loss, see post § 231.

Sufficiency of proof of loss, see post §§ 232-238.

Estoppel arising from proof of loss, see post § 239.

Effect of failure to furnish proofs, see post § 240.

Waiver of notice or proof of loss, see post §§ 241-244.

Amount of insurance and extent of loss, see ante XIV.

Notice as question of law and fact, see post § 341.

Instructions as to notice of loss, see post § 348.

Notice and proofs of loss in fraternal societies, see Fraternal Associations, VII.

Provisions in standard form of fire insurance as to requirements in case of loss, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 933. Notice of the loss of insured property is distinct from proof of loss, and its sole purpose is to enable the company to take proper action to protect its interests.—Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co., 41 Mich. 131.

§ 229. Time for notice and proof.

See also post ¶ 976.
Excuses for delay, see post § 230.
Satisfying requirement for immediate notice, see also post ¶ 944.

¶ 934. A notice of an accident after a delay of more than six months is insufficient under an accident policy requiring "immediate written notice."—Sweeney v. Travelers' Ins. Co., 199 Mich. 584.

¶ 935. Under an accident certificate requiring notice within five days, it is sufficient if notice is given within five days after it is ascertained that the illness is due to accident, and the fact that notice that illness was due to disease was first given because of wrong diagnosis, does not affect the second notice.—Phillips v. U. S. Benevolent Soc., 120 Mich. 142.

¶ 936. The failure of an insured person, without excuse, to give notice of an accidental injury until nearly five months after receiving it, warrants an instruction that it was not a compliance with a requirement of a policy of accident insurance that written notice should be given as soon as possible after the happening of an accident.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 937. Quære, whether, where a policy required proofs of loss to be furnished within a specified time, but did not declare the effect of a failure to furnish them as required, while for a violation of other provisions of the policy it is expressly provided that the company shall be absolved from all liability, the failure to furnish proofs within the time fixed would in any case deprive the insured of all rights.—Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

¶ 938. Where a fire insurance policy provides that proofs of loss shall be furnished within sixty days after a fire, that the loss shall not become payable until sixty days after such proofs have been received, and that no action shall be sustainable until after compliance by the insured with the requirements of the policy, nor unless commenced within twelve months after the fire, the insured has at least ten months within which to make his proofs of loss, but where he brings an action and permits the year to expire without furnishing such proofs and the provision has not been waived by the insurer, there can be no recovery.—Allen v. Milwaukee Mech. Ins. Co., 106 Mich. 204.

¶ 939. Whether a mortgagee's rights in insured property belonging to a deceased person can be impaired by delay in appointing an administrator and in furnishing proofs of loss, quære.—Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

¶ 940. Under an employers' liability policy requiring the assured, "upon the occurrence of an accident, and upon notice of any claim on account of an accident," to give immediate notice, in writing, "of such accident or claim" to the company, notice need not be given until there has been both an accident and a claim for damages by reason thereof.—Grand Rapids Electric Light & Power Co. v. Fidelity & Casualty Co., 111 Mich. 148.

§ 230. ——Excuses for delay.

¶ 941. Where an insurance policy requires the insured to send the company notice of the injury within a certain time, the insured is excused from doing so, despite the absolute language of the provision, where he is prevented by mental incompetency or other act of God.—Reed v. Loyal Protective Ass'n, 154 Mich. 161.

¶ 942. Where an accident policy requires the insured to send the company notice within fourteen days after the injury, he is not excused from doing so on the ground of inability, where the testimony simply shows that he was in a more or less dazed and unresponsive frame of mind, but was not irrational during the fourteen-day period.—Reed v. Loyal Protective Ass'n, 154 Mich. 161.

§ 231. Persons entitled to furnish notice and proof of loss.

¶ 943. A mortgagee of insured property is one of the parties assured within the meaning of the policy, and notice of loss given by him will inure to the benefit of all other interested parties and need not be in writing.—Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co., 41 Mich. 131.

¶ 944. The requirement in an insurance policy that the assured shall give immediate notice in case of loss is satisfied if notice is given by the person to whom the policy was made payable, and by the assignee of all the interest held by the assured, to the local agent, and if knowledge of it comes to the general agent of the company.—Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co., 41 Mich. 131.

§ 232. Sufficiency of proof of loss.

Signature and verification, see post § 233.
Effect of false statements or false swearing, see post § 234.
Demand for further proof, see post § 235.
Adjuster's certificate, see post § 236.
Necessity and sufficiency of inventory, see post § 237.
Waiver of defects, see post § 238.
Estoppel arising from proof of loss, see post § 239.

Effect of failure to furnish proofs, see post § 240.
Sufficiency of proofs of loss as question of law and fact, see post § 341.
Instructions as to proofs of loss, see post § 348.
Estoppel arising from proof of loss, see post § 239.
Admissibility of evidence as to proof of loss or death, see post § 314.
Sufficiency of evidence of loss, see post § 325.

¶ 945. An objection that a proof of loss does not show the exact place where a fire occurred cannot be sustained where the agents of the insurer knew the location.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

¶ 946. Objections by an insurance company that proofs of loss sent to a defendant and received by it did not have a formal address or state correctly the addresses of other companies are frivolous.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

¶ 947. An objection that proofs of loss fail to show that the plaintiffs were the sole owners of the stock at the time of the fire, because the language was in the present tense, the proofs being dated after the fire occurred, cannot be considered, as the fair inference is that both parties understood the reference.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

¶ 948. A person insured by two companies in a policy issued by "The Cincinnati Underwriters" and which required proofs of loss to be given to the companies sufficiently complies with the requirement if proofs are sent to the secretary of the underwriters, who also is secretary of both companies, and are by him turned over to one who is president of both companies and who also has charge of their loss department.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 949. The failure of an assured to state in his proof of loss the names of all persons with whom he had contracted to sell insured lumber is not sufficient to avoid a policy of insurance, where the proofs were prepared by an adjuster of the defendant in the presence of its local agent, who, at the time the policy was issued, had full knowledge of all such facts.—Fuhrman v. Sun Ins. Office of London, 180 Mich. 439.

§ 233. ——Signature and verification.

Necessity for including names of all persons interested in insured property, see ante ¶ 949.

¶ 950. Proofs of loss are not bad for the omission of the signature and oath of one member of the assured firm if all possible means were taken to obtain such name and oath.—Marthinson v. North British & M. Ins. Co., 64 Mich. 372.

¶ 951. On a policy issued to a foreign corporation proofs of loss made out by its attorney and verified by him are not open to the objection that by terms of the policy they should be sworn to by the insured; the situation presents an exception to the general rule.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 142 Mich. 29.

¶ 952. Where a loss occurs while insured is so ill that he is wholly unable to attend to any business, the proof of loss may be made by his agent, though the policy requires proof of loss to be made and sworn to by the insured.—Burns v. Michigan Manufacturers' Mut. Fire Ins. Co., 130 Mich. 561.

¶ 953. Where a fire insurance policy requires proofs of loss to be made out and sworn to by the assured before he can realize upon the policy, such proofs are a condition precedent; and it seems that the assured must make them out himself or show good reason for not doing so and for leaving them to be made out by an agent.—McGraw v. Germania Fire Ins. Co., 54 Mich. 145.

§ 234. ——Effect of false statements or false swearing.

Fraud or false swearing in application or in securing policy, see ante § 144.

¶ 954. False swearing by an insured person on proving loss will not necessarily defeat his right to recover upon his policy if it was not done with fraudulent intent to obtain more pay than he was entitled to.—Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306.

¶ 955. The by-laws of a mutual insurance company provided that all claims should be forfeited if there was any fraud in making proofs of loss. Held, that if the person assured, in good faith and with the knowledge of the company's responsible officer, included as her own articles belonging to other members of the family, there was no fraud.—Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289.

¶ 956. The statement in an affidavit, made by plaintiff after the loss, that he was the sole and unconditional owner, whereas he held only a contract for purchase, will not prevent a recovery, as defendant could not have been prejudiced by it.—Knop v. National Fire Ins. Co., 101 Mich. 359.

¶ 957. Where one with full knowledge has made claim against an insurance company for a loss which has not taken place, as by including in the proofs of loss property which he had shipped away before the fire, and has sworn to and presented the claim for payment, his testimony, if he means to show that this was done without fraudulent intent, must tend to show good faith. If done in bad faith, the advice or connivance of the agent of the company would constitute

no excuse whatever.—Hanover Fire Ins. Co. v. Mannasson, 29 Mich. 316.

¶ 958. A policy is not invalidated by the assured's including in her proofs of loss, without intending fraud, some articles not owned by her but which she supposed were covered by the policy.—Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.

¶ 959. An insured is not guilty of false swearing in his proofs of loss in swearing that the cause of the fire which destroyed the insured building was unknown where it appeared that the atmosphere in the room in which the fire started was charged with gasoline fumes, and that an explosion followed the lighting of a match near a gas generator, and that no one in the room claimed to know the origin of the fire.—Marx v. Williamsburgh City Fire Ins. Co., 192 Mich. 497.

¶ 960. The avoidance clause based on "fraud or false swearing" contemplates actual fraud and intentional false swearing or intentional swearing to that as true without knowledge that it is true; hence does not apply to the honest error of an attorney for insured in making out proofs of loss and including therein a piece of furniture which was removed from the premises before the fire, or his statement that the insured was the unconditional owner subject only to a conditional sale contract with which was a statement that the insured had taken back a chattel mortgage on the goods.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 142 Mich. 29.

¶ 961. Testimony by insured that the lost property was of a certain value, whereas he knew it was more, cannot be regarded as "false swearing"; since it could have had no tendency to defraud.—Walker v. Western Underwriters' Ass'n, 142 Mich. 162.

¶ 962. Contradictory or even untrue statements by insured as to the property insured and its value do not sustain a motion to direct a verdict on the ground that false swearing is shown, if it does not appear that they were made in bad faith or with intent to defraud.—Walker Western Underwriters' Ass'n, 142 Mich. 162.

§ 235. ——Demand for further proof.

¶ 963. An accident insurance company cannot insist that a claimant shall furnish further proofs of loss without pointing out wherein the proofs already submitted are defective, or what further information is desired.—Gnau v. Masons' Frat. Accident Ass'n, 109 Mich. 527.

¶ 964. Where proof of loss under an insurance policy was made by an agent and the company informed that the serious illness of insured made it impossible for him to make out such proofs, if the company was not satisfied therewith, it ought to so suggest promptly and require additional proof.—Burns v. Michigan Manufacturers' Mut. Fire Ins. Co., 130 Mich. 561.

§ 236. ——Adjuster's certificate.

¶ 965. Under the Michigan standard insurance policy, an insurance company has no right to require an adjuster's certificate in case of loss.—Burns v. Michigan Manufacturers' Mut. Fire Ins. Co., 130 Mich. 561.

§ 237. ——Necessity and sufficiency of inventory.

Appraisal of loss, see post § 252.

¶ 966. An insurance policy provided that in case of fire the insured should forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and render a sworn statement to the company, containing, among other things, the cash value of each item of property, and the amount of loss thereon. Held, that no inventory was required in case of a total destruction of the property.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

§ 238. ——Waiver of defects.

Waiver of notice or proof of loss, see post §§ 241-244.

¶ 967. A defense of defects in proofs of loss is waived when negotiations for a settlement are renewed, causing the insured to expend time and money to effect the settlement.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

¶ 968. Proof of loss as required by an insurance policy is waived where the local agent introduces to insured as the state agent one who has in his possession the policy which he apparently has received from the company, and who informs insured that the policy has been canceled, and repudiates all liability on the part of the company.—Morgan v. Illinois Ins. Co., 130 Mich. 427.

¶ 969. Where objection is made to the proofs of loss by fire and the insured furnishes further proofs which are not objected to, the company is estopped from claiming upon the trial that the proofs are defective.—Foiles v. Detroit Fire & Marine Ins. Co., 175 Mich. 716.

¶ 970. A letter from an insurer to a claimant, asking that the matter be allowed to rest until the adjuster of the company can see the claimant or his attorney, constitutes a waiver of a provision in the policy limiting the time for furnishing proofs of loss and beginning an action on the policy.—Turner v. Fidelity & C. Co., 112 Mich. 425.

¶ 971. An insurer should manifest, within a reasonable time after proofs of loss have been made, its disagreement with the amount claimed by such proofs to avoid a waiver of its right to object to the proof of loss.—Brock v. Dwelling House Ins. Co., 102 Mich. 583.

§ 239. Estoppel arising from proof of loss.

¶ 972. An insured person is not estopped by the proofs of loss from recovering a larger amount, if the insurer refused to act upon the proofs and repudiated liability.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

¶ 973. An insured person is not estopped by his proofs of loss from showing losses not mentioned therein unless the insurer, by relying on the proofs, has been placed in such a position that the admission of the further showing would be equitable.—Schmidt v. Mutual City & Village Fire Ins. Co., 55 Mich. 432.

¶ 974. One who furnishes proofs of death is not estopped by a statement therein, made in good faith upon information received from the attending physician of the disease which caused death.—John Hancock Mut. Life Ins. Co. v. Dick, 117 Mich. 518.

¶ 975. An assured is not bound by a schedule attached to proofs of loss, not signed by him, and of which he denied all knowledge.—Fuhrman v. Sun Ins. Office of London, 180 Mich. 439.

§ 240. Effect of failure to furnish proofs.

¶ 976. Where a policy provides that failure to comply with its conditions shall work forfeiture, a failure to furnish proofs of loss within the time required by the policy bars an action thereon, in the absence of waiver.—Gould v. Dwelling-House Ins. Co., 90 Mich. 302.

¶ 977. Failure to make proofs of loss within thirty days, as provided for in an insurance policy, will only operate to postpone the right of action of the assured until the proofs are supplied, where there is no limitation in the policy as to the time within which suit must be brought, and no provision for forfeiture in case proofs are not made within the thirty days.—Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.

¶ 978. A fire policy that expressly requires proofs of loss to be made within thirty days, that puts off the claim's becoming due until sixty days after the completion of all its express requirements, and whereby action thereon must be brought within six months after the loss, is to be so construed that failure to make proof of loss within thirty days merely postpones the right of action, and does not forfeit the policy.—Hall v. Concordia Fire Ins. Co., 90 Mich. 403.

¶ 979. If an insurance policy expressly requires the insured to give immediate notice to the company of any loss by fire, and, within sixty days after the fire, unless the company extend in writing that period, to make proof of the loss; and further provides that no suit or action on the policy shall be maintainable "until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire," and contains no provision making failure to furnish such proofs within sixty days a ground of forfeiture, such notice and proof of loss may be given at any time before beginning an action, and action cannot be brought until such notice and proof have been given, nor after twelve months.—Steele v. German Ins. Co., 93 Mich. 81; Rynalski v. Pennsylvania Ins. Co., 96 Mich. 395.

§ 241. Waiver of notice or proof of loss.

Authority of agent to make waiver, see post § 242.
Denial of liability on other grounds as waiver, see post § 243.
Effect of waiver, see post § 244.
Waiver of defects in proof of loss, see ante § 238.
Waiver of right to avoid or cancel for breach of warranty or condition, see ante XII, C.

¶ 980. Furnishing proofs of loss is waived—though the policy forbade any representative of the insurer from waiving any of its conditions—where the insurer's adjuster sent to investigate the loss stated, when an unsworn statement of items of loss were offered to him, that he did not care for them and that they were not necessary.—Young v. Ohio Farmers' Ins. Co., 92 Mich. 68.

¶ 981. An insurer's neglect to object within a reasonable time to proofs of loss, where the defects in them could be remedied if intelligibly pointed out, amounts to a waiver; the question whether he has acted in good faith and seasonably is for the jury.—Mercantile Ins. Co. v. Holthaus, 43 Mich. 423.

¶ 982. It is proper to instruct the jury that if an insurance adjuster's co-operation with an agent of the assured—as in making a list of the property destroyed, in employing a builder to estimate the value of buildings, and in referring the value of a building to arbitration—would and did induce an honest belief on the assured's part that the necessary proofs were making, then a finding that formal proofs were waived would be warranted.—Gristock v. Royal Ins. Co., 84 Mich. 161; adhered to on rehearing 87 Mich. 428.

¶ 983. The formal proofs of loss required by an insurance policy may be waived when the insured acts according to the instructions of an agent who has assumed to make investigations; he cannot be required to do more.—Security Ins. Co. v. Fay, 22 Mich. 467.

¶ 984. Where before the acts claimed as a waiver of proofs of loss under an accident policy within seven months the policy had become forfeited because of delay in giving notice of the injury, and an agent of the insurer, in his conferences with plaintiff's attorney, stated that the defense was that the notice of injury was given too late and that the trouble from which plaintiff suffered did not proceed from the injury, and that the company reserved what rights it had, and, in later sending a blank for furnishing proofs of loss to plaintiff, stated that there had been considerable delay in reporting the accident but he was furnishing the blank without prejudice to the rights of the company, and the policy stated that no agent had power to waive any condition of the policy, there was no waiver of the time limit for filing the proofs of loss.—Sweeney v. Travelers' Ins. Co., 199 Mich. 584.

¶ 985. A mutual fire insurance company waives any fraud by the insured in overestimating the value and quantity of the property destroyed in the first list prepared by him and sent to the insurer where the latter at a meeting of the board of directors permits, as shown by its records, the insured to furnish a new list and the minutes of such record at a subsequent meeting are read by the secretary and approved by the directors.—Veenstra v. Farmers' Mut. Fire Ins. Co. of Ottawa and Allegan Counties, 195 Mich. 55.

¶ 986. A condition of an accident insurance policy, that notice of injury shall be given the insurer as soon as possible after its occurrence, may be waived by its conduct.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 987. Where it appears from all the testimony that the failure of an assured to give an earlier notice of injury has not prejudiced an insurer, the court may instruct in an action on a policy of accident insurance, that the waiver by the latter of earlier notice is established.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 988. Failure of the insured to give notice of an injury within the time required by an accident policy is waived by the insurance company's asking for further information after receiving notice, without suggesting that the notice came too late.—Hohn v. Inter-State Casualty Co., 115 Mich. 79.

¶ 989. Shortly after a loss under a fire insurance policy, an adjuster of the company told the insured that everything was satisfactory as to the household furniture covered thereby, a list of which he had made at her dictation, but that he wanted her to obtain the bills of her store goods, after which, upon notification, he would meet her and make a settlement. The policy provided that the company should not be held to have waived any provision thereof by any requirement or proceeding on its part relating to any examination therein provided for. Held, that there was no waiver of the formal proofs of loss required by the terms of the policy; that, at most, any waiver was conditioned upon the procuring of the bills, which the insured failed to do; and that, it further appearing that the insured was advised, several months before the expiration of the time within which proofs of loss might be furnished, that the company was insisting upon the stipulated proofs, and that no prejudice had resulted to her in the meantime, an estoppel could not be predicated upon the conduct of the adjuster, even though the insured could be said to have been misled thereby.—Allen v. Milwaukee Mech. Ins. Co., 106 Mich. 204.

§ 242. ——Authority of agent to make waiver.

See also ante ¶ 831.

Effect in general of provision in policy prohibiting waiver by agent, see ante § 197.

Authority of agents in general, see ante III.

¶ 990. Where a policy provides that no agent shall have power to waive any of its conditions except by writing, indorsed upon or attached to it, an oral waiver by an agent of proofs of loss is not binding on the company.—Gould v. Dwelling-House Ins. Co., 90 Mich. 302.

§ 243. ——Denial of liability on other grounds as waiver.

Denial of liability on specific grounds as waiver of other grounds, see ante § 185.

¶ 991. The denial by an insurance adjuster of liability on part of the company constitutes a waiver of the filing of proofs of loss.—Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270.

¶ 992. An insurer who has absolutely denied liability for a loss is estopped from objecting to the want or sufficiency of the preliminary proof thereof; and a court will not presume reasons to support his refusal to receive such proof if seasonably offered.—O'Brien v. Ohio Ins. Co., 52 Mich. 131.

¶ 993. An insurance company can waive strict compliance with the terms of its policies as to furnishing proofs of loss; and where it does waive such proofs, either expressly or by a course of conduct calculated to throw the insured off his guard, as by a distinct refusal to pay the loss, based upon some other defense, so that proofs are not furnished within the time fixed in the policy, it cannot afterwards take advantage of the delay and set it up as a defense to an action upon the policy.—Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

¶ 994. An insured person who is notified by an agent of the insurance company that the company absolutely refuses to pay a loss is excused from furnishing proof of the loss

or demanding payment before bringing suit on the policy; especially if an agent of the company has made investigation.—O'Brien v. Ohio Ins. Co., 52 Mich. 131.

¶ 995. Where the proofs of loss did not comply with the requirements of the policy, the insurer, by denying all liability, and by claiming that the policy had been canceled and that no valid insurance existed upon the property, was estopped from objecting to the sufficiency of such proofs.—Lum v. United States Fire Ins. Co., 104 Mich. 397.

¶ 996. An insurer's refusal, within the time limited for furnishing proofs of loss, to pay the loss, relieves the assured from the necessity of furnishing such proofs.—Young v. Ohio Farmers' Ins. Co., 92 Mich. 68.

¶ 997. An insured person is excused from making proofs of loss by notice from the insurer that it does not propose to pay or adjust his loss because it believes he set fire to the insured premises.—Coryeon v. Providence-Washington Ins. Co., 79 Mich. 187.

¶ 998. No proof of loss was necessary to be made, where after being notified of a loss, the fire insurance company immediately answered that it had canceled the policy on the ground of the violation of a condition contained therein.—Improved Match Co. v. Michigan Mut. F. Ins. Co., 122 Mich. 256.

¶ 999. The rejection of a claim by a sick benefit association on the ground that the member has a disease not covered by the policy and that he is not entirely confined to the house waives the right to have a final proof of the disability filed within the time prescribed by the contract.—Hoffman v. Michigan Home & Hospital Ass'n, 128 Mich. 323.

¶ 1000. Where an insurance company is notified of a loss under a fire policy issued by it and it sends an adjusting agent to inquire into the loss, and such agent, while engaged in, or at the conclusion of, such business, refuses payment, and denies all liability of the company under the policy, such action by the adjuster constitutes a waiver of proof of loss by the company.—Popa v. Northern Ins. Co. of New York, 192 Mich. 237.

§ 244. ——Effect of waiver.

¶ 1001. Where defects in the proofs of loss of insured property are found to have been waived, any objection to the certificate attached to the proofs is disposed of by the verdict, and presents no legal question.—Mercantile Ins. Co. v. Holthaus, 43 Mich. 423.

XVI. ADJUSTMENT OF LOSS OR BENEFITS PAYABLE.

§ 245. Arbitration in general.

Notice, time, demand or request for arbitration, see post § 246.

Waiver or loss of right to arbitrate, see post § 247.

Matters which may be submitted, see post § 248.

Arbitrators or appraisers, see post § 249.

Defects, fraud or misconduct in arbitration, see post § 250.

Adjusting board or tribunal set up by mutual association, see post § 251.

Appraisal of loss, see post § 252.

Validity and conclusiveness of settlement or adjustment, see post § 253.

Effect of arbitration on other rights, see post § 254.

Examination of insured under oath, see post § 255.

Action to set aside settlement of loss, see post § 256.

Submission to arbitration as condition precedent to bringing suit on policy, see post § 268.

Participation of insurer in adjustment of loss as ground for estoppel against forfeiture or avoidance, see ante § 182.

Offer of compromise, settlement or arbitration as ground for estoppel against forfeiture or avoidance, see ante § 183.

What consequential losses are covered in property insurance, see ante § 97.

Reasonableness and validity of provision for arbitration, see post ¶ 1062.

General law of arbitration, see Arbitration.

¶ 1002. A number of fire insurance companies may join in an arbitration to determine the value of a loss without mixing separate controversies, where the policies are all alike, except in the names of the companies and are those prescribed by the laws of the state.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

§ 246. ——Notice, time, demand, or request for arbitration.

¶ 1103. A demand for an arbitration by a fire insurance company, after knowledge of the amount claimed by plaintiff, together with the fact that both parties entered into the arbitration, was proof of the existence of such a disagreement as justified the arbitration, under a provision of the policy providing for an arbitration in case of disagreement as to the amount of the loss.—Kersey v. Phoenix Ins. Co., 135 Mich. 10.

¶ 1004. Where the assignees of fire insurance policies, acting under the erroneous impression that an action could be brought in the state of Michigan, without requiring an appraisal such as was required as a condition precedent to the bringing of an action in the foreign state, and, on examining the plea filed, find that an appraisal is a condition precedent to the bringing of a suit in the foreign state and therefore controlling in an action in the courts of Michigan, demand an appraisal, which is refused, such demand is not too late.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

¶ 1005. An insurance policy provided that, in case of disagreement as to the amount of a loss thereunder, it should be ascertained by the appraisers, and that the amount of the loss should be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss were received by the company. Fifty-seven days after proofs of loss were received, to which no objection had been made, and when it was too late to select arbitrators and secure an appraisal until after the period fixed for the payment of the loss, dating from the furnishing of proofs of loss, had expired, the company served on the insured a demand for an appraisal, but naming no appraiser. Held too late to suspend the right of action of the insured on the policy.—Zimeriski v. Ohio Farmers' Ins. Co., 91 Mich. 600.

§ 247. ——Waiver or loss of right to arbitrate.

¶ 1006. An arbitration clause in an insurance contract is waived where auditors authorized to fix the amount of the loss reject the claim entirely and the insured is so notified.—Denton v. Farmers' Mut. Fire Ins. Co., 120 Mich. 690.

¶ 1007. A mutual fire insurance company may not set up as a defense to an action on a policy a by-law providing that in case of disagreement with the owner of property insured as to the loss incurred or damages payable, such difference shall be determined by arbitration; that in case of such disagreement the secretary shall notify the insured and give him opportunity to appear before the arbitration committee and present his claim and that the decision of such committee shall be final, and that no suit in law or in equity shall be commenced by the insured to determine such matter, where, after a fire, the officers of the company are notified and make an investigation and notify the insured that they deny all liability and refuse to pay the loss and give no notice of arbitration proceedings.—Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589.

§ 248. ——Matters which may be submitted.

¶ 1008. An agreement to submit to arbitration all matters in controversy between the parties is void.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 1009. Where a submission to an award provides that a fire insurance company and the insured have agreed to submit to a final settlement all things arising out of the policy of the insurance and the subsequent destruction by fire of part of the property insured, and the policy provides for settlement of all disputes by award and the charter provides that in case of loss, arbitration shall determine the amount of the loss and the liability of the company, and a by-law provides that all questions or disputes be settled in accordance with the charter and the state statutes, the question of the validity of the policy or its revocation for fraud is not properly before the arbitrators where not raised previous to submission.—Kearney v. Washtenaw Mut. Fire Ins. Co., 126 Mich. 246.

¶ 1010. A provision in a fire insurance policy giving the company's arbitration committee jurisdiction in case of "disagreement as to the amount of valuation, in whole or in part" was not applicable to a controversy in which the disagreement related to the validity of the claim.—Hogadone v. Grange Mut. Fire Ins. Co., 133 Mich. 339.

¶ 1011. A submission of "matters and things arising from and growing out of and based upon" the policy, is construed as referring to the policy and limited to matters and things in dispute and the policy cannot be declared void for fraud.—Kearney v. Washtenaw Mut. Fire Ins. Co., 126 Mich. 246.

¶ 1012. Under a charter of a mutual fire insurance company providing that in case of loss auditors living in the county should meet and investigate the cause of the loss and, if found not due to carelessness or to violation of the rules of the company, ascertain the amount of loss, their determination to be final unless arbitration was asked for, the auditors have no authority to pass upon a claim that the insured intentionally set fire to his building, the power conferred being limited to fixing the amount of the loss.—Denton v. Farmers' Mut. Fire Ins. Co., 120 Mich. 690.

§ 249. Arbitrators or appraisers.

Appraisal of loss, see post § 252.
Selection of arbitrators, see also post ¶ 1016.
Adjusting board or tribunal set up by mutual associations, see post § 251.

¶ 1013. A policy provided that the insurer and insured should each select an appraiser to fix the loss, and the two appraisers should choose an umpire. An umpire was agreed upon by the appraisers, but he remained undecided for a time about serving. The insured's appraiser then chose an umpire, appraised the loss, and plaintiff started suit. Held, plaintiff could not recover, as it was his duty to continue the effort to secure an umpire as provided by the policy.—Baumgarth v. Firemen's Fund Ins. Co., 152 Mich. 479.

§ 250. Defects, fraud or misconduct in arbitration.

¶ 1014. The insurance company selected as its appraiser an insurance adjuster who resided in a city 135 miles distant from the city where the fire occurred, and where the appraiser selected by the insured resided. The two appraisers disagreed as to the selection of the third appraiser. The company's appraiser suggested the names of three persons, residing at a distance from the place where the fire occurred, and the appraiser for the insured offered the names of twelve

residents of the locality from which the jury, in case of a suit, would be drawn. The appraiser for the company assigned no valid reason for a refusal to accept one of the twelve, the only reason given being that he did not care to take the chances of getting an appraiser that would be partial. Held, that as the conduct of the company's appraiser in refusing to agree on a third was inexcusable, and virtually amounted to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit did not bar an action on the policy.—Brock v. Dwelling House Ins. Co., 102 Mich. 583.

¶ 1015. The conduct of a fire insurance company's arbitrator in failing to agree to the selection of a third arbitrator was not under the circumstances, such conduct as warranted an inference of bad faith and the abandonment of the arbitration by the insured, in the absence of evidence that the men proposed by the company's arbitrator were not fair and competent, and that there was not a valid objection to those proposed by the insured's arbitrator.—Kersey v. Phoenix Ins. Co., 135 Mich. 10.

¶ 1016. The selection by a fire insurance company of one as an arbitrator, who had sustained a loss by the fire in question, was not such evidence of bad faith as to defeat the real object of the arbitration, and absolve plaintiff from compliance with a provision in the policy requiring that in the event of disagreement as to the amount of the loss, such amount should be submitted to arbitration before the commencement of suit.—Kersey v. Phoenix Ins. Co., 135 Mich. 10.

§ 251. Adjusting board of tribunal set up by mutual association.

¶ 1017. Members of a voluntary society may set up a tribunal to adjust the differences that arise between the association and its members, and make its decision final in the absence of bad faith or a refusal to act or to pay after an adjudication has taken place.—Patrons' Mut. Fire Ins. Co. of Michigan, Ltd. v. Attorney General, 166 Mich. 438.

§ 252. Appraisal of loss.

Necessity and sufficiency of inventory in proof of loss, see ante § 237.

Appointment and selection of appraisers, see ante § 249.

Appraisal of loss as condition precedent to action on policy, see post ¶¶ 1058, 1060, 1064.

¶ 1018. A policyholder made his proofs of loss, and, without waiting for any action by the company, asked for the appointment of appraisers, and they were appointed. Held, that the insurer cannot be heard to say that, inasmuch as no effort had been made by the parties looking to an adjustment, the appointment of appraisers was premature, and that an appraisal must be regarded as having been required within the language of the policy.—Brock v. Dwelling House Ins. Co., 102 Mich. 583.

§ 253. Validity and conclusiveness of settlement or adjustment.

Return of payment made by way of adjustment of claim as condition precedent to bringing suit on policy, see post ¶ 1054.

¶ 1019. Under an agreement of submission between the insurer and insured by which the appraisers are to estimate the actual cash cost of replacing the property and in case of depression from use, age, etc., a proper deduction to be made, the fact that the appraisers allowed nothing for foundry patterns out of date or "dead" and a small amount for those which might possibly be used, will not render the award void.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

¶ 1020. An agreement between the adjuster and the insured as to the quantity and value of the property destroyed by a fire, evidenced by a schedule of loss signed by the adjuster, is conclusive on both the insurer and the insured, where it was adopted by the insured in presenting his proof of loss.—Wilms v. New Hampshire Fire Ins. Co., 194 Mich. 656.

¶ 1021. An appraisal of loss as a result of arbitration under an insurance policy is only prima facie correct and a party attacking it assumes the onus probandi.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

¶ 1022. Where the holder of an insurance policy, after revoking an agreement for arbitration, submits proofs of loss, in which he adopts, item by item, the appraisal made by the arbitrators before such revocation, and which contains every article of goods, and the amount of the damage thereto, such appraisal is binding upon him in a suit upon the policy.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 1023. Where a policy insuring lumber contained an agreement for arbitration as to the amount of loss, which the policy limited to the actual cost of producing the lumber destroyed, and on receiving proofs of loss the insurer wrote that it disputed the amount of loss claimed, and insisted that it be estimated under the contract, such a letter was not a waiver of arbitration.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 1024. By-laws of a mutual benefit association providing that "In case any question shall arise as to the validity of any claim * * * the same shall be arbitrated by a board of three registered physicians in good standing" that "all awards * * * must be signed by all the arbitrators, and if not so signed there is no legal award," and that "no suit in law or equity shall be commenced or maintained," are reasonable and

valid, and an action cannot be maintained upon an award signed by two only of three arbitrators.—Russell v. North American Ben. Ass'n, 116 Mich. 699.

§ 254. Effect of arbitration on other rights.

¶ 1025. A submission to arbitration does not constitute a waiver of other provisions in a fire insurance policy, such as a provision for proof of loss, where the policy expressly stipulates to the contrary.—Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640.

§ 255. Examination of insured under oath.

Examination of insured under oath as condition precedent to bringing action on policy, see post § 269.

¶ 1026. Where a fire insurance policy provides that the insured, as often as required, shall submit to examinations under oath by any person named by the company, the insured is entitled to the presence of her attorney.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 226.

¶ 1027. An insured does not refuse to submit to an examination under a fire insurance policy after the loss where she simply declines to submit to an examination in the absence of her attorney, and the attorney, upon his return, and after commencement of an action, expresses a willingness to arrange for an examination.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 226.

¶ 1028. A stipulation in a fire insurance policy that the assured, in case of loss, shall, if required, submit to a private examination, is, if valid at all, so clearly opposed to the general policy of the law that no intendments will be made in pursuance of it; and where the assured person or his agent was notified that the company desired such an examination, the letter containing such notification was properly excluded from evidence, as it was not in strict accordance with the stipulation.—McGraw v. Germania Fire Ins. Co., 54 Mich. 145.

§ 256. Action to set aside settlement of loss.

Actions on policy or under it in general, see post XX.

¶ 1029. In a suit to set aside an award of fire insurance all insurance companies who participated in the award are necessary parties.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

¶ 1030. Delay of nearly three years in instituting a suit to set aside a compromise of a marine insurance loss on the ground of fraud in concealing salvage claims and to reinstate the written abandonment of the steamer to the underwriters as a constructive total loss held to constitute laches.—Loud v. Federal Ins. Co., 195 Mich. 60.

¶ 1031. By falsely representing to a son that insurance obtained upon his mother's life, payable to the son if he survived her and if not, to her estate, and for which he had paid the premiums in her behalf, was void as a wager contract, the insurance company's officers obtained a surrender of the policy on return of the premiums. Held, that a bill would lie in the son's behalf to revive the policy.—Heinlein v. Imperial Life Ins. Co., 101 Mich. 250.

¶ 1032. In a suit to set aside an award between an insurer and insured on the ground that the appraisers refused to give the parties a proper hearing, testimony that the appraisers promised to come to the factory on a certain day to allow the complainant to convince them that certain patterns were partially destroyed will not prevail in the absence of any evidence to show that the insurer interfered in any way with the taking of testimony and evidence and upon a showing that the appraisers had examined the property several times and no demand was made for an open hearing or sworn testimony.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

¶ 1033. On suit to set aside an award between insurer and insured on the ground of gross inadequacy, testimony of a much higher value being set on the goods destroyed by the insured and his witnesses will not justify setting aside the award where the property consists largely of foundry patterns of varied age and usefulness and machinery, as these are of a nature to admit of a wide difference of opinion as to the actual value.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

XVII. PAYMENT AND DISTRIBUTION OF MONEY AMONG CLAIMANTS.

§ 257. In general.

Payment to mortgagees, pledgees, reversioners or persons in secondary interest, see post § 258.

Settlement with only one of parties interested, see post § 259.

Suits and proceedings to determine rights in insurance money, see post § 260.

Return of payment made by way of settlement or adjustment as condition precedent to suit on policy, see post ¶ 1054.

Satisfaction of insurance obligation and discharge by restoration or otherwise than in money, see post XVIII.

Mode, medium and sufficiency of payment in general, see Payment, I.

Exemption of insurance benefit, see Exemptions § 25.

Rescission of compromise settlement made through fraud and collusion between insurer and guardian of beneficiary, see Rescission.

Nature of fund resulting to county from insurance on county buildings, how applied, see Counties § 37.

Rights under will in avails of policy payable to persons appointable by insured, see Wills, VI.
Insurance on decedent's life as asset of his estate, see Estates of Decedents § 74.
Exemption of insurance from bankruptcy by agreement with trustee, see Bankruptcy § 4, ¶ 15.
Loss payable as fund or debt subject to garnishment, see Garnishment § 35.
Provision as to time within which loss payable in standard form of fire insurance policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 1034. The accidental destruction by fire of goods in a trespasser's hands does not entitle him to an assignment of the owner's policies of insurance, and he cannot claim the benefit, by way of reducing damages, of the insurance money paid such owner.—Perrott v. Shearer, 17 Mich. 48.

¶ 1035. In a case of accident insurance where there is nothing in the certificate to show to whom specifically payment is to be made, it is proper to treat the contract as one shown to have been made between the insurer and decedent, and as providing that in case of death the loss should be payable to the wife of the assured.—Enright v. Standard Life & Accident Ins. Co., 91 Mich. 238.

¶ 1036. Where a married woman, the owner of an equitable interest in a house and lot, obtained a policy of insurance thereon in favor of the owner of the legal title, the loss must be paid upon destruction of said premises, to such legal owner, and the fact that there is a dispute as to whether the policy was intended to be made in the name of the woman or her husband, is not a good defense to a suit on the policy, by the woman.—Quackenbush v. Citizens' Ins. Co. of Missouri, 150 Mich. 555.

§ 258. Payment to mortgagees, pledgees, reversioners, or persons in secondary interest.

¶ 1037. Where one mortgages a house and makes the insurance policy thereon payable to another, to secure the latter for acting as his surety on a note, the mortgagor has no equitable right, in afterward selling the house, to surrender the policy; and if the purchaser knows the facts and takes out a new policy, the mortgagee still has an equitable interest in it to the amount of the obligation of suretyship, and can enforce his demand in a suit in equity against the purchaser and the insurance company. The mortgagor would not be a necessary party; the purchaser would have no relief against him. But a decree compelling the application of the insurance money to the payment of the mortgage should be conditional on the surrender or satisfaction of the note as well as the release of the mortgage.—Miller v. Aldrich, 31 Mich. 408.

¶ 1038. If a mortgagee obtains insurance on his own account, and the premium is not paid by or charged to the mortgagor, the latter cannot claim the benefit of a payment of the insurance.—Pendleton v. Elliott, 67 Mich. 496.

¶ 1039. If a policy insuring mortgaged property contains no stipulation for subrogation in case of payment to the mortgagee, and there is any arrangement between the mortgagor and mortgagee by which the mortgagor becomes liable to pay for the insurance, the latter is entitled to the benefit thereof and to have it applied pro tanto in reduction of the mortgage debt.—Pendleton v. Elliott, 67 Mich. 496.

¶ 1040. Where in pursuance of an agreement with the reversioners, a life tenant insures a house for the full value, the insurance fund must be used in rebuilding or invested so that the income and the principal shall go to the respective parties and a decree, that the insurance company pay the money into court to be retained until further order, and income to be paid to the life tenant, will be sustained.—Convis v. Citizens' Mut. Fire Ins. Co. of Calhoun County, 127 Mich. 616.

§ 259. Settlement with only one of parties interested.

¶ 1041. An insurance policy was payable to the wife of insured and in case of her death to her children. She died and upon the death of insured, the company in good faith paid the whole amount to a son of the wife who had the policy in his possession and who stated that he was her only child and heir, and who was adjudged by the orphan's court to be entitled to the fund. Action was brought by the children of a stepson of the wife under the claim that insured intended that the stepson should share in the proceeds. Held that verdict should have been directed in favor of defendant.—Voss v. Connecticut Mut. Life-Ins. Co., 131 Mich. 597.

§ 260. Suits and proceedings to determine rights in insurance money.

Action on policy in general, see post XX.

¶ 1042. Equity has jurisdiction of a suit by reversioners against a fire insurance company and the life tenant to determine the rights to the insurance fund on a house insured by the life tenant by agreement with the reversioners.—Convis v. Citizens' Mut. Fire Ins. Co. of Calhoun County, 127 Mich. 616.

XVIII. DISCHARGE BY RESTORATION OR OTHERWISE THAN IN MONEY.

§ 261. In general.

Discharge in money and payment and distribution thereof among claimants, see ante XVII.

Opportunity to elect to restore or pay loss as condition precedent to bringing action on policy, see post § 270.
Prohibition of municipal regulation against repair of building partially destroyed by fire as a "taking," see Eminent Domain ¶ 82.

¶ 1043. A wooden building situated within the fire limits of Detroit was injured by fire, and, by the ordinances of that city, could not be repaired without the consent of the common council. This consent was refused. The building was insured for $2,000, and the policy contained a clause that, in case of loss or damage to the property, it should be optional with the company to rebuild or repair the building within a reasonable time. The cost of repairing the building would be much less than the amount of the insurance, but without leave to repair, the building, which before the fire was worth $4,000, would now be worth less than $100. It was held that the insured was entitled to recover the whole insurance, and the insurers could not discharge their obligation by tendering the cost of repair.—Brady v. Northwestern Ins. Co., 11 Mich. 425.

XIX. SUBROGATION AND OTHER RIGHTS OF INSURER.

§ 262. In general.

Subrogation rights in general, see Subrogation.
Provision for subrogation in standard form of fire insurance policy, see Pub. Acts 1917, No. 256, part IV, chap. II, § 6.

¶ 1044. An insurance company subrogated on settling a loss to a part of the claim of the insured against one whose negligence caused the loss cannot sue to recover such part only of the claim.—Continental Ins. Co. v. H. M. Loud & Sons Lumber Co., 93 Mich. 139.

§ 263. Actions to enforce right.

Enforcement or protection of right of subrogation in general, see Subrogation, II.

¶ 1045. In an action by an insurance company to recover against an automatic sprinkler company for damages to an insured stock of goods on account of the negligent installation of a sprinkler system, under its right of subrogation and an assignment from the owner of the goods, the question of negligence of the insurance company in its inspection of the sprinkler system is not in issue as the insurer owed no such duty to the automatic sprinkler company.—United States Casualty Co. v. Bagley, 129 Mich. 70.

¶ 1046. Where insurance companies are subrogated to the rights of the owner of an ice house destroyed by fire set by defendant's locomotive, such subrogation agreements and a contract under which the owner of the building was to bring suit in behalf of himself and of the insurance companies were properly excluded.—Union Ice Co. v. Detroit & Mackinac Ry. Co., 178 Mich. 346.

XX. ACTIONS ON POLICY OR UNDER IT.

A. RIGHT OR CAUSE OF ACTION, AND TIME TO SUE.

§ 264. In general.

Accrual or maturity of right, see post § 265.
Bar of action by default or delinquency, see post § 266.
Conditions precedent to action, see post §§ 267-270.
Time to sue and loss of right by delay, see post §§ 271-277.
Defenses open to insurer, see post § 278.
Parties and interpleader, see post XX, B.
Pleading and evidence, see post XX, C.
Trial practice, instructions and judgment, see post XX, D.
Actions by and against agents, see ante §§ 33, 34.
Actions for reinstatement, see ante § 210.
Action to set aside settlement of loss by arbitration, see ante § 256.
Suits and proceedings to determine rights in insurance money, see ante § 260.
Actions to enforce insurer's right of subrogation, see ante § 263.
Splitting cause of action by permitting one set of beneficiaries to sue alone on policy, see also post ¶ 1104.
General law of actions, see Actions.
Actions on certificate or contract of benefit insurance, see Fraternal Associations § 69.
Actions and proceedings for benefits in fraternal association, see Fraternal Associations, VIII.
Recovery of balance after attempted but abortive compromise for less sum, see also Accord and Satisfaction, § 8.
Jurisdiction of state courts in general average cases and marine insurance, see Courts § 96.
Rescission and cancellation suits, see Rescission.
Enjoining action on insurance policy obtained by fraud, see Injunctions § 34.
Invalidity of any article, by-law, resolution or policy provision of life or casualty insurance company prohibiting member or beneficiary from bringing suit, see Pub. Acts 1917, No. 256, part II, chap. I, § 8.

¶ 1047. An action on a life insurance policy is a single cause of action and cannot be split by permitting one set of beneficiaries to sue alone on the policy.—Voss v. Connecticut Mut. Life Ins. Co., 119 Mich. 161.

¶ 1048. There can be no splitting of causes of action on a single insurance policy.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 1049. An insurance policy effected in another state on property in Michigan may be

sued upon here; the right of action is transitory.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1050. In an action on a fire insurance policy by a mortgagee, where after being notified of the loss, the company sent an adjuster will full authority to adjust losses and make settlements, and the adjuster fixed plaintiff's proportion of the loss and promised that payment would be made to him within 60 days, and where defendant claimed that there could be no splitting up of causes of action, plaintiff was entitled to recover under the common counts even though he could not recover upon the policy itself.—Granger v. Manchester Fire Assur. Co., 119 Mich. 177.

§ 265. Accrual or maturity of right.

Bar of action by default or delinquency, see post § 266.

Right to equitable relief where written contract does not accord with oral understanding of parties, see also ante ¶ 206.

¶ 1051. Where a mutual benefit association disclaims all liability upon a membership contract which provides for the payment of the proceeds of a single assessment upon its members, suit is properly instituted to determine whether a fireman retired because of injury in course of duty before twenty-five years' service is entitled to benefit of membership.—Neville v. Detroit Firemen's Fund Ass'n, 104 Mich. 149.

§ 266. Bar of action by default or delinquency.

Loss of right by delay or laches, see post § 271.

¶ 1052. The fact that an insurance company has expressly reserved the right to sue for past due assessments will not enable the insured to recover for losses sustained while in default where the by-laws provide that the insured shall have no claim for losses while in default.—Hill v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 129 Mich. 141.

§ 267. Conditions precedent to action.

Submission to arbitration or award or appraisal by arbitrators, see post § 268.

Examination of insured under oath, see post § 269.

Opportunity to elect to restore or pay loss, see post § 270.

Necessity for pleading compliance with conditions precedent in declaration on policy, see post ¶ 1127.

¶ 1053. A life insurance policy was made payable to the insured at the expiration of twenty years from its date, in case he should then be living. If he should die in the meantime, it was payable to his mother, if living, otherwise to his brothers and sisters. It was further provided that upon the surrender of the policy, duly receipted by the insured and the beneficiaries, within three months after the expiration of the third or any subsequent year for which premium had been paid, the company would pay a specified cash value. Held, that the insured could not maintain an action to recover such cash value without first obtaining receipts from all of the beneficiaries.—Lockwood v. Michigan Mut. Life Ins. Co., 108 Mich. 334.

¶ 1054. The return or tender of the amount paid to an insured in adjustment of his claim for sick benefit, prior to beginning suit on the policy, in which he claimed that the adjustment was the result of misrepresentation, was not waived by the statement in a letter to the insured's attorney stating that its adjuster was in error in telling the insured that his policy could be canceled, but that the company had paid enough anyway, and by the subsequent reinstatement of the insured.—Slater v. United States Health & Acc. Ins. Co., 133 Mich. 347.

§ 268. ——Submission to arbitration or award or appraisal by arbitrators.

Waiver of submission, see ante ¶ 781.

Arbitration and adjustment of insurance in general, see ante XVI.

¶ 1055. Where a policy of insurance in a benefit order makes the by-laws a part of the insurance contract, and such by-laws provide that the plaintiff before suing on the policy must submit his claim to the board of arbitration, such submission is a condition precedent to his right to recover.—Allen v. Patrons' Mut. Fire Ins. Co. of Michigan, Ltd., 165 Mich. 18.

¶ 1056. The fact that an insurance policy contains a provision that any claim thereunder shall be submitted to arbitration does not prevent a suit for recovery thereon, where it is also provided in the policy that no suit shall be brought thereon within 90 days and no recovery shall be had unless the suit was commenced within six months after assured's death.—Chadwick v. Phoenix Accident & Sick Benefit Ass'n.—143 Mich. 481.

¶ 1057. Notwithstanding a provision in a fire insurance policy requiring the submission to arbitration in case of disagreement, before commencement of suit, that the award shall be prima facie evidence of the amount of the loss, the submission to arbitration was a condition precedent to the commencement of suit.—Kersey v. Phoenix Ins. Co., 135 Mich. 10.

¶ 1058. Where the insurance policy calls for an appraisal, the insured has no right of action until such appraisal is made.—Baumgarth v. Firemen's Fund Ins. Co., 152 Mich. 479.

¶ 1059. An agreement in a policy of insurance to submit all questions of loss to arbitration, on the written request of either party,

will not bar an action on the policy, the agreement being a revocable one, and there being no provision for forfeiture in the event of noncompliance with it; especially where no such request for arbitration has been made. Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633.

¶ 1060. A condition in a fire insurance policy that a loss thereunder shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss required in the policy have been received by the company, including an award by appraisers when appraisal has been required, makes such an appraisal when required, a condition precedent to the right to sue; and the company has a reasonable time within the sixty days after proofs of loss have been furnished in which to move with respect to the ascertainment or estimate of the loss.—Brock v. Dwelling House Ins. Co., 102 Mich. 583.

¶ 1061. The articles of a fire insurance company provided that no suit at law or in equity should be commenced or maintained by any loser to determine the justice of his claim, the validity of the policy, and the liability of the company, but that the board of arbitration of said company should have exclusive jurisdiction to determine all controversy between the loser and the company, and such determination should be binding and conclusive upon any such loser and the company. Section 10 of Act No. 262 of the Laws of 1895, provides that suit at law may be prosecuted by any member for claims which may have accrued if payments are withheld more than sixty days after such claims shall become due. Held, the articles were not in violation of such statute, since the statute gives the right of suit only for accrued claims, and the articles provide that no claim shall accrue until admitted by the board of arbitration.—Patrons' Mut. Fire Ins. Co. of Michigan, Ltd. v. Attorney General, 166 Mich. 438.

¶ 1062. An agreement in an insurance policy to submit the amount of "loss or damage" in case of fire to arbitration, and making such arbitration a condition precedent to suit, is reasonable and valid, and enforceable whether the loss is total or partial.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 1063. An insurance policy provided for arbitration as to the amount of loss, giving the insurer the right to take the property at the value fixed by the arbitrators, and prohibiting action on the policy until award made. After fire and partial destruction, an arbitration agreement was made which confined the appraisers to the question of damage to the goods not wholly destroyed, but this was subsequently revoked by the assured, who then had the goods appraised and sold. Held, that by the agreement to arbitrate only the damage to goods injured, any other arbitration provided for by the policy was waived; that by the revocation the assured lost his right to sue on the policy, which right could only be regained by a reasonable offer to submit the amount of damages to arbitration; and that after the goods had been disposed of, an offer to submit to such arbitration came too late.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 1064. Under a Michigan standard fire insurance policy providing that, in case of "disagreement as to the amount of loss, the same shall be ascertained by" appraisers, whose award "shall be prima facie evidence of the amount of such loss"; that the loss shall not become payable until sixty days after notice and proofs of loss have been received, "including an award by appraisers when appraisal has been required"; and that no suit on the policy shall be sustainable until after full compliance by the insured with all the requirements of the policy—an appraisal is a condition precedent to suit only when one "has been required" by a demand; and where proofs of loss have been seasonably furnished, and no appraisal has been demanded for eight months after the fire, suit is properly brought.—National Home Building & Loan Ass'n v. Dwelling House Ins. Co., 106 Mich. 236.

§ 269. ——Examination of insured under oath.

Examination of insured under oath in general, see ante § 255.

¶ 1065. The provision of a fire insurance policy relating to the examination of the insured under oath by the company and stating that no action on the policy may be maintained until such requirement has been complied with, is a reasonable and valid one, and one who without cause refuses to submit to an examination is precluded from recovering on the policy.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 226.

§ 270. ——Opportunity to elect to restore or pay loss.

Discharge by restoration in general, see ante XVIII.

¶ 1066. A claim under a fire insurance policy does not mature until the company has decided whether it will exercise the right to rebuild, if such a right is reserved.—Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

§ 271. Time to sue and loss of right by delay.

Provisions in policy requiring action within specified time, see post § 272.

Provisions forbidding action until certain time, see post § 273.

Provisions in conflict with statutes, see post § 274.

Pendency of other actions or proceedings, see post § 275.

Waiver of time limitation or estoppel to assert, see post § 276.

Extension of time, see post § 277.
Loss of right to sue to set aside arbitration by laches, see ante ¶ 1030.

¶ 1067. Under Act 277, P. A. 1905, How. 2nd Ed. § 8328, an action on Michigan standard fire insurance policy must be commenced within twelve months from the date of the fire.—Dahrooge v. Rochester German Ins. Co., 177 Mich. 442.

¶ 1068. Under a provision in an insurance policy that the amount thereof should not be "payable" until the expiration of 60 days after notice, and a statute which provides that action shall not be brought until 60 days after the claim shall have become due, the suit may be brought 60 days after notice since the word "due" in the statute does not mean the same as "payable," and the time does not run from the time that the amount is "payable" under the policy.—Putze v. Saginaw Valley Mut. Fire Ins. Co., 132 Mich. 670.

¶ 1069. Comp. Laws 1897, § 9758, How. 2nd Ed., § 13571, providing that in cases where action has been commenced within the time limited, and has failed for specified reasons, the time for commencing action is extended, has no application to an action on a Michigan standard fire insurance policy. Dahrooge v. Rochester German Ins. Co., 177 Mich. 442.

¶ 1070. In determining whether an action on an insurance policy was brought within the time permitted, the summons must be sued out and delivered or transmitted to an officer of the proper county, with the bona fide intention of having it served.—Peck v. German F. Ins. Co., 102 Mich. 52.

§ 272. ——Provisions in policy requiring action within specified time.

Validity of condition requiring action within specified time, see ante ¶ 445.
Invalidity of provision in life insurance policy limiting time within which to bring suit thereon, see Pub. Acts 1917, No. 256, part III, chap. II, § 4.

¶ 1071. Recovery under a Michigan standard form insurance policy was barred by the insured's failure to begin his action within 12 months of the happening of the loss.—Barry & Finan Lumber Co. v. Citizens' Ins. Co., 136 Mich. 42.

¶ 1072. Where a fire insurance policy provides that no suit or action thereon for the recovery of any claim shall be sustainable unless commenced within twelve months next after the fire, a suit cannot be maintained unless it is in fact commenced within the year specified in the policy.—Peck v. German Fire Ins. Co., 102 Mich. 52.

¶ 1073. A provision in a benefit certificate, requiring suit to be brought within nine months after the death of the member, is operative, where all negotiations relating to a settlement were terminated by a denial of liability on the part of the company within forty-five days after the death of the insured. —Shackett v. People's Mut. Ben. Soc., 107 Mich. 65.

¶ 1074. Where an accident policy provides that suit thereon must be brought within one year from the time of the accident, there can be no recovery in an action brought after the expiration of the year by a holder who was notified seven months after the accident that the insurer declined to pay his claim and that "it would be better to let the courts decide this matter."—Law v. New England Mut. Acc. Ass'n, 94 Mich. 266.

¶ 1075. Where a policy provides that the insurer shall have sixty days to make payment, and that no action shall be maintained thereon unless commenced within six months after the loss, an action is barred after six months beyond time of fire where the insurer, on the sixtieth day after the loss, repudiated liability, thus excusing proofs of loss, though there had been negotiations before that.—Lentz v. Teutonia Fire Ins. Co., 96 Mich. 445.

¶ 1076. By one of the conditions attached to a fire policy it was provided that no suit should be brought upon it unless within twelve months next after the loss; and in case any suit should be commenced after the expiration of twelve months, the lapse of time should be deemed and taken as conclusive evidence against the validity of the claim. It was held that if such a condition was valid at all it was valid as a contract only; and that the limitation fixed by it must, upon the principle governing contracts, be more flexible in its nature than one fixed by statute, and liable to be defeated or extended by any act of the insurer which prevents actin being brought within the prescribed period.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 1077. Under a marine insurance policy requiring prosecution of a claim within one year of date of loss, where summons was issued within a year from the time the vessel was stranded but not served until a few days thereafter, suit was commenced within the time limited, since the language must be construed most strictly against the insurer and the "date of loss" is ambiguous in that it is uncertain whether it refers to the time a vessel was stranded or while it was being floated, towed and repaired.—Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601.

¶ 1078. What is the "date of loss" under a marine insurance policy requiring commencement of suit on claims within one year of the date of loss, where a vessel was stranded and subsequently floated and repaired, quære.—Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601.

§ 273. ——Provisions forbidding action until certain time.

¶ 1079. Where a fire insurance company has sixty days within which to pay a fire loss, and within such period an authorized adjuster declared that the insurance company will not pay such loss, suit may be commenced at once.—Popa v. Northern Ins. Co. of New York, 192 Mich. 237.

¶ 1080. Under a standard fire insurance policy issued by a mutual company, providing that all agreements affecting the policy should be written or printed upon the policy itself and that suit might be brought any time after 60 days after proof of loss, a suit brought more than 60 days after the adjustment of the loss and the refusal to pay on the ground of forfeiture of the policy, and after a statement of the secretary in answer to inquiry whether to commence suit or wait for the executive committee, that he did not think that the committee would do anything was not prematurely brought; although the company claimed that under the terms of the charter and How. St. § 4258 governing mutual companies, suit could not be brought until 60 days after the loss became due.—First Baptist Church v. Citizens Mut. Fire Ins. Co., 119 Mich. 203.

§ 274. ——Provisions in conflict with statutes.

Invalidity of any article, by-law, resolution or policy provision of life or casualty insurance company prohibiting member or beneficiary from bringing suit, see Pub. Acts 1917, No. 256, part II, chap. I, § 8.

¶ 1081. A policy of accident insurance paying a death benefit, which provides that a condition requiring action to be brought within six months from time fixed for furnishing proof of death, shall yield to any statute prohibiting such limitation, is within a statute of a foreign state in which the policy was issued and delivered, declaring that irrespective of any limitation in a policy of life insurance, action may be brought within three years after the cause of action accrues.—Johnson v. Fidelity & Casualty Co. of New York, 184 Mich. 406.

¶ 1082. Whether the right of action on an insurance policy can be limited to a shorter period than is prescribed by the statute of limitations, quære.—Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

§ 275. ——Pendency of other actions or proceedings.

¶ 1083. A provision in the policy of a domestic insurance company that omission to sue for twelve months after a loss should be conclusive against the validity of the claim is not suspended for the period occupied in attempting to sue in foreign jurisdictions.—McIntyre v. Michigan State Ins. Co., 52 Mich. 188.

§ 276. ——Waiver of time limitation or estoppel to assert.

¶ 1084. The Michigan standard fire insurance policy provision requiring commencement of suit within one year of the sustaining of loss was not waived by statements made by mere local agents for taking policies, to the effect that payment would be made and that the insured had more than one year's time for commencing suit.—Barry & Finan Lumber Co. v. Citizens' Ins. Co., 136 Mich. 42.

¶ 1085. Where an insurance company, by its acts and promises of settlement, induces the insured to wait until after the period limited for recovery, the court sitting without a jury, is entitled, on such evidence, to find that the company has waived the limitation clause.—Mastenbrook v. United States Acc. Ass'n, 154 Mich. 16.

¶ 1086. In an action on an insurance policy a letter from defendant company's general counsel, explaining delays, and asking time for further investigation, waives the contract limitation in the policy as to the time of bringing suit.—Dolsen v. Phoenix Preferred Acc. Ins. Co., 151 Mich. 228.

¶ 1087. Claimant in case of waiver by request to wait does not lose his right of action by delaying suit for nineteen months after the receipt of the request, although the time limited in the policy itself was seven months to prove loss and one year to sue.—Turner v. Fidelity & Casualty Co., 112 Mich. 425.

¶ 1088. Where proofs of loss under an insurance policy are received within a reasonable time before the expiration of the period fixed by the policy for bringing suit against it, the company cannot cut off the right to sue by withholding its decision upon the proofs until that period has expired, even though the time allowed for examining the proofs would have consumed it.—Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

¶ 1089. The time limited on a policy of insurance for bringing suit for a loss thereunder held extended where the action did not accrue until after the furnishing of proofs of loss, by reason of continued negotiations for a settlement.—Voorheis v. People's Mutual Benefit Soc., 91 Mich. 469.

¶ 1090. In an action on a standard fire insurance policy commenced after the expiration of the period of limitations in Act 277, Pub. Acts 1905, How. 2nd Ed. § 8328, held, that negotiations between the parties and assurances by the defendant that the claim would be paid did not constitute an estoppel to set up the limitation, where such negotiations were terminated before the expiration of such period.—Dahrooge v. Rochester German Ins. Co., 177 Mich. 442.

¶ 1091. The action of an accident and sick benefit insurance company in writing to the insured in relation to a proposed compromise of his claim that it will hold the matter in abeyance for a few days awaiting a further communication from him, that the proposition made is purely one of compromise, and that the company will in no way waive the conditions of the contract, does not waive a provision of the policy that no action shall be begun thereon after six months from the date on which proofs of loss are required to be filed.—Harris v. Phoenix Accident & Sick Benefit Ass'n, 149 Mich. 285.

¶ 1092. Where the plaintiff became a member of a mutual fire insurance company and received a policy of insurance upon his having executed a note wherein it was provided that in case the note was not paid within a named time the policy should become void and remain so until the note had been paid, such plaintiff is estopped from setting up that defendant did not have the right to accept premium notes as advance payments for assessments and that the taking of the note was an act ultra vires, and that he was therefor not in default for nonpayment.—Hale v. Michigan Farmers' Mut. Fire Ins. Co., 148 Mich. 453.

¶ 1093. Notice to the insured that the insurer will not pay him because it believes he burned the premises rebuts any idea of waiver of the time of limitation as to bringing suit.—Coryeon v. Providence-Washington Ins. Co., 79 Mich. 187.

§ 277. ——Extension of time.

¶ 1094. Where condition of a fire insurance policy provided that suit must be brought upon it within twelve months after the loss, the insured had the whole of the twelve months within which to commence suit, and that the limitation must rest upon the tacit condition, without which it could not be valid, that the insurer should be accessible to the service of process by which suit may be commenced against him, if not for the whole period at least for a sufficient time immediately preceding its close to enable the insured to commence his suit in the ordinary legal mode.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

¶ 1095. Where fire insurance policy contained a condition requiring that suit upon it be commenced within twelve months after loss, and process having been issued before the expiration of the twelve months, returnable two days after their expiration, and no agent of the insurer—a foreign corporation—being found in the county upon whom to make service, and new process being issued on the return of the first, it was held that the failure to commence suit within the twelve months was sufficiently excused; and the second suit, under the circumstances, was brought in season.—Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

§ 278. Defenses open to insurer.

Waiver of defense by failure to plead, see post § 292.

Burden of proof to establish defense that insured burned insured property, see post ¶ 1173.

Estoppel of foreign insurer to defend against its contract on ground that it had no authority to do business, see ante ¶ 51.

Giving receipt in full on payment of disputed claim on policy as bar to action for further amount, see Release.

¶ 1096. An insurance company, when sued upon a policy, cannot, after the beginning of suit, make any objections to paying the losses that are different from or additional to those which it stated before suit.—Castner v. Farmers' Mut. Fire Ins. Co., 50 Mich. 273; Richards v. Washington Fire & Marine Ins. Co., 60 Mich. 420.

¶ 1097. The fact that soon after a fire the assured was notified that the insurer would not pay him, because it was believed he set fire to the premises, enables the company to use such defense under a proper plea and notice even though it was not one of the reasons assigned by the insurer's manager for rejecting proofs of loss.—Coryeon v. Providence-Washington Ins. Co., 79 Mich. 187.

¶ 1098. A provision in a fire insurance policy giving the company's arbitration committee exclusive jurisdiction to determine a controversy as to loss, affords a complete defense to an action on the policy based on such a controversy.—Hogadone v. Grange Mut. Fire Ins. Co., 133 Mich. 339.

¶ 1099. The question of contributory negligence cannot be raised as a defense in an action on an accident insurance policy.—Hunt v. United States Acc. Ass'n, 146 Mich. 521.

¶ 1100. If the right of action upon a policy taken out in the names of several persons having interests is barred as to any it is as to all, and what would be a defense against one would be as much so against his assignee.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 1101. Where it does not appear that an insurer at the time of filing a plea to an action on a policy of fire insurance was aware of a material misrepresentation by the insured in his application for the policy, on such action being dismissed and another begun, the insurer is not estopped from setting up such defense in the latter action.—Jacobs v. Queen Ins. Co., 183 Mich. 512.

B. PARTIES AND INTERPLEADER.

§ 279. Necessary and proper parties.

Mortgagee or lienor of property insured, see post § 280.

Assignee of policy, see post § 281.

Administrator or executor of insured, see post § 282.
Stranger to the policy, see post § 283.
Necessary and proper parties in action to set aside arbitration, see ante ¶ 1029.
Necessary defendant in action on oral insurance contract made by agent without designating company, see also Contracts ¶ 1145.
Sufficiency of parties where parent and minor children as beneficiaries under insurance policy sue as coparties without parent being designated as next friend, see Guardian ad Litem ¶ 6.
Bill by fraternal benefit society to interplead claimants of proceeds of certificate, see Fraternal Associations ¶ 95.

¶ 1102. The person to whom and for whose benefit an insurance policy is issued, and in whose name it stands, is its legal owner, and is the proper person to sue thereon.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 1103. Whoever sues on an insurance policy must be able to enforce the whole of it as a single cause of action.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 1104. The single cause of action on a fire insurance policy cannot be split by permitting one set of beneficiaries to sue alone on it.—Voss v. Connecticut Mut. Life Ins. Co., 119 Mich. 161.

¶ 1105. A policy of insurance taken out by a widow upon her property and that of her minor children is a joint policy even though the interests be several, and suit thereon must be brought by all the insured except where any of them have assigned to others.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 1106. Where each of several persons assured by the same policy has distinct insurable interests they can enforce their rights under the policy in equity if they cannot at law.—Mercantile Ins. Co. v. Holthaus, 43 Mich. 423.

¶ 1107. Where charterers of a vessel have insured it under an agreement with the owners that in case of its total loss the insurance money shall be paid over to them, and have had themselves named in the policy as the parties on account of whom insurance was taken, though the loss was made payable to the owners, the latter have such an interest in the policy as will entitle them to sue upon it in their own name.—Richelieu & O. Nav. Co. v. Thames & Mersey Marine Ins. Co., 58 Mich. 132.

¶ 1108. If two policies of insurance upon personalty have been issued, one to the plaintiff alone, the other to the plaintiff and another, each owning in severalty his respective share, and a fire has occurred destroying the plaintiff's property only, the plaintiff's action upon both policies in his sole name is properly brought.—Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514.

§ 280. ——Mortgagee or lienor of property insured.

¶ 1109. The right of action upon an insurance policy payable to mortgagee therein named as his mortgage interest might appear, is in the mortgagor.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 1110. Persons named in an insurance policy as payees to the extent of a partial interest only, such as mortgagees of part of the property insured, are not thereby entitled to sue on the policy, though the insurer might be protected in paying to them as equitable appointees.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 1111. When a mortgagor binds himself to insure the property but does not do so, and the mortgagee, for his own protection, takes out a policy upon it in the mortgagor's name, but payable to himself, he can sue on it in his own name if he paid the consideration and if it was delivered directly to himself, and covered nothing but the mortgaged property and did not exceed the amount of the mortgagee's interest.—Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co., 48 Mich. 148.

¶ 1112. The vendor under a contract for the sale of land may, under a loss payable clause in a policy of fire insurance on the property issued in the name of the vendee, maintain an action thereon in his own name when the amount of his claim exceeds the amount of the loss. (Affirmed by equally divided court.)—Gourlay v. Insurance Co. of North America, 181 Mich. 286.

§ 281. ——Assignee of policy.

Substitution of assignee of policy as party plaintiff by amendment of declaration, see Pleading, VI.

¶ 1113. Separate interests held by several persons under the same policy of insurance may be united by the assignment of the policy to one who may bring suit upon it.—Mercantile Ins. Co. v. Holthaus, 43 Mich. 423.

¶ 1114. Under Comp. L. 1871, § 5775, How. St. § 7344, permitting the assignee of a chose in action to sue on it in his own name, held, that a corporation to which all individual interests under an insurance policy had been assigned could sue on it in its corporate name.—Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co., 41 Mich. 131.

§ 282. ——Administrator or executor of insured.

Substitution of heir of beneficiary in place of his administrator, see Parties.

¶ 1115. An administrator can sue on an insurance policy for the use and benefit of a

mortgagee, to whom the loss is made payable.—Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

¶ 1116. Where the person designated by a member of a benefit association, pursuant to its by-laws, to receive the death benefit, for the use of the wife and children of the member, declines to act, suit to recover the death benefit is properly brought by the administrator of the estate of the deceased member.—Neville v. Detroit Firemen's Fund Ass'n, 104 Mich. 149.

¶ 1117. A wife, designated as payee in an insurance certificate issued to her husband, having brought suit as administratrix of his estate; may, the events not being affected, waive her rights in favor of the estate, and an appropriate amendment will be regarded by the court as made.—Enright v. Standard Life & Accident Ins. Co., 91 Mich. 238.

§ 283. ——Stranger to the policy.

¶ 1118. A patient cannot recover in tort for malpractice against an insurer furnishing an indemnity insurance contract to his physician by which the insurer agrees to indemnify the physician against loss from liability imposed upon him by law for damages on account of bodily injuries in consequence of malpractice, since there is no privity of contract between the insurer and the patient.—Bowers v. Gates, 201 Mich. 146.

¶ 1119. A trespasser in whose possession were goods destroyed by accidental fire has no rights against insurer on policy running to the owner and no right to benefits of payment made owner.—Perrott v. Shearer, 17 Mich. 48.

§ 284. Intervention and interpleader.

General law of interpleader, see Interpleader.
Pleading in interpleader suits, see also Interpleader § 9.
Determination of trust in proceeds as incident of interpleader, see also Interpleader ¶ 39.
Interpleader by assignee against conflicting creditors of insured as claimants of amount payable, see Interpleader ¶ 13.
Assumption of burden of defense by indemnity insurance company in suit against insured as intervention, see Parties.
Costs to interpleading complaints and between defendants interpleaded, see Costs § 35.

¶ 1120. An insurer which insured a man for $3,500 and took a mortgage from him for the same amount, and whose policy expressly entitled it to withhold from the insured or his assignees the amount of any indebtedness to the company, on being sued by an assignee of the policy upon its maturity with a prayer that the loss payable be decreed a primary fund for payment of the mortgage, to which the assignee had also succeeded by purchase of the land, cannot interplead another assignee also claiming the loss, where the first-named assignee (complainant) had kept up the policy on an understanding that when mature it would pay the mortgage; since the insurer giving such assurance cannot claim that without its fault it has been placed in a situation where it cannot safely decide between the two claimants.—Vogle v. Union Central Life Ins. Co., 147 Mich. 333.

C. PLEADING AND EVIDENCE.

§ 285. Pleadings in general.

Sufficiency of declaration, see post §§ 286, 287.
Bill of particulars, see post § 288.
Pleas and notices of defense, see post § 289-292.
Necessity and sufficiency of affidavit of nonexecution, see post § 293.
Issues, proof and variance, see post §§ 294-295.
Burden of proof and presumptions, see post §§ 296-304.
Admissibility of evidence, see post §§ 305-316.
Weight and sufficiency of evidence, see post §§ 317-327.
Trial practice, instructions and judgment, see post XX, D.
General law of pleading, see Pleading.
Pleading in actions on benefit certificate or contract, see Fraternal Associations § 70.
Sufficiency of bill to make cause triable on equity side by reason of mistake in application producing apparent breach of warranty, see also Equity ¶ 316.

§ 286. Sufficiency of declaration.

Allegation as to plaintiff's interest, see post § 287.
Bill of particulars, see post § 288.
Declaration in general, see Pleading, II.
Amendment of declaration upon insurance policy, see Pleading, VI.
Pleading fraud in bill to cancel policy on that ground, see also Fraud § 96.
Declaration for fraud in obtaining money by adjustment and payment to codefendants, see Fraud ¶ 716.
Matters to be specifically set forth in declaration upon policy of insurance, see 1916 C. C. Rule 22, § 5.
Requisites of declaration on insurance policy, see 1916 C. C. Rule 22, § 5.

¶ 1121. A declaration in an action against an insurance company makes out no cause of action where it counts on a certificate that does not give the terms of the insurance, but refers to a policy which it was beyond the authority of the insurance agent to issue.—Barry v. Boston Marine Ins. Co., 62 Mich. 424.

¶ 1122. In a suit upon an insurance policy, the declaration set forth the date of the issuance and delivery of the policy, the amount and term of the insurance, the pre-

mium paid, the property insured, describing it the same as in the policy, the entire destruction of the property on a given date by fire, the consequent loss to plaintiff, and the refusal of the defendant to pay said loss, and claimed damages in a certain sum. The declaration was not demurred to. Held, that it contained sufficient averments to warrant a recovery under First C. C. Law Rule No. 104, which was adopted for the purpose of avoiding needless prolixity.—Lum v. United States Fire Ins. Co., 104 Mich. 397.

¶ 1123. A declaration in a suit to recover the cash surrender value of a life insurance policy, under a provision guaranteeing the payment of such value upon the surrender of the policy within a specified time, is not fatally defective on error in failing to allege the surrender of the policy; the omission may be presumed to have been supplied by amendment.—Lockwood v. Michigan Mut. Life Ins. Co., 108 Mich. 334.

¶ 1124. A declaration to recover moneys claimed from a benefit society by a member was held bad for attempting to unite in one count a claim founded on one set of regulations of the society with one founded on another and distinct set, and for alleging the mere legal conclusion that the society was indebted to the member, without averring the regulations, the member's performance of conditions, the demand, etc., by which it became liable.—Portage Lake Miners' & Mechanics' Benev. Society v. Phillips, 36 Mich. 22.

¶ 1125. A declaration in a suit against a mutual fire insurance company set forth that plaintiff, being a member of the company, and having bought insured property from another member, applied to the secretary for insurance on it in his own name, tendering the proper amount; that the secretary had authority and actually contracted, but informed him that the property would be regarded as insured, and asked him to keep the money until a formal policy could be prepared; and that before he could get him to make out the policy the property was burned. The declaration gave the charter and by-laws of the company in full, and set out an absolute contract in positive terms. Held, that under Circuit Court Rule 104, which dispenses with prolix declarations on policies of insurance, the declaration made out a good cause of action, and that unless the charter and by-laws made such contracts as it alleged illegal, plaintiff should have been allowed to show that they had been recognized by the company as within the secretary's power.—Gay v. Farmers' Mut. Ins. Co., 51 Mich. 245.

¶ 1126. Where, under the terms of a mutual benefit certificate, plaintiffs are entitled to the sum of $3,000 if an assessment will produce that amount, a declaration alleging that money not exceeding $3,000 is due plaintiffs; that if one assessment should produce less than $3,000 such amount would be received in full of all demands; that the member fully performed on his part, and that defendant became liable and promised to pay said sum but failed to levy an assessment therefor, was sufficient against a denial of any liability, there being testimony that an assessment would produce more than $3,000, and it being defendant's duty to make one.—Silvers v. Michigan Mut. Ben. Ass'n, 94 Mich. 39.

¶ 1127. A declaration in an action upon an insurance policy is good if it alleges performance of conditions precedent, and need not aver compliance with conditions subsequent, but may meet them on the trial as they arise.—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443.

§ 287. ——Allegation as to plaintiff's interest.

¶ 1128. The use just after the plaintiff's name of the phrase "for the use and benefit of" some person named other than the plaintiff, in the beginning of a declaration on an insurance policy, no assignment being set forth, and no allusion made in the body of the declaration to any other interest or title than such as the plaintiff held, has no force to make the issue different from what it would have been if the phrase had been left out.—Clay Fire and Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1129. A declaration on an insurance policy averred in one count that plaintiffs were the absolute owners of the premises insured, and in another that they held them under a will. Held, that proofs showing that they held under a deed instead were admissible under the former count; and indeed, as the fact of ownership was the material question, the admission of the proof would not have been error in any case, and such an averment of the source of title would be surplusage, and would be amendable even after verdict.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

§ 288. Bill of particulars.

Bill of particulars in general, see Pleading, V.

¶ 1130. A bill of particulars in an action on insurance of household goods which merely specifies "contents of house" is too general and evasive to admit of proof of the contents.—Knop v. National Fire Ins. Co., 101 Mich. 359.

§ 289. Pleas and notices of defense.

Necessity of special plea or notice, see post § 290.

Form and sufficiency of notice of defense, see post § 291.

Waiver of defense by failure to plead, see post § 292.

Pleas and notices of defense in general, see Pleading, III.

Right to amend plea, see Pleading, VI.

¶ 1131. Where a declaration upon an insurance policy which plaintiff alleges has been renewed does not purport to set up a written renewal, the plea of the general issue is sufficient.—Montross v. Roger Williams Ins. Co., 49 Mich. 477.

¶ 1132. In an action on a life insurance policy a defense that the insured had changed his occupation to one which was classified by the defendant as more hazardous may be made under a plea of the general issue.—Hare v. Workingmen's Mut. Protective Ass'n, 151 Mich. 225.

¶ 1133. In an action on an insurance policy, a failure to submit to arbitration as required by the policy may be shown as a defense under the general issue without notice, although the provision requiring arbitration was not declared on either in hæc verba or in legal effect.—Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210.

§ 290. ——Necessity of special plea or notice.

Form and sufficiency of notice of defense, see post § 291.

Sufficiency of general issue as plea, see ante ¶¶ 1131-1133.

Right to amend notice of defense to include newly discovered defense, see Pleading, VI.

¶ 1134. In an action on a fire insurance policy the fraud of the plaintiff cannot be considered as an issue where it is not set forth in the notice attached to the plea as required by 1897 C. C. Rule No. 7, sub. b.—Baumler v. Farmers' Northern Mut. Fire Ins. Co., 148 Mich. 430.

¶ 1135. In an action upon a fire insurance policy, defendant company must give notice in the pleadings of its intention to rely on the defense that it received no notice of the fire, and that no proof of loss was furnished as required by the terms of the policy.—O'Neill v. Northern Assur. Co. of London, England, 155 Mich. 564.

¶ 1136. In an action on a fire insurance policy the defendant cannot rely upon a breach of a representation contained in the application where notice of intention to do so was not set forth in the notice attached to the plea as required by 1897 C. C. Rule No. 7, sub. b.—Maas v. Anchor Fire-Ins. Co. of Cincinnati, Ohio, 148 Mich. 432.

¶ 1137. In an action on an insurance policy such a defense as that plaintiff (the assured) burned his own property must be specially averred.—Residence Fire Ins. Co. v. Hannawold, 87 Mich. 103.

¶ 1138. In an action on an insurance policy the defense that plaintiff burned the property must be specially pleaded, even though the declaration avers destruction by fire without any fraud, etc.—Morley v. Liverpool, L. & G. Ins. Co., 92 Mich. 590.

¶ 1139. In an action on a life insurance policy, Circuit Court Rule No. 7 requires special notice before the defenses that the suit was not commenced within six months from the date when the policy required proofs of loss to be filed, or that plaintiff failed to furnish proofs of loss within thirty days after death of the insured.—Hare v. Workingmen's Mut. Protective Ass'n, 151 Mich. 225.

¶ 1140. In an action upon an insurance policy defendant's omission to set up, in the notice of special defense, a misrepresentation in the application for insurance, as to the amount of incumbrances upon the insured property, excludes evidence of such misrepresentation.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 1141. Where a false statement by an insured person as to the quantity of land owned by him is not relied on in the notice of defense required by Circuit Court Rule 104, it cannot be made a ground of defense to an action on the policy, and evidence as to other land owned by the plaintiff becomes immaterial.—Pangborn v. Continental Ins. Co., 62 Mich. 638.

¶ 1142. In an action on a fire insurance policy the defense that the assured destroyed the property cannot be proved unless notice of it has been given under the general issue, even though the declaration avers that the property was destroyed by fire without any fraud, negligence, procurement, or privity of the assured.—Morley v. Liverpool, L. & G. Ins. Co., 92 Mich. 590.

¶ 1143. An insurance company cannot avail itself, in an action upon a policy, of a stipulation therein which was intended to avoid its promise by way of defeasance or excuse, unless it has given notice of such defense under its plea of the general issue. So held where the insurer sought to defend upon the ground that the plaintiff had violated the conditions of the policy in that he had failed to give notice of foreclosure proceedings, had allowed the building insured to remain unoccupied, and had ceased to use the premises for more than ten days before the fire.—Cronin v. Fire Ass'n of Philadelphia, 112 Mich. 106.

§ 291. ——Form and sufficiency of notice of defense.

Amendment of notice of defense, see Pleading, VI.

¶ 1144. In assumpsit on an insurance policy a notice attached to the plea of the general issue that defendant would show that plaintiff was guilty of fraud in procuring the insurance is sufficient if it fairly apprises the plaintiff of the defense to be set up.—

Farmers' Mut. Fire Ins. Co. v. Crampton, 48 Mich. 421.

¶ 1145. A defense that an action on an insurance policy was prematurely brought is sufficiently pleaded where the notice stated that the suit was prematurely brought; that plaintiff had not complied with all the conditions of the policy, and had not waited as long as the law required after the claim became due before commencing the action.—Putze v. Saginaw Valley Mut. Fire Ins. Co., 132 Mich. 670.

¶ 1146. Where a notice of special defense to life policy on the ground of fraudulent misrepresentations does not expressly assert that such representations were contained in the application, yet if it refers to the application so that plaintiff cannot be misled, the application can be put in evidence as containing the fraudulent representations specified in the notice.—Metropolitan Life Ins. Co. of New York v. Ethier, 34 Mich. 277.

¶ 1147. If the notice of special defense in an action upon an insurance policy does not set up a misrepresentation as to incumbrances, evidence of such misrepresentation is inadmissible.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich 236.

¶ 1148. In an action on a fire insurance policy the notice attached to the plea of the general issue referred to the plaintiff's written application for insurance as a part of the contract of insurance, and alleged that he warranted his anwers to the inquiries of the company to be true, and that the company had issued the policy in reliance on his representations. Held, that evidence of his oral statements as to the value of the property, made at the time of the application, were properly excluded on the ground that the notice referred to the written application and answers.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

§ 292. ——Waiver of defense by failure to plead.

Defenses in actions on policy in general, see ante § 278.

¶ 1149. Where, in a suit on an insurance policy, the company, while pleading the general issue, relies on a failure to make good a representation, etc., not contained in the policy, but set forth in some other instrument in the insurer's hands, the notice attached to the plea must declare the instrument and indicate the breach. The defense is one that can be waived, and omission to give the notice implies a waiver of it. And this must be done whether evidence showing such breach is incidentally given by the opposite side or not (Circuit Court Rule 104).—Home Ins. Co. of Columbus, Ohio v. Curtis, 32 Mich. 402.

¶ 1150. In a suit upon an insurance policy made payable to the mortgagee of the premises, it seems that it cannot be shown that the owner had violated a condition of forfeiture upon which they had been deeded to him, especially if no such defense had been pleaded.—Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co., 48 Mich. 148.

§ 293. Necessity and sufficiency of affidavit of nonexecution.

Issues where no affidavit of nonexecution is filed, see post ¶ 1154.

¶ 1151. The averment in a declaration on an insurance policy that it was made and issued to plaintiff as described is admitted if not denied by affidavit filed with the plea (Circuit Court Rule 79).—Simon v. Home Ins. Co. of New York, 58 Mich 278; Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1152. Action on policy of insurance which had been renewed. No affidavit of nonexecution was made. On the trial defendant offered to show that plaintiff, who was defendant's agent, had fraudulently renewed the policy after a loss had occurred. Held incompetent, as the policy and renewal constituted the contract on which the action was brought, and their due execution as alleged could not be questioned without the affidavit prescribed by Circuit Court Rule 79.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

¶ 1153. Where a declaration in a suit to recover insurance alleges that the policy contained a clause permitting concurrent insurance, and defendant company does not deny under oath the execution of the policy sued on, the defendant cannot introduce testimony to show that the policy contained a clause prohibiting concurrent insurance.—Miller v. Prussian Nat. Ins. Co., 158 Mich. 402.

§ 294. Issues, proofs and variance.

Under general issue, see post § 295.
Necessity of special plea or notice, see ante § 290.
Burden of proof, see post §§ 296-304.
Admissibility and sufficiency of evidence, see post §§ 305-327.
Proof of execution of policy as issue where copy attached to declaration, general issue pleaded and no affidavit of nonexecution filed, see Pleading, IX.
Order of proofs, see Trial, V, B.
Offers of proofs in general, see Trial, V.

¶ 1154. Where no affidavit of nonexecution is filed, issues based on the misnomer of insured, or on the ownership of the policy, or the mode of its procurement, are not open.—Simon v. Home Ins. Co. of New York, 58 Mich. 278; Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1155. Under a declaration counting on a policy, and stating, under a videlicet, that

it was made in Michigan, but without the usual statement preceding it, of the actual place of its execution, the proof of a policy made in Illinois is not a fatal variance in a case where it is certain the defendant was not misled or surprised; the rule as to declaring on policies was meant to get rid of such requirements in this class of cases.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1156. Where an owner contracted to sell land, and assigned a policy of insurance held by him upon the buildings to the vendee with the consent of the company, the loss, if any, being payable to the vendor as his interest might appear, a retransfer of the land and policy to the vendor after such loss will not enable the vendor to recover therefor under a declaration not counting upon such reassignment, but upon the sole ownership of the property of the plaintiff, and insurance made to and held by him as such owner.—Bonenfant v. American Fire Ins. Co., 76 Mich. 653.

¶ 1157. Under a declaration in the usual form upon an insurance policy, plaintiff cannot show a different contract of insurance from that set up in the policy; e. g., that by the fraud of defendant's agent a clause was inserted making the contract a different policy from the one agreed upon.—O'Donnell v. Connecticut Fire Ins. Co., 73 Mich. 1.

¶ 1158. Under a declaration on an insurance policy alleging that proofs of loss were sent to a specified office of defendant, evidence that such proofs were also sent to another office is inadmissible.—Coryeon v. Providence-Washington Ins. Co., 79 Mich. 187.

¶ 1159. The declaration in an action to enforce an insurance policy having alleged that proofs of loss were sent to the defendant's Chicago office, unless the declaration be amended, evidence that proofs were also forwarded to the defendant's Providence office was inadmissible, though notice had been served upon defendant to produce such proofs, which it failed to do, claiming that it had never received them.—Coryeon v. Providence-Washington Ins. Co., 79 Mich. 187.

¶ 1160. The declaration by C. to the use of R. alleged that defendant insured plaintiff and R., mortgagee, "as the interest of the latter should appear," and that the insured building was burned, whereby plaintiff, and R., as such mortgagee, had sustained damage to the amount of the policy; concluding with an averment of damages to plaintiff. The policy was for $1,500, of which $500 was on the building and subject to the mortgage clause. Held, that, in the absence of a demurrer, the declaration was not open to the objection that it averred that plaintiff and R. were jointly entitled to recover the entire amount of the loss; and that there was, therefore, no variance between the contract declared upon and the policy offered in evidence.—Cronin v. Fire Ass'n of Philadelphia, 112 Mich. 106.

¶ 1161. A declaration upon a fire insurance policy, alleging that it was issued to plaintiff and his copartner, that the firm assigned it to plaintiff, and that at the time of the execution of the policy, and from the time of said assignment until the loss, plaintiff had an interest in the property insured, "being the sole owner thereof," when construed as a whole, shows the ownership by plaintiff of an undivided interest before and of a sole interest after the assignment, and, therefore, proof of an assignment to plaintiff of his copartner's interest in the property does not constitute a variance.—Rediker v. Queen Ins. Co., 107 Mich. 224.

¶ 1162. A policy of insurance varying only from the one described in the declaration, which covers several items, in that but $100 is written upon a barn, while the policy counted upon calls for $400 insurance on said building, cannot be received in evidence under the pleadings without amendment.—Dove v. Royal Ins. Co., 98 Mich. 122.

¶ 1163. Under a declaration on a fire insurance policy issued to plaintiff and another and assigned to plaintiff, alleging that at the time of the loss plaintiff was the sole owner of the property insured, evidence of an assignment to plaintiff of the interest of the coinsured in the property is admissible, although not covered by express averment.—Rediker v. Queen Ins. Co., 107 Mich. 224.

¶ 1164. In an action on an insurance policy plaintiff under pleadings in conformity with Circuit Court Rule 3 (c) and 7 (d) may introduce evidence which tends to show the invalidity of the application.—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443.

¶ 1165. In an action on a policy of insurance, the declaration, purporting to set forth a contract of insurance according to its legal effect, averred that "it was further provided that if said policy was issued upon or referred to an application, etc., such application, etc., should be considered a part of said contract and a warranty of the insured." An application was not otherwise referred to in the declaration. It appeared from the cross-examination of a witness that an application was signed by the insured at the time the policy was issued, but the application was not produced nor its contents shown. Held, that it did not necessarily follow that the contract as contained in the policy was varied by the application, and so no variance appeared.—Throop v. North American Fire Ins. Co., 19 Mich. 423.

§ 295. ——Under general issue.

See also ante ¶¶ 1131-1133.

Necessity of special plea or notice, see ante § 290.

¶ 1166. In an action on an insurance policy, a defense that under the policy the amount was not due until 60 days after proof of loss and that under statute action could not be brought until after 60 days more and hence the action was prematurely brought, is not admissible under a plea of the general issue.—Putze v. Saginaw Mut. Fire Ins. Co., 132 Mich. 670.

¶ 1167. In an action on an insurance policy testimony of misrepresentations and warranties by the insured when the policy was issued was properly excluded, it appearing that the plea of the defendant was simply the general issue, (1897 Circuit Court Rule No. 7, paragraph d.)—Baker v. Michigan Mut. Protective Ass'n, 118 Mich. 431.

¶ 1168. Evidence that an applicant for life insurance failed to state his true place of residence in his application is inadmissible without notice of such defense under First Circuit Court Rule No. 104, which provides that in case the company relies upon the failure of the assured to perform or make good any promise, representation, or warranty not contained in the policy, but set forth in any other paper or instrument in the hands of the company, the notice under the general issue shall declare the same, and indicate the breach relied on.—Hann v. National Union, 97 Mich. 513.

¶ 1169. In an action upon an insurance policy where the declaration is in the usual form, and the plea the general issue, plaintiff cannot show a different contract of insurance from that set up in the policy, e. g., he cannot show that by the fraud or mistake of defendant's agent a clause was inserted making the contract a different policy from the one agreed upon.—O'Donnell v. Connecticut Fire Ins. Co., 73 Mich. 1.

§ 296. Burden of proof and presumptions.

Agents and their authority, see post § 297.

Delivery of policy and payment of premiums, see post § 298.

Property or interest covered or risk insured against, see post § 299.

Warranties and breach of warranties, see post § 300.

Breach of condition in policy, see post § 301.

Suicide, see post § 302.

Waiver of forfeiture, see post § 303.

Amount of loss or benefit payable, see post § 304.

Presumptions in actions for premium or assessment, see ante § 93.

Instructions as to burden of proof, see post § 345.

Presumptions as to assignment of policy, see ante § 127.

Presumptions as to assignment of policy, see ante § 127.

General law of evidence, see Evidence.

Presumption that mutual members know law of the corporation, see Evidence § 48.

Presumptions and proof of customs, see Customs § 7.

Judicial notice of customs of insurance business, see Evidence § 12.

Judicial notice of seasonal increase of marine risks, see Evidence ¶ 108.

¶ 1170. A person insured in a farmers' mutual fire insurance company is presumed, as contract holder, to have knowledge of the terms of his contract, and, as member of the company, to have knowledge of its powers.—Geraghty v. Washtenaw Mut. Fire-Ins. Co., 145 Mich. 635.

¶ 1171. In a suit upon a policy the plaintiff has the burden of proof that the case is within the exceptions to the rule which requires the proofs to be made out by the person assured.—McGraw v. Germania Fire Ins. Co., 54 Mich. 145.

¶ 1172. Where an insurance policy requires that, in making proof of loss, the written portion of any policy for additional insurance shall be set forth, the court cannot presume that the statement actually made does not substantially comply with the requirement, if the later policy is not in proof.—Pennsylvania Fire Ins. Co. of Philadelphia v. Kittle, 39 Mich. 51.

¶ 1173. Burden of proof is on the defendant to establish such a defense as that the insured burned the property insured.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

¶ 1174. The burden of establishing insanity is upon the party who asserts it.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

¶ 1175. Every person is presumed sane until the contrary is shown.—Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592.

§ 297. ——Agents and their authority.

Authority of agent in general, see ante §§ 23-27.

¶ 1176. An insurance agent cannot be presumed authorized to insure a vessel in tow upon an insurance blank that was meant to cover cargoes only.—Barry v. Boston Marine Ins. Co., 62 Mich. 424.

¶ 1177. Where it was claimed that an agent of the secretary of an insurance company had made out a policy upon property more heavily incumbered than the rules of the company would allow, notwithstanding the fact that he had notice of the incumbrances, it was held that it rested with the

party claiming the insurance to prove that the said agent had such notice, so far as it was material.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 396.

¶ 1178. An insurance company will be presumed to have the knowledge of its agent as to the existence of other insurance, where the evidence shows an application for insurance made to the agent by a person who states that he had other insurance on the property, but that such insurance is of no value because the property is to be vacant, and where the agent is given the policy of the other company, although the evidence does not show whether he opened and read it.—Power v. Monitor Ins. Co., 121 Mich. 364.

§ 298. ——Delivery of policy and payment of premiums.

Necessity and sufficiency of delivery of policy, see ante §§ 49-50.

Payment of premiums in general, see ante §§ 84-87.

¶ 1179. In an action on an insurance policy found among the papers of the assured, where the issue was as to delivery of the policy, and plaintiff's claim was based upon the production only of the policy and no proof was made of payment of premium or delivery, the burden of proof of delivery and payment of premiums devolves upon the plaintiff where, enclosed with and pinned to the policies, in envelopes, were internal revenue stamps ready to be attached, but not attached and uncanceled, and on the outside of the envelopes in large print were instructions to attach the stamps when the policy should be put in force (the internal revenue law requiring the affixing of the stamps to the policy).—Amos-Richia v. Northwestern Mut. Life Ins. Co., 143 Mich. 684.

¶ 1180. In an action by mortgagees to recover under the "loss payable" clause of a fire insurance policy, the burden is on defendant to prove a want of consideration where that defense is relied on.—Gourlay v. Ins. Co. of North America, 189 Mich. 384.

§ 299. ——Property or interest covered or risk insured against.

Property or interest covered or risk insured against, see ante VII.

¶ 1181. Plaintiff in an action on a fire insurance policy has the burden of showing that the loss was occasioned by the peril insured against.—John Davis & Co. v. Insurance Co. of N. A., 115 Mich. 382.

¶ 1182. In an action on a fire insurance policy providing for the termination of the policy in the event of the building falling through a cause other than fire, where it was conceded that the stock in question was destroyed by fire; the burden was upon the defendant to prove that the building fell from some other cause than fire.—N. & M. Friedman Co. v. Atlas Assur. Co., 183 Mich. 212.

¶ 1183. The burden of proving accidental death in a suit upon an accident insurance policy is upon plaintiff, and until some proof is offered tending to establish one of several equally reasonable theories, some consistent with the theory of accidental death, and some inconsistent with it, a case is not made out.—Merrett v. Preferred Masonic Mut. Acc. Ass'n, 98 Mich. 338.

¶ 1184. When sued upon a policy an accident insurance company has the burden of proving that an injury to plaintiff, shown to be the result of an accident, was within some exception named in the policy.—Hess v. Preferred Masonic Mut. Accident Ass'n, 112 Mich. 196.

¶ 1185. In an action on a life insurance policy providing that death caused or superinduced by the use of intoxicants within a stated period from the date of the policy was a risk not covered by the policy, the burden was upon the company to show that the insured died from delirium tremens.—Malicki v. Guaranty Fund Life Soc., 119 Mich. 151.

¶ 1186. The burden is on the plaintiff to show an accidental death within the terms of a policy of accident insurance, in order to recover thereon.—Rathman v. New Amsterdam Casualty Co., 186 Mich. 115.

¶ 1187. In an action by a beneficiary on an accident insurance policy providing that the insurance shall not extend to accidental injuries or death resulting from, or caused directly or indirectly, wholly or in part, to hernia or disease in any form, the burden of proof is upon the plaintiff not only to establish that the injury was accidental but also that such accidental injury was the sole cause of death.—Skinner v. Commercial Travelers' Mut. Acc. Ass'n, 190 Mich. 353.

¶ 1188. Where a fire insurance policy confines the company's liability to the actual cash value of the property at the time of the fire, and the company accepts an aggregate instead of requiring a detailed valuation, it is presumed to regard itself as sufficiently protected.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

§ 300. ——Warranties and breach of warranties.

Warranties in general, see ante VIII.

Avoidance or forfeiture for breach of warranty, see ante XII, B.

¶ 1189. Where in a suit on a life insurance policy, defendant shows that the insured in response to questions in the application failed to state that he had been treated by a physician within two years, and shows by undisputed evidence of a physician

that the insured received such treatments, a prima facie case of a substantial breach of the contract is established by defendant.—Bullock v. Mutual Life Ins. Co. of New York, 166 Mich. 240.

¶ 1190. In a suit on a life insurance policy, where the defendant shows by the testimony of the physician that the insured was repeatedly treated by him during a certain period of time, and the insured in his application in response to questions by the defendant's examining physician, failed to mention said treatments, the burden is on the plaintiff to show that the treatments alluded to were for some ailment which did not tend to weaken or seriously undermine the applicant's health.—Bullock v. Mutual Life Ins. Co. of New York, 166 Mich. 240.

¶ 1191. It cannot be said as matter of law that a brick oven is so unusual that a failure to mention its existence in a house or other building is presumptively fraudulent.—Richards v. Washington Fire & Marine Ins. Co., 60 Mich. 420.

§ 301. ——Breach of condition in policy.

Breach of conditions in general, see ante §§ 147-171.

¶ 1192. Under a fire insurance policy containing a rider permitting the mill in question to remain idle during the winter season, the burden rested upon the company to prove that the mill was idle later than the winter season when it burned in order to establish forfeiture for breach of condition.—Barker v. Citizens' Mut. Fire Ins. Co., 136 Mich. 626.

¶ 1193. Under a fire insurance policy containing a rider permitting the insured mill to remain idle during the winter season, the giving of an instruction that the burden was on the defendant to prove that the mill was idle beyond the winter season, could not be made the basis of an assignment of error that thereby the court improperly imposed upon defendant the burden of proving that the day of the fire (June 12th) was not within such season.—Barker v. Citizens' Mut. Fire Ins. Co., 136 Mich. 626.

¶ 1194. After the plaintiff, in an action upon a fire insurance policy makes out a prima facie case by introducing the policy in evidence and showing the loss, the burden is then on the defendant to show that the policy has been avoided by a breach of its conditions, and by showing some connection between the loss and the breach of the condition.—Lagden v. Concordia Mut. Fire Ins. Co., 188 Mich. 689.

§ 302. ——Suicide.

Breach of condition against suicide, see ante § 158.

¶ 1195. The burden of proof of establishing that an insured committed suicide devolves upon the defendant.—Bromberg v. North American Life Ins. Co., 192 Mich. 143.

¶ 1196. The suicide clause in an insurance policy is a condition subsequent, and the company has the burden of proving that the death of the insured was by suicide.—Ferris v. Court of Honor, 152 Mich. 322.

¶ 1197. In an action upon a life policy, a condition in the policy making it void in case the person whose life is insured die by his own hand is to be construed in the nature of a penalty or forfeiture, and the burden is on the insurers to show it, and not on the insured to negative it.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

¶ 1198. Where death may be attributed to suicide or accident, the presumption of law is against suicide.—Burnham v. Interstate Casualty Co., 117 Mich. 142.

¶ 1199. It will not be presumed that an insured person committed suicide because of the mere fact that he is found dead in his room with a gunshot wound in his head.—Bromberg v. North American Life Ins. Co., 192 Mich. 143.

§ 303. ——Waiver of forfeiture.

Waiver of forfeiture in general, see ante XII, C.

¶ 1200. The plaintiff in a suit upon an insurance policy has the burden of showing knowledge on the part of the company, at the time of the issue of the policy, of the existence of a mortgage upon the insured property, the policy providing that it shall be void if the property be so incumbered.—Wierengo v. American Fire Ins. Co., 98 Mich. 621.

¶ 1201. In an action on a Michigan standard policy of insurance against fire where at the time the policy is issued the insured is not the owner of the land in fee simple, the burden of proof to show knowledge of this fact is on the insured.—Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440.

¶ 1202. The rule that in an action based upon a life insurance policy, the burden is upon the defendant to prove its affirmative defense and in turn the burden shifts to plaintiff to prove a waiver or estoppel; was not affected by the fact that the court gave to the defendant the opening and rebutting in the introduction of evidence.—Moore v. Mutual Reserve Fund Life Ass'n, 133 Mich. 526.

§ 304. ——Amount of loss or benefit payable.

Amount of loss or benefit payable, see ante XIV.

¶ 1203. Where the by-laws of a mutual benefit society provide that it shall in no

case be liable to a beneficiary in a sum greater than that realized from one assessment upon its members, the burden of showing the membership of the society in a suit for benefits, in order to establish that the amount so realized would be less than the amount claimed, is upon the society, it being a matter peculiarly within its knowledge. —Gnau v. Masons' Frat. Acc. Ass'n, 109 Mich. 527.

§ 305. Admissibility of evidence.

As to agents and their authority, see post § 306.
As to interest of insured, see post § 307.
As to other insurance, see post § 308.
As to property or interest covered or risk insured against, see post § 309.
As to representations and warranties in application, see post § 310.
As to forfeiture for breach of condition or warranty, see post § 311.
As to false swearing and fraud, see post § 312.
As to waiver of conditions, see post § 313.
As to proof of loss or death, see post § 314.
As to cause of death of insured, see post § 315.
As to amount of insurance, extent of loss or abandonment, see post § 316.
Evidence inadmissible under general issue, see ante § 295.
Evidence inadmissible because of variance, see ante ¶¶ 1157-1163.
Evidence in actions for premium or assessments, see ante § 93.
General law of evidence, see Evidence.
Parol evidence to explain, vary, contradict, or otherwise affect written terms and conditions of insurance, see Evidence, V.
Statements by insured to officer of insurer as evidence of knowledge of thing mentioned, see Evidence ¶ 544.
Parol evidence of waiver or election or rights under written contracts, see Evidence § 206.
Amount and ratable proportions of loss as expert question, see Evidence § 263, ¶ 1502.
Qualifications of experts on valuation and damages, see Evidence §§ 286-290.
Proofs of loss as admissions against interest, see Evidence § 389.
Declarations by insured or assignor as admissions binding assignee or beneficiary, see Evidence, VII, C.
Disqualification of witnesses because of confidential relationship of physician and patient, see Witnesses, V.
Presumptions and evidence of death, see Death §§ 2-4.
Proper cross-examination as to existence and terms of insurance contract, see Examination of Witnesses § 49.
Cross-examination as to other alleged frauds on insurers, see Examination of Witnesses ¶ 447.
Admissibility of policy and proofs of loss in action on award, see also Arbitration ¶ 83.
Admissibility of official birth and death certificates, see Evidence § 536.

¶ 1204. Where a man 26 years old had disappeared and gone away, being absent for more than seven years, with no intelligence as to his whereabouts, although there was evidence from which the jury might find an intention not to return, in an action on his insurance policy, it was not error to exclude mortality tables in evidence, because his expectancy of life was immaterial.—Heagany v. National Union, 143 Mich. 186.

¶ 1205. As tending to show that the insured had been treated by a physician for a certain disease, defendant offered in evidence a prescription claimed to have been prepared for her by such physician; but the druggist who filled the prescription was unable to testify that it was brought to him by the insured. Held, that it was properly rejected.—Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

¶ 1206. Evidence to show the appearance of a sidewalk under like circumstances and surroundings on the night succeeding an accident is not incompetent as relating to facts observed subsequent to the time of the accident.—Stone v. Standard Life & Accident Ins. Co., 71 Mich. 81.

¶ 1207. In an action on a fire insurance policy when the theory of the defense is that the plaintiff himself fired the property, statements made by plaintiff before the fire to third persons, to the effect that he was going away, are inadmissible; so also is plaintiff's evidence as to why he went and where he was on the night of the fire.—Farmers' Mut. Fire Ins. Co. v. Crampton, 43 Mich. 421.

¶ 1208. Where the defense in an action upon an insurance policy is that plaintiff wilfully burned the property, defendant may show, as bearing upon a motive for the burning, that there had been trouble in plaintiff's family.—Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247.

§ 306. ——As to agents and their authority.

Agents and their authority, see ante §§ 23-27.
Sufficiency of evidence as to agents and their authority, see post § 319.
Evidence as to agency of adjuster or confidential relation to insured bearing on claim of fraud, see also Fraud ¶ 408.

¶ 1209. It seems that where the question is whether policies were issued by an insurance agent before or after the loss, it is error to exclude evidence that the agent's instructions were to telegraph his company of any loss that might occur.—Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482.

¶ 1210. An insurance agent having agreed with A. to look after his risks in the com-

pany which he represented and in various others reported lists to him showing the amount of his insurance therein, and gave him a receipt for money advanced to pay premiums. Held, in an action by A. against the company represented by the agent, that as these papers were merely drawn up for A.'s information, by a person acting therein as his agent, and not in the course of any agency for the company, they were inadmissible to show any recognition by the company of the policy on which suit was brought. —Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

¶ 1211. Where it clearly appears that a policy of insurance was not delivered before the applicant's death, it is not error to exclude evidence that the policy had been charged by the company to the agent; that the agent had given bond to the company; and that the policy being delivered after the applicant's death had been gotten back by the agent by means of threats.—Dennis v. Fidelity Mut. Life Ins. Co., 159 Mich. 594.

¶ 1212. Where proofs of loss were made by an agent of the assured, the latter, in a suit upon the policy, in which proofs were introduced without objection was properly allowed to testify that he had given the agent authority to act in all respects as he himself would, with reference to the proofs. —McGraw v. Germania Fire Ins. Co., 54 Mich. 145.

§ 307. ——As to interest of insured.

Insurable interests in general, see ante IV.

Sufficiency of evidence as to title and interest of insured, see post § 320.

¶ 1213. Where a defense is made to an action on a fire insurance policy that plaintiff was not the absolute owner of the goods insured, evidence is admissible as to what defendant's agent was told in regard to the plaintiff's ownership of the property, both as being part of the res gestæ and as showing that defendant's agent had knowledge of plaintiff's title, although another was in possession of the goods.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 150 Mich. 311.

¶ 1214. In an action on a fire insurance policy testimony that plaintiff owned the property insured is incompetent as stating a conclusion of the witness.—Kennedy v. London & L. Fire Ins. Co., 157 Mich. 411.

¶ 1215. Where the purchase of new machinery was the occasion of obtaining additional insurance, evidence of the purchase was admissible in an action on the policy as res gestæ.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

¶ 1216. Plaintiff in an action on an insurance policy gave evidence that the property involved had been deeded to him. The defense was that he had falsely claimed ownership. But it was also shown that when the adjuster had asked to see the deed he had answered that it was in his brother's keeping, and had produced a receipt for it from his brother. The defense attempted to show that the delivery was in escrow, conditioned upon his properly supporting his parents. Held proper to cross-examine him as to why the deed was in his brother's hands; and whether he had not shown the adjuster a paper setting forth the escrow and the reasons therefor.—Pangborn v. Continental Ins. Co., 62 Mich. 638.

¶ 1217. Evidence that the money paid for three horses was applied by the seller in removing a lien from one of them, is admissible in an action on a policy of insurance on such horse, where such testimony tends to substantiate statements made by the purchaser in an application for insurance as to the amount paid for the insured animal.—Simmons v. National Live Stock Ins. Co., 187 Mich. 551.

§ 308. ——As to other insurance.

Breach of condition against other insurance, see ante § 163.

¶ 1218. In a suit on an insurance policy it is not error to admit evidence of the basis on which another company, from which additional insurance had been obtained, had settled for the loss; such evidence does not prove the extent of the loss as against the defendant company, but shows what has been paid in reduction of its risk.—Pennsylvania Fire Ins. Co. of Philadelphia v. Kittle, 39 Mich. 51.

§ 309. ——As to property or interest covered or risk insured against.

Property or interest covered or risk insured against, see ante VII.

Sufficiency of evidence as to property or interest covered or risk insured against, see post § 322.

¶ 1219. In a fire insurance policy the covering words, "on lumber in mill building, on cars under mill sheds, and in sheds adjoining to said mill," are words of ordinary meaning, but extraneous evidence is properly admitted to establish the character and situation of particular sheds claimed to be covered by such insurance.—Wolverine Lumber Co. v. Phoenix Ins. Co. of Brooklyn, 145 Mich. 558.

§ 310. ——As to representations and warranties in application.

Representations in application as warranties, see ante §§ 105-107.

¶ 1220. In an action on a fire insurance policy it is proper to cross-examine the plaintiff as to whether a fraudulent overvaluation of the property was not given at the time he

applied for the policy.—Farmers' Mut. Fire Ins. Co. v. Crampton, 43 Mich. 421.

¶ 1221. When an application for insurance is reduced to writing by the insurer upon the oral statements of the applicant, and is made the basis of the contract for insurance, the insurer is under a strong moral obligation to draft the paper so that it shall assure to the applicant the protection for which he prays; and when a controversy arises upon the truthfulness of the application as a representation or a warranty, and statements alleged by the insurer to be essential to a true representation are omitted, and the insurer seeks to avoid the contract on that ground, parol evidence is admissible to show that the facts were truly stated, and that the insurer's conduct led the applicant to believe that such as were omitted in the application were immaterial; the same rule will bind the insurer when the papers are drawn and the insurance effected by an agent.—North American Fire Ins. Co. v. Throop, 22 Mich. 146.

¶ 1222. In an action upon an insurance policy where the defense is a false statement in the application that the assured was in good health at the time it was made, a photograph of the assured offered to show her healthy appearance is incompetent.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 1223. Where it is claimed that a policy of fire insurance on partnership property was avoided by a misrepresentation of the membership of the insured firm, evidence of similar misstatements to third persons at about the time of the issuance of the policy, is admissible as bearing on the intent of the insured to deceive the insurer.—Jacobs v. Queen Ins. Co., 183 Mich. 512.

§ 311. ——As to forfeiture for breach of condition or warranty.

Forfeiture for breach of condition or warranty, see ante XII, B.

Sufficiency of evidence of forfeiture, see post § 323.

¶ 1224. Testimony as to what was done with reference to cancelling a fire insurance policy was properly excluded in an action on the policy where the premium was not returned until the loss actually occurred.—McGraw v. Germania Ins. Co., 54 Mich. 145.

¶ 1225. As it is a complete bar to recovery upon a policy issued to several persons if any one of the insured has attempted to defraud the company by noncompliance with conditions or by false proofs of loss, in an action on the policy it is admissible to inquire whether the widow had not made such attempt.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 1226. Where defendant in an action on a fire insurance policy claimed that plaintiff himself set fire to the property, it was held proper to show that money belonging to the plaintiff, and personal property belonging to near relations of his, were destroyed; also, that the value of the property destroyed far exceeded the insurance.—Farmers' Mut. Fire Ins. Co. v. Crampton, 43 Mich. 421.

¶ 1227. In a suit on a fire insurance policy the defendant set up as a defense that the plaintiff fraudulently caused the property to be fired. Before being accused of such act the plaintiff had called up the sheriff's office and asked for an investigation, stating that the circumstances were suspicious. Held, that the testimony of witnesses as to what plaintiff said in this conversation was admissible to rebut the charge of fraud.—O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187.

¶ 1228. In an action to enforce a fire insurance policy, defended on the theory that the plaintiff purposely started the fire, testimony tending to show that plaintiff had loose notions respecting the destruction of insured property is material, though the weight of such testimony might depend on whether he had expressed such views lately or long before.—Farmers' Mut. Fire Ins. Co. v. Crampton, 43 Mich. 421.

¶ 1229. One who agrees in his application for membership in a mutual indemnity association insuring against loss of employment that the cause assigned by his employer for his discharge shall be the sole basis for determining the liability of the association in the event of discharge may not show, in an action upon the policy, that the cause assigned by the employer did not exist.—Palmer v. Locomotive Engineers' and Conductors' Mut. Protective Ass'n, 189 Mich. 35.

¶ 1230. A certificate of death signed by insured and showing that T., a son of insured, died of consumption in April, 1909, is admissible to show falsity in a warranty, consisting in the answer "No" by insured to a question in a policy, "Is any member of your household affected with consumption, or been so affected during the past two years?"; where the application was made within the two years and the certificate of insurance made the answers warranties. The question was not to be construed as calling for a statement merely that no living member had been affected within the two years, but as calling for information whether any member had within that time past been so affected.—O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

§ 312. ——As to false swearing and fraud.

False swearing and fraud as ground for cancellation or forfeiture, see ante § 144.

¶ 1231. In an action to recover on a fire insurance policy on personal property in which the defense was that the policy was void because of false swearing in the proofs

of loss, held that evidence as to what prompted the particular witness to inquire into the plaintiff's history was admissible.—Barrett v. Connecticut Fire Ins. Co., 195 Mich. 209.

¶ 1232. Where fraud is charged to plaintiff in an action on fire insurance policies, a great latitude in cross-examining plaintiff and his wife, as to his conduct, should be allowed.—Silverstone v. London Assur. Corporation, 176 Mich. 525.

¶ 1233. In an action upon a fire insurance policy, evidence that the assured was doing a losing business and could not pay his just bills is too remote to be admissible for the purpose of establishing fraud on his part in making false statements as to the amount of goods on hand at the time of the fire.—Morley v. Liverpool, L. & G. Ins. Co., 92 Mich. 590.

§ 313. ——As to waiver of conditions.

See also ante ¶ 845.

Sufficiency of evidence of waiver of forfeiture, see post § 324.

Waiver of conditions or breach of conditions in general, see ante XII, C.

Admissibility of parol evidence of waiver of conditions, see Evidence ¶ 562.

¶ 1234. In a suit for insurance it was held no error to admit evidence that neither the agent nor the company objected at the time to the preliminary proofs of loss, which were presented a few days too late. The agent having gone on to repair the loss to another building insured by the same policy, and damaged by the same fire, and the company having allowed his expenditures, the company could take no advantage of a failure to make the preliminary proofs within the exact time specified in the conditions annexed to the policy; and if strict formal proofs were waived, the giving to the company of immediate notice of the fire, which was a precedent requirement, must be regarded as waived also.—Hibernia Ins. Co. v. O'Connor, 29 Mich. 241.

¶ 1235. In a suit on a life insurance policy, where the defense is made that the insured and the beneficiary falsely represented in the application for insurance that the insured was sound in health, when as a matter of fact she had a disease of the heart from which she died soon after, and plaintiff, the beneficiary, offers to prove that he informed the soliciting agent of the company that the insured had such heart disease, such evidence is not admissible if it appears that it was not the duty of such agent to discover the facts, and that his authority did not extend to receiving the application or any communications upon the subject.—Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467.

¶ 1236. Evidence of a conversation between the insured, her husband and the agent of a fire insurance company at the time of solicitation of the insurance, relative to the premises being vacant, is admissible to show that the agent had knowledge that the premises were vacant at the time the policy was negotiated.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 226.

¶ 1237. In an action on a standard fire insurance policy, containing a clause that the policy shall be void if any of the property is incumbered by a chattel mortgage, evidence that the defendant's agent agreed with plaintiff that the provision should be waived, is admissible.—Dahrooge v. Sovereign Fire Ins. Co., 175 Mich. 248.

§ 314. ——As to proof of loss or death.

Proof of loss in general, see ante XV.

Sufficiency of evidence as to proof of loss, see post § 325.

¶ 1238. Final proofs of loss rendered to an insurer are not proper evidence of the fact of loss in an action on the policy.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 1239. In an action on a fire insurance policy, proofs of loss are incompetent to prove the ownership of the property or the fact or amount of the loss.—Kennedy v. London & L. Fire Ins. Co., 157 Mich. 411.

¶ 1240. An admission by a life insurance company that proofs of death had been furnished to it will not preclude the introduction of the documentary evidence of such proofs of death in an action on the policy.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

¶ 1241. In an action on an insurance policy, where the defense was that the answers made by the insured to certain questions in the application for insurance were not true, proofs of death are admissible in evidence as an admission against the company, but not conclusive, although the policy may state that such proofs shall be evidence of the facts stated therein in behalf of but not against the company.—Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369.

¶ 1242. Where upon request for further proofs of death, an affidavit of the attending physician of insured was furnished, such affidavit is admissible in evidence where defendant offered the proofs of loss, except such affidavit, on its own part.—Thompson v. Loyal Protective Ass'n, 167 Mich. 31.

¶ 1243. In a suit on a fire insurance policy, plaintiff was allowed to hold in his hand the proofs of loss which he had helped to make, and to refresh his memory in testifying to the items of loss as they appeared therein. Defendant at the time objected that the proofs should be let in only for the purpose of showing a compliance with

the stipulations of the policy. After said testimony of plaintiff was completed, the proofs were admitted in evidence without objection. Held, no error was committed. —Goodwin v. Union Ins. Co. of Philadelphia, 163 Mich. 41.

¶ 1244. After proofs of death had been furnished by plaintiff, defendant, without plaintiff's authority or knowledge, procured certain affidavits concerning matters that occurred before the death of the insured, and produced them upon the trial, with the request that they be introduced in connection with the proofs of death. Held, that the court did not err in refusing to compel plaintiff to introduce such affidavits in evidence they being in no way ascribable to plaintiff or related to death of insured.—Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

¶ 1245. In an action to recover on a policy of fire insurance on personal property, in which the defense was fraud and false swearing in the proofs of loss, held that it was not error to permit plaintiff to testify as to what she was informed by the seller of a particular article of its actual worth when she bought it at a special sale, she having scheduled it in the proof at such claimed actual value.—Barrett v. Connecticut Fire Ins. Co., 195 Mich. 209.

¶ 1246. Where, in an action on a life insurance policy, defendant refuses to admit that the proofs of death submitted by plaintiff were in full compliance with the requirements of the policy, it is not error to permit such proofs to be introduced and read in evidence.—Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687.

¶ 1247. A certified copy of a coroner's certificate of death of an insured person which is obtained by a son of the beneficiary without the knowledge of the beneficiary and attached to the proofs of death sent to the insurer is admissible as in the nature of an admission in an action by the beneficiary on the life insurance policy.—Bromberg v. North American Life Ins. Co., 192 Mich. 143.

§ 315. ——As to cause of death of insured.

Sufficiency of evidence as to cause of death, see post § 326.

Inquest of death and verdict as documentary evidence, see Evidence § 537.

¶ 1248. In an action on an insurance policy the question being whether insured had committed suicide or had been murdered, evidence that deceased had for some months been intemperate in his habits and that he was in straitened circumstances pecuniarily and was worried about his affairs, is admissible.—Furbush v. Maryland Casualty Co., 131 Mich. 234.

¶ 1249. Where an action on a life insurance policy is defended on the ground that the insured had heart disease at the time of the application for insurance, the proofs of death which show that the insured died of heart disease are admissible in evidence, as they are in the nature of an admission.—Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467.

¶ 1250. A proper death certificate is admissible in evidence in an action on a life insurance policy when issued and made under Comp. L. 1897, § 4616, How. St. 2nd Ed., § 1579.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

¶ 1251. The attending physician's death certificate, stating the cause of death and the contributory cause (abortion) is admissible as a document to that extent, but inadmissible in so far as it improperly states what deceased said as to who performed the abortion.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

¶ 1252. In an action on an insurance policy, a coroner's verdict of suicide is not admissible in evidence.—Wasey v. Travelers' Ins. Co., 126 Mich. 119.

¶ 1253. A provision in an accident insurance policy that the policy shall not extend to any case of death, etc., unless the claimant establish by direct and positive proof that the death was caused by external violence and accidental means, and was not the result of design, cannot exclude circumstantial evidence of the fact.—Utter v. Travelers' Ins. Co., 65 Mich. 545.

¶ 1254. Where a physician who examined an insured person previous to his death, testified that it was caused by tuberculosis, the beneficiary in a policy of accident insurance who was present at such examination may in rebuttal testify as to statements then made by the insured that he was suffering from ptomaine poisoning.—Johnson v. Fidelity & Casualty Co. of New York, 184 Mich. 406.

¶ 1255. Where there is no dispute but that the preliminary proofs of death were properly furnished, it is error to permit plaintiff in an action on an insurance policy to read such proofs in full to the jury, as the ex parte statements therein are not evidence.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

§ 316. ——As to amount of insurance, extent of loss or abandonment.

Amount of insurance, extent of loss and abandonment to insurer, see ante XIV.

Sufficiency of evidence as to amount or extent of loss, see post § 327.

Judgment and sale of vessel as evidence of abandonment, see also Former Adjudication ¶ 17.

Evidence to prove values, see Values.

¶ 1256. In an action on a fire insurance policy for $1,600 upon a stock of goods, all record evidence of the value of which had been destroyed, it was held proper for the defense, who claimed that the stock was small and greatly over-insured, and that it was burned for the insurance money, to introduce testimony comparing it with other stock worth $500, and prove that one of the plaintiffs said at about the time of the fire that he had but $500 insurance, and to produce the testimony of a drayman who was familiar with the stock.—Livings v. Home Mut. Fire Ins. Co., 50 Mich. 207.

¶ 1257. Where there is no market value for hotel property in the place where it was situated, at the time of its destruction by fire, its real or ordinary cash value at the time of fire should be ascertained, if it can be, from all the testimony as to the cost, uses it has been put to, its age, condition and location.—Fite v. North River Ins. Co., 199 Mich. 467.

¶ 1258. In an action on a fire insurance policy evidence as to what the plaintiff paid for the goods one year prior to the fire, and their condition at the time of the fire, and the wear they received, is admissible as tending to show their cash value at the time of the fire.—Popa v. Northern Ins. Co. of New York, 192 Mich. 237.

§ 317. Weight and sufficiency of evidence.

Application and existence and terms of contract or policy, see post § 318.
Agents and their authority, see post § 319.
Interest or title of insured, see post § 320.
Payment of premium or assessment, see post § 321.
Property or interest covered or risk insured against, see post § 322.
Forfeiture or avoidance for breach of warranty or condition, see post § 323.
Waiver of forfeiture, see post § 324.
Proof of loss, see post § 325.
Cause of death of insured, see post § 326.
Amount and extent of loss suffered, see post § 327.
Sufficiency of evidence in action to set aside arbitration, see ante ¶¶ 1032, 1033.
Sufficiency of evidence in suit to enforce assignment of policy, see ante § 127.
General law of evidence, see Evidence.
Proof of corporate existence of insurance company, see Pub. Acts 1917, No. 256, part II, chap. 1, § 9.

¶ 1259. In an action on a fire insurance policy, evidence held sufficient to sustain a finding that the fire insurance adjuster denied the company's liability and refused the payment of the loss.—Fisk v. Fire Ass'n of Philadelphia, 192 Mich. 243.

¶ 1260. Where an indemnity insurance contract makes it obligatory upon the insured to establish certain things to show himself entitled to indemnity, failure to do so precludes recovery.—Stitt v. Locomotive Engineers' Mut. Protective Ass'n, 177 Mich. 207.

§ 318. ——Application and existence and terms of contract or policy.

Application and policy in general, see ante V.
Evidence to rebut presumption that signer of application read it, see Fraud ¶ 409.

¶ 1261. While, under Circuit Court Rule 104 (first rules), the declaration need not set forth the insurance policy declared upon in hæc verba, or according to its legal effect, the rule of evidence is unchanged, and proofs must be made in the same way as if the policy had been fully set forth.—Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210.

¶ 1262. In an action upon a policy of insurance set forth in the declaration according to his view of its legal effect, plaintiff need not introduce in evidence the application, which is hypothetically referred to in the policy, and so averred in the declaration, in order to enable the court to determine whether the terms of the application invest the contract with a different legal sense than that ascribed to it in the declaration.—Throop v. North American Fire Ins. Co., 19 Mich. 423.

¶ 1263. A prima facie case in an action upon a fire insurance policy is made out by introducing the policy in evidence, and showing the loss.—Lagden v. Concordia Mut. Fire Ins. Co., 188 Mich. 689. (Ostrander, Stone and Steere, JJ., dissenting.)

¶ 1264. The failure of a life insurance company to offer the by-laws in evidence in an action on the policy, will not require a reversal of a judgment in its favor, where the policy makes such by-laws a part of the contract, and where the policy and the physician's examination were sufficient to show a breach of the contract of warranty on the part of the applicant.—Mudge v. Supreme Court I. O. F., 149 Mich. 467.

¶ 1265. An insurance contract cannot be held conditional where it appears that a policy was issued, when the insured made application, stating that the premium was paid, although the evidence showed that the insured made application at the instance of an agent, giving a note for the premium, and stipulating that such note was to be returned unless the agent succeeded in obtaining the return of notes given for another policy then in suit, and where the insured returned the policy on the agent's failure to obtain the other notes but was persuaded to let the matter rest, being taken seriously ill shortly afterwards so that the agent paid the note on maturity. The evidence did not show the company's knowledge of the arrangement between its agent and the insured, that the policy was not to be in effect while the agent was trying to obtain a return of the other

notes, or until the new note was to be paid, and it was clear that the insured had never requested cancellation of the policy.—Shields v. Equitable Life Assur. Soc., 121 Mich. 690.

¶ 1266. Contention that there was no evidence to support a contract of insurance to begin at a future date, and that rate of premium and term of policy were not fixed, held not tenable.—Michigan Pipe Co. v. North British & Mercantile Ins. Co., 97 Mich. 493.

§ 319. ——Agents and their authority.

Agents and their authority in general, see ante III.

¶ 1267. In an action on policy evidence held insufficient to show that a certain person representing himself as an adjuster of defendant insurance company was in fact an adjuster of such company.—Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270.

¶ 1268. On a bill to set aside a compromise of marine insurance loss on the alleged ground of false representations and fraudulent concealment and to reinstate a written abandonment of the steamer to the underwriters as a constructive total loss, evidence held insufficient to show that an agent of the underwriters had any authority to make an election binding on the underwriters to pay to a wrecking company for salvage charges a specified sum or a certain percentage of the salved value.—Loud v. Federal Ins. Co., 195 Mich. 60.

§ 320. ——Interest or title of insured.

Right, title and interest of beneficiary in general, see ante IX.

¶ 1269. The occurrence in an insurance policy of a direction to pay the loss, if any, to some one other than the insured named in it, as his interest may appear, does not in an action by the insured upon the policy necessitate the proof of any interest owned or held by such person in the insured property.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1270. Testimony by insured that he made a deed to his wife and that he caused it to be recorded and then understood that he had transferred it to her, followed by his testimony on cross-examination that he did it intending to place the record title in her to ward off an unjust claim, will permit but will not require a finding that the actual title or ownership passes as distinguished from the bare record title, it being evident that insured did not apprehend the difference.—Hogadone v. Grange Mut. Fire Ins. Co., 133 Mich. 339.

¶ 1271. In an action by the personal representative of a deceased person against a creditor of decedent to recover balance of proceeds out of life insurance policies after satisfying alleged debt to which policies were alleged to have been collateral security, evidence held sufficient to establish that the policies were assigned as collateral security.—Atkin v. Van Sickle, 187 Mich. 635.

§ 321. ——Payment of premiums or assessments.

Payment of premium or assessment in general, see ante §§ 84-87.

¶ 1272. In an action on an insurance policy, a letter of the district manager and adjuster, stating that "the premiums on the policy were paid under certain conditions," is prima facie evidence, at least, of the payment of the premiums.—Dolsen v. Phoenix Preferred Acc. Ins. Co., 151 Mich. 228.

§ 322. ——Property or interest covered or risk insured against.

Property or interest covered or risk insured against, see ante VII.

¶ 1273. In an action on an insurance policy covering a stock of merchandise and providing for the termination of the policy in the event of the building in which the stock was contained falling through a cause other than fire, where it was established that immediately after the building fell and for more than an hour thereafter there was no appearance of fire in or about the ruins, and where plaintiff claimed that a flame of fire was seen to shoot from the top of the building and that the contents of the building were covered after it fell, by mortar and brick, and that thereby the fire was retarded and concealed, the finding for the plaintiff was not disturbed.—N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212.

¶ 1274. A Canadian steamer while navigating Canadian waters with a defective compass and without a lookout, and while violating a Canadian statute requiring vessels to go at moderate speed in a fog, was stranded in a fog on an island far out of her course, and was abandoned. Held, that on a policy insuring her against perils of the sea, except those occasioned by want of ordinary care and skill, or of unseaworthiness, her owner could not recover for her loss without showing that the disaster was not caused or contributed to either by such breach of the statute or by the defect of the compass, and that it was caused by perils insured against.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 1275. In an action on a policy for loss from fire following an explosion of gasoline an objection that the loss from the explosion not covered by the policy is not separated from the loss due to the fire is not meritorious, where there is evidence that the fire destroyed all of the insured property and no evidence that any destruction was caused by the explosion.—Walker v. Western Underwriters' Ass'n, 142 Mich. 162.

§ 323. ——Forfeiture or avoidance for breach of warranty or condition.

Forfeiture or avoidance for breach of warranty or condition, see ante XII, B.

¶ 1276. A statement in the application that the applicant is in sound health is not shown to be untrue unless it appears that he had some disease of a serious nature, not a temporary ailment.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 1277. In an action on an insurance policy, defended on the ground of breach of warranty in that the insured was not in good health at the time of insuring, testimony that he was attended by a physician is sufficient to make out a prima facie breach of warranty.—Rhode v. Metropolitan Life Ins. Co., 129 Mich. 112.

¶ 1278. In an action on a life insurance policy, the evidence showed that the insured told the examining physician that she was in sound health and had never been seriously ill, when as a matter of fact she was at that time suffering from a disease of the heart. It was also proved that the application and the policy contained the provision that no liability should be incurred by the company unless the policy should be delivered while the insured was in good health. Held, that these facts are sufficient to justify a verdict directed in defendant's favor, even though a question of fact was raised as to whether the insured told the examining physician that she had not been attended by a physician within two years, and that she did not have heart disease.—Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467.

¶ 1279. In an application for insurance it was stated that the building was to be used for stores, and that there were to be two tenants only. The proof showed that the building was used for stores, and the second story and garret for sleeping rooms and for no other purpose. Held not to be inferred from these proofs that other persons besides the tenants occupied the upper rooms.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

¶ 1280. In an action on an insurance policy where the truth of a statement by applicant that she had not consulted a physician within seven years before the application, and that she had never had heart disease, is in issue, verdict for defendant should not be directed because a physician testified that she had consulted him and he had diagnosed her ailment as valvular heart disease, where, though it was undisputed that she had consulted him, he was uncertain as to the date and relied upon memory wholly in testifying that it was within seven years, and there was other testimony tending to create a doubt so that it could not be said as a matter of law that his testimony was undisputed.—Wilson v. Royal Neighbors of America, 139 Mich. 423.

¶ 1281. In an action on a policy excepting risks incurred through voluntary exposure to obvious injury or danger, evidence that insured was killed by being thrown from a running mare does not authorize a directed verdict for the defendant, where there was further testimony that the mare was kind and even-tempered, had been ridden with safety, and that insured had seen her run in races.—Putnam v. Phoenix Preferred Acc. Ins. Co., 155 Mich. 134.

¶ 1282. In an action upon an insurance certificate in which the defense was fraud in making a false statement as to not being pregnant in the medical examiner's blank, evidence held sufficient to sustain a verdict for the plaintiff.—Clark v. North American Union, 139 Mich. 589.

¶ 1283. Where, in proving his loss under a policy of insurance, one discloses the existence of another policy obtained in violation of the conditions of the former, such statement is an admission that dispenses with any other proof against him of such further insurance.—New York Central Ins. Co. v. Watson, 23 Mich. 486.

¶ 1284. Evidence held insufficient to establish that the statement in an application for employers' liability insurance that no other company had canceled a policy or refused to issue one within a specified time, was false and fraudulent.—American Fidelity Co. v. R. L. Ginsberg Sons' Co., 187 Mich. 264.

¶ 1285. In an action on a fire insurance policy, testimony that the insured creamery had not been operated for periods of more than ten days is not contradicted, so as to raise a question for the jury, by testimony of the plaintiff that he visited the creamery once a week for thirteen weeks and on "most occasions" it was in operation especially where on a previous trial he had testified that he visited the creamery three times during that period.—Cronin v. Fire Association of Philadelphia, 127 Mich. 612.

¶ 1286. In an action on an insurance policy, defended on the ground of ill health and misrepresentations of the insured at the time of making the contract, the statements of the insurance company's examining physician made at the time of insuring, declaring the insured to be in good health are sufficient to go to the jury.—Rhode v. Metropolitan Life Ins. Co., 129 Mich. 112.

¶ 1287. It is not contributory negligence to pass from a passenger car to the dining car of a vestibuled train, in the absence of a showing that the person so doing knew or ought to have known that the vestibule doors were open.—Robinson v. United States Benevolent Soc., 132 Mich. 695.

¶ 1288. In an action on an accident insurance policy, on the death of a mason due to his stepping on a part of a scaffold from

which the support had been removed, testimony of the employer that he had warned the insured to "look out for those loose ends" is not sufficient to reverse a judgment on verdict directed for the plaintiff when it is doubtful if he heard or understood the warning.—Irwin v. Phoenix Accident & Sick Ben. Ass'n, 127 Mich. 630.

¶ 1289. Under a fire insurance policy providing that the policy should be void if an insured manufacturing establishment ceased to be operated for more than ten consecutive days, but containing a rider permitting the insured mill in question to remain idle during the winter season, proof of a usage that the winter season in the locality in question meant the interval from the time the mill closed in the fall until the logs came to the mill in the next season, which at this mill was late in June or early in July, was sufficient proof of the duration of the "winter season."—Barker v. Citizens' Mut. Fire Ins. Co., 136 Mich. 626.

¶ 1290. In an action upon a fire insurance policy, it appeared that the property insured was destroyed by forest fires; that the tenant who was occupying the place, upon discovering the approach of the fire, plowed several furrows around the buildings; that he then loaded his household effects upon a wagon, and drove them to a place of safety, leaving his wife in charge of them; that, while he was engaged in fighting the fire, he was informed that his wife was ill, and he thereupon took her to a village a few miles distant; that, when he left, there were eight or ten people defending the property; that he brought two men from the village, and started back to the farm house, but could not get there readily, because of the flames. Held, that the evidence did not conclusively show lack of diligence in protecting the property, sufficient to avoid the policy under a provision requiring the insured to show, as a condition to a recovery thereon, that "due diligence was used to save the property exposed."—Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386.

§ 324. ——Waiver of forfeiture.

Waiver of forfeiture in general, see ante XII, C.

¶ 1291. Waiver of a forfeiture will be assumed on slight evidence if equity requires. —Lyon v. Travelers' Ins. Co. of Hartford, Conn., 55 Mich. 141.

¶ 1292. Forfeiture is not favored either in law or equity, and a provision for it in a contract of insurance will be strictly construed; and courts will find a waiver of it upon slight evidence when the equity of the claim is, under the contract, in favor of the assured.—Turner v. Fidelity & C. Co., 112 Mich. 425.

¶ 1293. Forfeitures are not favored either at law or in equity, and provisions therefor in a policy of insurance will be strictly construed, and courts will find a waiver upon slight evidence, when the equity of the claim is, under the contract, in favor of the assured.—Bonenfant v. American Fire Ins. Co., 76 Mich. 653.

¶ 1294. The fact that a soliciting agent who took an application for insurance and forwarded it to the company, three or four years later assisted insured in obtaining additional insurance on the property, does not constitute a waiver of a condition in the policy that it shall be void if additional insurance is procured.—A. M. Todd Co. v. Farmers' Mut. Fire Ins. Co. of Allegan & Ottawa Co., 137 Mich. 188.

¶ 1295. The application for a policy of insurance stated that the policy should not be in force until delivered, and the first premium paid. The applicant called at the office of the agent for the policy when he was out. Later the agent asked the applicant several times to settle for the policy. The applicant died before delivery. Held, there was no evidence of a waiver of payment and an agreement to give time on the premium.—Dennis v. Fidelity Mut. Life Ins. Co., 159 Mich. 594.

§ 325. ——Proof of loss.

Proof of loss in general, see ante XV.

¶ 1296. Evidence held sufficient to support a finding that the loss of an eye was the result of an accident; and that sufficient proof was given to, and that preliminary notice of the injury was waived by, an accident insurance company.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 1297. Where the policy contemplates a pro rata distribution of the funds received in a particular department only in case the sum realized is insufficient to pay the accrued policy contract, thus providing against such a contingency, if it should ever happen, a claimant is not required, in a suit upon the policy, to prove that the contingency has not happened.—Warner v. National Life Ass'n, 100 Mich. 157.

§ 326. ——Cause of death of insured.

Sufficiency of evidence of death to go to jury, see also Death § 5.

¶ 1298. Testimony that the insured was suffering from melancholia agitata which is often accompanied by a suicidal impulse that he had spoken of a previous impulse to commit suicide, that he was very anxious to escape from a hospital, that he disappeared while out driving with a physician friend, that his overcoat was found on the bank of a river and his body in the river will not reverse a verdict that death was caused in an effort to escape and not by suicide.—Wasey v. Travelers' Ins. Co., 126 Mich. 119.

¶ 1299. A certified copy of a coroner's certificate of death of an insured person reciting that the insured came to his death from a gunshot wound in his head self-inflicted is admissible as prima facie evidence of the cause of death of the insured under Comp. L. 1897, § 4617, How. 2nd Ed., § 1580.—Bromberg v. North American Life Ins. Co., 192 Mich. 143.

§ 327. ——Amount and extent of loss suffered.

Amount and extent of loss suffered in general, see ante XIV.

¶ 1300. In an action by a mutual fire insurance corporation against a former member to recover a pro rata portion of losses and expenses of plaintiff from the date of the last assessment to the date of cancellation of the policy, evidence held sufficient to make out a prima facie case for plaintiff.—Patrons' Mut. Fire Ins. Co. v. Butler, 193 Mich. 648.

¶ 1301. Failure on the part of the plaintiff in an action on a policy providing for specific and concurrent insurance in varying amounts, to show the amount of loss upon each class of the property insured, will not reverse, where the insurance was small and the loss total, and where the attorneys for the company failed to cross-examine as to the value of the various articles destroyed and the loss thereon, and only raised the question by request to charge.—Improved Match Co. v. Michigan Mut. F. Ins. Co., 122 Mich. 256.

¶ 1302. A verdict for the insurer cannot be directed on the theory that there was no competent proof of what the actual cash value of the lost property was, where it was shown what property was lost by a list submitted in course of attempted settlement and by a more complete list embraced in the submitted proofs of loss, and where the evidence of value was vague and not satisfactory, partly because dependent on testimony of the insured who was a Russian and imperfectly understood the questions put and imperfectly answered them through an interpreter, but there was some positive evidence of the value of some of the articles.—Walker v. Western Underwriters' Ass'n, 142 Mich. 162.

¶ 1303. On a bill to enforce certain policies of fire insurance where it appeared that all such policies were issued by an agent of the insurers, that previous to the complete destruction of the building a small fire loss had been adjusted by the insurers' agent, that the agent had some knowledge of the value of the property, and there was no evidence of fraud and deceit practiced by plaintiff, evidence held sufficient to show that the property was of the value claimed by plaintiff.—Fite v. North River Ins. Co., 199 Mich. 467.

¶ 1304. Under a provision in a fire policy upon a vessel that the loss or damage for which the insurer shall be liable shall in no event exceed what it would cost the insured to repair or replace the same with material of like kind and quality, the insured cannot, in a suit on the policy, be required to prove the exact extent of the damage as an element of proof of cost, where the boat sank before being entirely consumed.—Jackson v. British-America Assur. Co., 106 Mich. 47.

D. TRIAL PRACTICE, INSTRUCTIONS AND JUDGMENT.

§ 328. In general.

Trial practice in general, see Trial.
Place and county for suit against insurer, see Venue, I.
Improper argument on trial, see Argument of Counsel.
Reference in argument to defendant's being insured as error, see Argument of Counsel § 25.

¶ 1305. Where the plea in an action on an insurance policy charged plaintiff with burning the property, the remark by the trial judge that the course of testimony was the same as if plaintiff were on trial for arson was not open to exception if it did not lead the jury to infer that defendant's proofs must preclude any reasonable doubt.—Monaghan v. Agricultural Fire Ins. Co., of Watertown, N. Y., 53 Mich. 238.

§ 329. Questions of law and fact.

Construction of policy or contract, see post § 330.
Agents and their authority, see post § 331.
Interest of insured, see post § 332.
Property or liability covered and risk insured against, see post § 333.
Forfeiture or avoidance for breach of condition or warranty, see post § 334.
Truth of statements in application, see post § 335.
Forfeiture for nonpayment of premium or assessment, see post § 336.
Increase of risk or voluntary exposure, see post § 337.
Vacancy of premises, see post § 338.
Waiver of warranties or forfeitures, see post § 339.
Reinstatement of insured, see post § 340.
Sufficiency of notice and proofs of loss, see post § 341.
Cause of death or injury of insured, see post § 342.
Waiver of objection as to whether question is one of law or fact, see Saving Questions, V.

¶ 1306. The question of whether an agent appointed by the purchaser of land, with the knowledge of his vendors, to look after the insurance upon such property, had authority to receive notice of and agree to the cancellation and surrender of a policy of insurance upon the building on such land, is a question for the jury; where it appears that

such purchaser, under his contract of purchase, was obligated to keep the property insured and to pay the premiums therefor, for the benefit of his vendors; and where it appears that such agent procured such policy of insurance; and where there is evidence that such agent subsequently agreed to the cancellation and surrender of such policy.—O'Neill v. Northern Assur. Co., 145 Mich. 516.

¶ 1307. Where in an action on a life insurance policy there is evidence that the insured was the keeper of a house of ill fame and not a house wife as represented, and there was no attempt to dispute defendant's claim on this point, it was error for the court to submit this question as an open one to the jury.—Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290.

¶ 1308. A policy conditioned that the insured should be in good health at the time of the delivery of the policy was applied for on December 16th and was delivered to the insured on Tuesday, January 30th, following. She had done a hard day's work on the Saturday preceding and took some medicine that night, and on Sunday was not feeling well; on Monday, Tuesday, and Wednesday she had some disturbance of the bowels, but was about the house, doing her work, and resting occasionally. Inflammation of the bowels set in on Thursday; on Saturday she became seriously ill, and died the following Tuesday. Held, that the question whether the insured was in good health at the time of the delivery of the policy was properly left to the jury.—Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94.

¶ 1309. In a suit by an administrator upon a policy of insurance payable to the decedent, his executors, administrators, or assigns, defendant sought to defeat a recovery by proof of the surrender of the policy, and the issue of a policy payable to certain beneficiaries therein named. Held, that plaintiff can recover only upon proof of the existence of the first policy, and the question of such alleged surrender was properly left to the jury.—Krause v. Equitable Life Assur. Soc., 105 Mich. 329.

¶ 1310. The question whether or not the insured in a life insurance policy drank not only beer, but also spirituous liquors at the time of making application, is one for the jury, where testimony is mostly negative as to drinking spirituous liquors.—Malicki v. Guaranty Fund Life Soc., 123 Mich. 148.

§ 330. ——Construction of policy or contract.

Construction of policy or contract, see ante §§ 65-70.

Contract or policy in general, see ante V.

¶ 1311. Where a policy of insurance, introduced in evidence, contained in the statement of a number of rods distance, a word which might be "six" or "oix," and there were no circumstances raising any doubt as to what it was really meant for, the question was one of law for the court as a matter of construction, and it ought not to have been left to the jury to determine which way it was written.—Lapeer County Farmers' Mut. Fire Ins. Ass'n v. Doyle, 80 Mich. 159.

¶ 1312. The provision in a life insurance policy that if statements of the insured were untrue in any particular which would have led to the insured's rejection had they been stated in accordance with the facts, whether intentionally or otherwise, the contract should be void, was for construction by the court; and it was error to admit testimony on behalf of defendant that if such facts had been truthfully stated, the contract would not have been made.—New Era Ass'n v. Mactavish, 133 Mich. 68.

§ 331. ——Agents and their authority.

Agents and their authority in general, see ante III.

¶ 1313. Whether a policy remained in force was a jury question on evidence that it was a renewal and that a credit of a small loss not regularly proved ($5.20) was asked by insured against the premium, which the agent refused to grant, referring the matter to another but agreeing to hold the policy for a few days until a conference could be had, and where insured testified that a month later such person assured him that it was still in force, but the agent meanwhile reported the policy to the insurer and himself paid the premium and the policy was stamped on the back "Cancelled." The question was one of mixed law and fact, the fact being what effect the transaction with the agent had.—Dove v. Royal Ins. Co., 98 Mich. 122.

¶ 1314. The question whose was the agency of an intermediary is for the jury, where there was some evidence either way.—Preston National Bank v. Michigan Mut. Fire Ins. Co., 115 Mich. 511.

§ 332. ——Interest of insured.

Interest or title of beneficiary or insured, see ante IX.

¶ 1315. In an action to recover on a policy of insurance, where the policy provided that the interest of the assured at the time of the loss must be that of owner or mortgagee, where the husband had procured the insurance upon the buildings and later conveyed to his wife the land on which they stood, and after the fire had assigned the policy to the wife, who afterwards reassigned it to the husband, where the whole question turned on whether or not the deed of conveyance to the wife had been delivered to her before the fire, the question of delivery is one for the jury, and it was not error to tell the jury that it was not necessary that the deed should have been actually placed in the wife's hands, a manual delivery not being always

necessary.—Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co., 87 Mich. 349.

¶ 1316. Where the circumstances in the light of which such a policy is to be construed do not justify the court in saying, as matter of law, that defendant, a vendor out of possession, the purchaser being in possession, intended to insure his interest, and the testimony tends to show that the applicant informed the agent who wrote the policy that he "had a land contract out," the question should be submitted to the jury.—Hamilton v. Dwelling House Ins. Co., 98 Mich. 535.

¶ 1317. It is a question for the jury in action on an insurance policy on a stock of goods as to whether insured had a claimed reserve stock, where he did not include such reserved stock in his numerous financial statements to banks and commercial agencies.—Silverstone v. London Assurance Corporation, 187 Mich. 333.

§ 333. ——Property or liability covered and risk insured against.

Property or liability covered or risk insured against, see ante VII.

¶ 1318. Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part of the stock, it was held that whether they were included in the term "groceries" in the policy was a question of fact for the jury.—Niagara Fire Insurance Co. v. De Graff, 12 Mich. 124.

¶ 1319. In an action on a sick benefit policy the question of whether the insured is suffering from a disease covered by the policy or from consumption is for the jury on conflicting evidence.—Hoffman v. Michigan Home & Hospital Ass'n, 128 Mich. 323.

¶ 1320. It was a question for the jury whether a fire policy "on lumber in mill building, on cars under mill sheds, and in sheds adjoining to said mill building," covered lumber in sheds at some distance from the mill, or merely the lumber under the projecting roofs or awning of the mill built for the protection of lumber and men when loading or unloading cars in stormy weather. —Wolverine Lumber Co. v. Phoenix Ins. Co. of Brooklyn, 145 Mich. 558.

§ 334. ——Forfeiture or avoidance for breach of condition or warranty.

Forfeiture or avoidance for breach of condition or warranty, see ante XII, B.

¶ 1321. The question of forfeiture in the case of a fire insurance policy is a mixed one of law and fact.—Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555.

¶ 1322. Whether there has been such a change of title to insured property as to avoid a policy of fire insurance is a question for the jury when resting on conflicting testimony.—Houran v. Aetna Ins. Co., 183 Mich. 418. (Ostrander, Stone, Bird and Steere, JJ., dissenting.)

¶ 1323. Where it is expressly provided in an insurance policy that overvaluation of his property by the assured shall make his policy void, it is error for the court to submit the question of overvaluation to the jury as one of fraud or good faith, because the question for the jury is simply whether or not the property has really been overestimated, whatever the intent may have been. If the estimate of value has been made by some one else, even if it be by the insurance agent himself, and has been adopted by the insured under the honest belief that it is correct, the assured is still responsible for it under the notice contained in the policy.—American Ins. Co. v. Gilbert, 27 Mich. 429.

¶ 1324. In a suit on a fire insurance policy the defendant raised the objection that plaintiff had conveyed the goods insured to his wife and thereby invalidated the policy. Plaintiff testified that he made out a bill of sale to his wife to escape his creditors, and recorded it, but that his wife did not know of it and that the bill was never delivered to her. Held, the question of delivery was for the jury, and its finding for plaintiff could not be disturbed on this ground.—Goodwin v. Union Ins. Co. of Philadelphia, 163 Mich. 41.

¶ 1325. In an action on a fire insurance policy, on personal property where the defense was that the policy was void because of fraud or false swearing in the proofs of loss, and where it appeared that plaintiff included in one schedule, relating to property to which he had title, property sold under a conditional sale contract and unpaid for, and overvalued property in another schedule, relating to property in which he had only an equitable interest, held that it was a question for the jury whether plaintiff had committed fraud or sworn falsely.—Barrett v. Connecticut Fire Ins. Co., 195 Mich. 209.

§ 335. ——Truth of statements in application.

Representations in application as warranties, see ante VIII.

Application in general, see ante V.

¶ 1326. A question for the jury as to whether a plaintiff at the time of taking out fire insurance informed the agent of the company of the location of the property with substantial accuracy, is presented where the plaintiff testifies that he made a diagram of the buildings and informed the agent of their position.—Collins v. North British & Mercantile Ins. Co., 118 Mich. 281.

¶ 1327. Whether the names of the individual members of an insured partnership were misrepresented in an application for a

policy of fire insurance, which would be vitiated by any concealment or misrepresentation of material facts, under the evidence should have been submitted to the jury.—Jacobs v. Queen Ins. Co., 183 Mich. 512.

¶ 1328. Whether or not a woman keeping a house of prostitution was a housewife as stated in her application for insurance is a question for the jury.—Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290.

¶ 1329. Where a plaintiff in a suit to recover insurance testifies that he informed the agent taking his oral application that his title to the property was conditioned, and the agent testifies to the contrary, the question is for the jury, and the court should not direct a verdict for the defendant.—Miller v. Prussian Nat. Ins. Co., 158 Mich. 402.

¶ 1330. In an action on a life insurance policy where the defense set up was that the insured was not in good health at the time the policy was issued and the answers in the application as to the health of insured were untrue and breaches of warranty the court did not err in denying defendant's motion for a directed verdict and properly submitted the question of the insured's health to the jury, where there was also evidence that the insured was in good health.—Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290.

¶ 1331. Whether a statement by an applicant for life insurance, that he had not been attended by any physician, was materially false, it being shown that he had been treated by a physician, is properly submitted to the jury to determine whether the ailment for which he had been treated was a serious one or a mere temporary difficulty.—Rhode v. Metropolitan Life Ins. Co., 132 Mich. 503.

¶ 1332. In an action on an insurance policy where defendant disputed recovery on the ground of a false answer to a question in the application, where the physician who filled in the application testified on cross-examination that he had no recollection as to whether the insured had answered the particular question, it was held error to refuse to submit the issue as to whether the question had actually been answered to the jury.—Clark v. North American Union, 179 Mich. 131.

¶ 1333. Whether a policy of insurance was issued on the written application of the insured, so as to make the representations therein contained binding upon him, or was in fact issued upon the mere oral application of a mortgagee protected by the policy to the extent of his interest, was a question for the jury, where the insured, although testifying that the written application was made by him to an agent other than the one who signed the policy, admitted that the signature to the application forwarded by the latter was his, and such application had the stamp of defendant's manager thereon, bearing date as of the day preceding that on which the policy was issued, and where the mortgagee testified that he made an oral application to the agent signing the policy, and a few days later received the same and paid the premium.—Cronin v. Fire Assoc., 112 Mich. 106.

§ 336. ——Forfeiture for nonpayment of premium or assessment.

Forfeiture for nonpayment of premium, see ante §§ 150-155.

¶ 1334. Plaintiff sued on a policy of fire insurance in defendant benefit order. The agent who took plaintiff's application, one day asked the secretary of the local grange whether plaintiff's dues were paid, and expressed his regret upon learning he was behind. The secretary's husband then said he would become responsible for them. At that time the secretary had the grange funds, money of her husband, and her personal money all together in her desk. Both the secretary and her husband testified that they intended this agreement to operate as a payment by the husband. Held, the court properly left to the jury the question whether the dues were by this arrangement intended to be presently paid.—Keating v. Patrons' Mut. Fire Ins. Co. of Michigan, 160 Mich. 648.

¶ 1335. In an action on an insurance policy on which plaintiff had failed to pay an assessment, testimony tending to show that he had not received the notice of assessment required by defendant's charter, was some evidence that it was not mailed, and raised an issue of fact which should have been submitted to the jury.—Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties, 153 Mich. 594.

§ 337. ——Increase of risk or voluntary exposure to danger.

¶ 1336. Where the plaintiff, a saloonkeeper, in a suit to recover insurance, had failed to pay the annual and special taxes on his business and to take out a license, it is a question for the jury whether the hazard has been increased by plaintiff so as to invalidate the policy, and the court should not direct a verdict.—Miller v. Prussian Nat. Ins. Co., 158 Mich. 402.

¶ 1337. A condition in a fire insurance policy avoiding it in case the hazard is increased without the consent of the insurer should not be construed to forbid the making of ordinary repairs in a reasonably safe way, although involving a temporary increase of risk. Hence, it cannot be said, as a matter of law, that the use of gasoline torches in burning old paint from the metal-covered cornice of a brick building, in order to repaint it, increases the hazard, within the meaning of such a provision, where there is evidence that it is customary to remove paint in this manner, but the question is a proper one for the jury.—Smith v. German Ins. Co., 107 Mich. 270.

¶ 1338. In an action on an accident policy, where the insured while walking on the tracks was killed by a train, the question whether insured exposed himself to such unnecessary risk of injury or danger as would bar recovery of the full amount of the policy is for the jury to determine from the evidence.—Walter v. People's Health & Accident Ins. Co., 173 Mich. 581.

§ 338. ——Vacancy of premises.

Breach of condition against vacancy of fire risk, see ante § 165.

¶ 1339. There having been evidence that insured had two houses and occupied the insured one "a few days in every week," though not in it at the time of the fire, the question as to whether the house was occupied or vacant is one which must be submitted to the jury.—Maas v. Anchor Fire Ins. Co. of Cincinnati, Ohio, 148 Mich. 432.

¶ 1340. In an action on a fire insurance policy, held that evidence as to the construction placed upon the word "vacant" in a vacancy clause in the policy by defendant's agent at the time of soliciting the insurance was inadmissible, as the question whether a house was vacant within the meaning of the policy was a question of law for the court.—Gordon v. St. Paul Fire & Marine Ins. Co., 197 Mich. 228.

¶ 1341. In an action on an insurance policy, where the facts are undisputed, the question whether the building was "vacant and unoccupied" so as to avoid the policy is one of law for the court.—Richards v. Continental Ins. Co., 83 Mich. 508.

§ 339. ——Waiver of warranties or forfeitures.

Waiver of warranties and forfeitures, see ante XII, C.

¶ 1342. Waiver is a question for the jury on the evidence.—Cobbs v. Fire Ass'n of Philadelphia, 68 Mich. 463, adhered to on rehearing 68 Mich. 465.

¶ 1343. Waiver is a law question if the facts are admitted or the testimony undisputed.—Marthinson v. North British & Mercantile Ins. Co., 64 Mich. 372; Cobbs v. Fire Association of Philadelphia, 68 Mich. 465; Towle v. Ionia, Eaton & Barry Farmers' Fire Ins. Co., 91 Mich. 219.

¶ 1344. Where there is no dispute as to the acts of an insurance company concerning an alleged waiver of proof of loss by it, or as to the facts concerning what would be a reasonable time in delaying to require further proofs of loss the question of what constitutes a waiver is one of law.—Foiles v. Detroit Fire & Marine Ins. Co., 175 Mich. 716.

¶ 1345. Waiver of a condition against additional insurance unless indorsed on the policy, is a question for the jury where there is evidence that the secretary of the company was informed of the additional insurance and made no objection, and after the fire requested proof of loss.—Walter v. Mutual City & Village Fire Ins. Co., 120 Mich. 35.

¶ 1346. Where there is evidence that the insurance company through its agent may have known of additional insurance without a consent indorsed on the policy and may have supposed that its right to object was waived, though the agent had lacked authority to waive it, the question of the waiver by an insurer of the forfeiture incurred should have been submitted to the jury.—Cleaver v. Traders' Ins. Co., 71 Mich. 414.

¶ 1347. Waiver of a defense as to the existence of other insurance, by an insurance company, in an action on a policy, is for the jury, where the question of waiver is contradicted, the defense not being interposed at the time of the claim, or suit, but subsequently, by an amendment to the plea.—Power v. Monitor Ins. Co., 121 Mich. 364.

¶ 1348. Whether a provision in an accident insurance policy requiring all disagreements to be settled by arbitration is waived, where the company, in its correspondence with the claimant, calls for further proofs of loss without indicating any defect in the first, exhibits no desire to have the claim arbitrated, and states that if suit is brought it will place the matter in the hands of its attorneys, is a question for the jury.—Gnau v. Masons' Frat. Accident Ass'n, 109 Mich. 527.

¶ 1349. In an action on an insurance policy where the defense relied on was that the insured in her application had stated that she was a housewife and that as a matter of fact she was the keeper of a house of ill fame, and the evidence showed that defendant had solicited her application for insurance, and she had signed the application in the house of ill fame, and the premiums on the policy were collected there, the house being conspicuously one of ill fame, it is a question for the jury whether the defendant's agents were not aware of the character of the house and the nature of the business there, when they accepted the application and the premiums, and if the jury so found the company could not rely upon a breach of warranty in this respect.—Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290.

¶ 1350. In an action on a mutual fire insurance policy the question whether defendant had waived forfeiture by plaintiff of his insurance by reason of his nonpayment of an assessment is properly submitted to the jury, in an instruction that if they find that defendant continued to treat plaintiff's policy as in force subsequently to serving notice of the assessment, and up to the time of the

fire, a period of about nine months, without objection or protest or notice of any claim of forfeiture, and by its conduct led the plaintiff to believe that it considered the policy as in force, such conduct would be a waiver of any forfeiture or suspension of the policy, and the defendant would be liable for the loss.—Elmondorph v. Citizens' Mut. Fire Ins. Co., 91 Mich. 36.

§ 340. ——Reinstatement of insured.

Reinstatement in general, see ante XII, D.

¶ 1351. The construction of correspondence relating to the mistaken cancellation of a benefit policy and the reinstating of the insured was for the court.—Slater v. United States Health & Acc. Ins. Co., 133 Mich. 347.

§ 341. ——Sufficiency of notice and proofs of loss.

Notice and proofs of loss, see ante XV.

¶ 1352. Whether proofs of death comply with the requirements of an insurance policy is a question for the court and does not concern the jury.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

¶ 1353. An insurance company sued to recover back certain moneys paid on a loss, on the ground of a misdescription of the risk and deceptive proofs of loss. The premises had been held adversely to the insured, who, however, had recovered against the holder on a first trial in ejectment, but had not taken out a writ of possession. The application for insurance was oral and was made by the applicant's attorney, who told the insurance agent of the ejectment suit and its result, and that the defendant had a right to a new trial. The agent filled out the policy, describing the premises as occupied by a tenant. Held, that the case should have gone to the jury.—Hurd v. St. Paul Fire & Marine Ins. Co., 89 Mich. 443.

¶ 1354. What is a reasonable time for giving notice to a liability insurance company of injuries to third persons covered by an indemnity policy is a question of law where the facts are undisputed.—Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74.

¶ 1355. In a suit on an insurance policy, where the evidence is disputed as to whether the insured made false statements to defendant's representative and in his written proof of loss, the questions are for the jury.—Moloney v. Germania Fire Ins. Co., 168 Mich. 269.

¶ 1356. In an action against a farmers' mutual fire insurance company to recover for the loss of a house and contents, farm buildings, machinery and stock, where it appeared that plaintiff made an incorrect list of the property claimed to have been lost and subsequently made out a new one, and the only explanation given by him as to the origin of the fire was that it must have originated from spontaneous combustion from a silo on the inside of the barn at one end of a haymow, which silo had been recently filled with green corn and clover, and claimed that he first saw the fire on the top of the mow in the barn, and defendant claimed that it must either have been of incendiary origin or due to negligence, held that the cause of the fire was a question for the jury.—Veenstra v. Farmers' Mut. Fire Ins. Co. of Ottawa and Allegan Counties, 195 Mich. 55.

¶ 1357. The question as to whether the failure to file proofs of death of a member of an accident association within the time fixed lay with the plaintiff or the association, was for the jury.—Shelden v. National Masonic Acc. Ass'n, 122 Mich. 403.

¶ 1358. Whether notice of injury was given by an insured person as soon as possible and within a reasonable time, as required by the terms of an accident policy, is not a question for the jury, where the insured, without excuse, waited nearly five months before giving such notice.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 1359. What is a reasonable time wherein to notify insurer of proceedings against insured is for the jury.—Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

§ 342. ——Cause of death or injury of insured.

¶ 1360. Though an injury from a fall produces insanity by reason of which the person purposely takes his own life, it is too remote and conjectural to be submitted to a jury as a direct cause of self-destruction.—Streeter v. Western Union Mut. Life & Accident Soc., 65 Mich. 199.

¶ 1361. In an action on an insurance policy where there are many circumstances surrounding the case which should be taken into consideration in determining whether the death was from suicide or homicide, the question is for the jury.—Furbush v. Maryland Casualty Co., 131 Mich. 284.

¶ 1362. In an action upon an accident insurance policy where the issue was whether death was caused by suicide or homicide, the question was one for the jury, and its finding for plaintiff was not interfered with.—Furbush v. Maryland Casualty Co., 133 Mich. 479.

¶ 1363. Where in an action upon an insurance policy, the evidence upon the question whether the insured, who was drowned, came to his death through accident, or by apoplexy, sudden seizure, or suicide, is insufficient to overcome the presumption against suicide, the question is properly submitted to the jury.—Burnham v. Interstate Casualty Co., 117 Mich. 142.

¶ 1364. Plaintiff, beneficiary on an accident policy, offered the testimony of an eyewitness that he saw the insured struck in the face by a canthook. Other witnesses testified as to the presence of marks on his face. There was a conflict in testimony as to whether such a blow might cause death in ten days from an abscess on the brain. Held, the question whether the insured met his death by accident was for the jury.—Hurd v. Northern Acc. Co., 160 Mich. 535.

¶ 1365. It was for the jury to say whether the presumption against suicide had been overcome where it appeared that insured, on the afternoon of the day he made his will, being then in financial difficulties and heavily insured against death, went in a small boat and was thereafter seen to be rowing apparently endeavoring to get his hat, which was in the water near by, next to be himself in the water apparently swimming towards the boat, and where he was floating dead on the surface when persons reached him in an endeavor to relieve him; and the fact that the body floated, being explained by a possible reason in evidence, would not exclude an inference of drowning though bodies of persons drowned usually sink.—Burnham v. Interstate Casualty Co., 117 Mich. 142.

¶ 1366. Where the surroundings as to who was aggressor in the affray in which an insured was killed were such as to raise a question as to the credibility of the only witness, and where the latter made contradictory statements, the case was for the jury.—Payne v. Union Life Guards, 136 Mich. 416.

¶ 1367. In an action on a life insurance policy, where it appeared that the insured was found lying dead in his room with a gunshot wound in his head and a revolver in his hand; that he had complained of not feeling well; that there was no evidence of a struggle, and the coroner's report recited that deceased had committed suicide, held that it was a question for the jury whether deceased committed suicide.—Bromberg v. North American Life Ins. Co., 192 Mich. 143.

¶ 1368. Whether death resulted from natural or accidental causes is a question for the jury in an action on a policy of accident insurance, where the testimony is conflicting.—Johnson v. Fidelity & Casualty Co. of New York, 184 Mich. 406.

¶ 1369. In an action on an accident and health insurance policy insuring against personal, bodily injuries effected, during the continuance of membership of the insurance through external violent and accidental means, and in which the testimony was conflicting, held that the question whether the primary cause of the death of insured was due to a blow received upon the abdomen by the falling of a telescope resulting in an ulcer and abscess or to disease was a question for the jury.—Skinner v. Commercial Travelers Mut. Accident Ass'n, 190 Mich. 358.

¶ 1370. The attending physician, a witness for the plaintiff, testified that the insured died of pneumonia, while two other physicians, who were sworn as experts on behalf of the defendant testified that, in their opinion, the symptoms detailed by the attending physician were attributable to the use of intoxicating liquors, an excepted risk. Conflicting testimony was also introduced regarding the extent to which the insured indulged in the use of intoxicants. Held, that the question as to the cause of death was properly submitted to the jury.—Maier v. Massachusetts Benefit Ass'n, 107 Mich. 687.

§ 343. Directing verdict.

Verdict, findings and judgment, see post § 350.

¶ 1371. Where in a suit on a life insurance policy, the plaintiff fails to introduce any evidence rebutting the testimony of defendant's examining physician to the effect that the insured failed in response to questions in the application to mention certain treatments taken by him from a physician in a hospital, the trial court is bound to direct a verdict for the defendant.—Bullock v. Mutual Life Ins. Co. of New York, 166 Mich. 240.

¶ 1372. In an action on a life insurance policy where there was evidence consisting of a letter sent with the policy advising insured that the premium was not paid, and the policy contained a recital that the premium had been paid, but the application provided that there should be no liability on the policy until it was delivered and the first premium paid, held that the court erroneously directed a verdict on the ground that there was a completed contract.—Christophersen v. Metropolitan Life Ins. Co., 199 Mich. 634. (Moore, J., dissenting.)

¶ 1373. Where plaintiff applied to an insurance agent for fire insurance upon her property, and was informed that his companies would not accept the risk, but that he would try elsewhere, and where after policies had been issued and canceled by various companies including defendant company, plaintiff sought to hold defendant liable on the ground that the agent had no authority to accept notice of cancellation and surrender of the policy, a verdict for defendant should have been directed on the ground that such agent was plaintiff's agent and that the law would not permit her to say that he was her agent to surrender one policy, but was not her agent to surrender another under precisely the same state of facts.—Kooistra v. Rockford Ins. Co., 122 Mich. 626.

¶ 1374. A verdict for an insurance company is properly directed in an action on a policy, where the application of the insured shows a denial of other applications for insurance as well as a denial of an unfavorable opinion by a physician with reference

to life insurance, and evidence of the defendant shows application for insurance by a fraternal order and rejection by a medical examiner who advised him that he was not a proper subject for insurance. Insurance companies have the right to be truthfully informed whether an applicant for insurance has before then applied for insurance, and been rejected, and to know whether a medical examiner has declined to give a favorable opinion upon an application for insurance.—Ferris v. Home Life Assur. Co., 118 Mich. 485.

¶ 1375. In an action upon a life insurance policy where there was some testimony within the notice of the defenses relied upon tending to prove that the policy was avoided, a verdict was improperly directed for the plaintiff.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

¶ 1376. A fire insurance policy contained the provision that "all farm property usually kept in barn buildings, * * * shall be considered as contents thereof, when in the yards about said buildings." The plaintiff insured constructed a new shed nearby the buildings mentioned in his policy, and moved some of the machinery from said buildings into the shed. The officers of the defendant came to view the premises, and to consider with him whether he carried sufficient protection. The contents of the new shed were mentioned, and words and acts passed between the parties from which an inference might be drawn that the officers intimated that the contents of the shed were covered by the policy. The shed and its contents were destroyed by fire. Held, the court properly refused to direct a verdict for the defendant, and properly left it to the jury to say whether defendant was estopped to deny its liability.—Wilson v. Farmers' Mut. Fire Ins. Co., 156 Mich. 545.

¶ 1377. In an action upon a policy issued before Pub. Acts 1897, Act No. 167, took effect, it was error to instruct that a representation in the application that the property in question was incumbered for a less amount than it was in fact incumbered for was immaterial, and a verdict for defendant should have been directed.—Niles v. Farmers' Mut. Fire Ins. Co., 119 Mich. 252.

§ 344. Instructions.

On burden of proof and presumptions, see post § 345.
On forfeiture or avoidance for breach of condition or warranty, see post § 346.
On increase of risk or hazard, see post § 347.
On notice and proof of loss or claim, see post § 348.
As to amount or extent of loss, see post § 349.
Instructions construed as a whole, see also Instructions § 19.
Duty to give requested instructions as to what items covered by the policy, see also Instructions ¶ 138.
Instructions as to requirements of proof of fraud and on probative tendency of evidence, see Fraud § 62.
Instructions in actions on fraternal benefit contract, see Fraternal Associations § 79.

¶ 1378. In an action on fire insurance policies, fraud being the defense, in charging the jury it is not the duty of the court to single out a particular transaction, or the testimony of a particular witness, but it is the better practice to challenge the attention of the jury carefully to the entire evidence upon the subject.—Silverstone v. London Assur. Corporation, 176 Mich. 525.

¶ 1379. In an action by the purchaser of property against a mutual fire insurance company to recover on an alleged oral contract of insurance an instruction which authorized a recovery either on the theory that there had been an assignment of an old policy by plaintiff's predecessor in title or that there had been an oral agreement for the issuance of a new one held prejudicially erroneous where plaintiff was only entitled to recover on the latter theory.—Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties, 192 Mich. 230.

¶ 1380. In an action to enforce the claim of an assured under a fire policy, where the company's defense is that the plaintiff started the fire with intent to defraud, a charge leading the jury to infer that there must be the same conclusive evidence of guilt that would be essential if the insured were on trial for the crime is erroneous and misleading; though defendant cannot complain of it in case there is no evidence at all of guilt.—Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289.

¶ 1381. Where there were circumstances tending to discredit the testimony of an insurance agent that policies were issued before the loss, it was error to instruct the jury that they were so issued.—Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482.

¶ 1382. An instruction introducing the element of the excessive use of ale, wine, beer or intoxicating liquors by the insured, is erroneous in an action on a life insurance policy where there was a conflict of evidence on the question as to whether or not the insured drank only beer or habitually drank liquor at the time of making application.—Malicki v. Guaranty Fund Life Soc., 123 Mich. 148.

¶ 1383. Where a letter notifying a fire insurance company as to the taking out of other insurance was sent to the secretary who died before the trial of an action for loss under the policy, and where the letter was not within the knowledge or accessible to other officers of the company, it was error to charge that the letter was filed and the contents would survive the death of the secretary and would be equally within the knowledge of

other officers if it ever got into the possession of the company.—Shelden v. Michigan Millers' Mut. Fire Ins. Co., 124 Mich. 303.

¶ 1384. An instruction that the stranding of an insured steamer in a dense fog was an accident that was prima facie covered by the policy, and for which the insurers were prima facie liable, and that the insurers would be liable if the fog proximately contributed to the stranding, was properly refused where the policy insured against perils of the sea, except those caused by want of ordinary care and skill or unseaworthiness. —Richelieu & Ohio Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

§ 345. ——On burden of proof and presumptions.

¶ 1385. Instructions as to the burden of proof upon an accident insurance policy approved.—Thompson v. Loyal Protective Ass'n, 167 Mich. 31.

¶ 1386. In an action on a life insurance policy where the insured is shown to have been suffering from insanity and to have had a previous impulse to commit suicide, an instruction that the presumption is that the deceased did not commit suicide whether sane or insane is erroneous because the facts repel any presumption of law.—Wasey v. Travelers' Ins. Co., 126 Mich. 119.

§ 346. ——On forfeiture or avoidance for breach of condition or warranty.

Forfeiture or avoidance for breach of condition or warranty, see ante XII, B.

¶ 1387. It is misleading to charge that reliance on a specific ground of forfeiture waives all other grounds, where there is a reliance on several grounds and the charge is coupled with a reference to one ground, which was waived and does not refer to the others which were not.—Cronin v. Fire Ass'n of Philadelphia, 119 Mich. 74.

¶ 1388. In an action upon a fire insurance policy, where there was evidence that defendant had among various grounds for denying liability, claimed violation of a condition against vacancy as a ground for voiding the policy, and where there was no evidence of waiver of the latter condition, it was misleading for the court in its charge to submit to the jury the question whether there had been a waiver of such condition against vacancy.—Cronin v. Fire Ass'n of Philadelphia, 119 Mich. 74.

¶ 1389. In an action on a fire insurance policy providing that vacancy of the insured creamery for ten days should invalidate the policy, where there was dispute as to whether or not the creamery was in operation during such time, it was error for the court to refuse to charge that if the jury found that the creamery stopped running and ceased to produce the usual and ordinary product more than ten days prior to the fire, the policy was voided.—Cronin v. Fire Ass'n of Philadelphia, 119 Mich. 74.

¶ 1390. An instruction that if, when applying for insurance, plaintiff fairly disclosed to defendant's agents the condition of his title, the contract of insurance was valid, but that if he informed them that he owned the property in fee, and had a clear title to the same, when in fact he had only an executory contract for its purchase, such misrepresentation would vitiate the policy, was held correct.—Wooliver v. Boylston Ins. Co., 104 Mich. 132.

¶ 1391. In an action upon a life insurance policy issued pursuant to a representation that the insured drank only two or three glasses of beer daily, and that he did not drink spirituous liquors, it was error to instruct the jury that if they found that the insured "was not an intemperate user of alcoholic liquors, it would not avoid the policy."—Malicki v. Guaranty Fund Life Soc., 119 Mich. 151.

¶ 1392. In an action upon a life insurance policy issued pursuant to a representation that the insured did not attend the bar which was operated in connection with his grocery, but that such bar was exclusively attended by his clerk, an instruction was erroneous under which the jury might have found that nothing short of a "habitual" tending of the bar and making that the "business" of the insured would avoid the policy, and that anything short of that would be an "occasional" act which would not avoid the policy.—Malicki v. Guaranty Fund Life Soc., 119 Mich. 151.

¶ 1393. The fact that the insured believed that the court would not enforce a forfeiture for failure to pay an assessment within the twenty days prescribed in the by-laws will not justify an instruction that the beneficiary cannot recover if the insured relied upon such belief where the evidence shows in his case a custom of the company of receiving payments after the twenty-day limit.—Wallace v. Fraternal Mystic Circle, 127 Mich. 387.

¶ 1394. Where, by an interrogatory addressed to an applicant for insurance, his attention was directed to incendiarism as a risk to which the property might be exposed, and where, as the evidence shows, an attempt had really been made to set fire to it, which the applicant does not state to the insurer, it is error to submit to the jury the question whether an attempt to fire the building was material to the risk. Where the truthfulness of the application is made the basis of the contract it would also be error to instruct the jury that if such information had been given to the insurer as would put him upon inquiry as to the attempt to burn the building that would justify the insured in his failure to

communicate the facts within his knowledge.—North American Fire Ins. Co. v. Throop, 22 Mich. 146.

¶ 1395. In an action on assigned policies of fire insurance, in which it was claimed that the name of one of the firm of the assignors was fraudulently concealed from the insurers when the policies were applied for, held that an instruction that in order to defeat a recovery on the policies the defendant must, by a preponderance of the evidence, establish that the members of the firm of the assignors committed a gross, wilful and intentional fraud, and committed the crime of perjury with relation thereto, otherwise their verdict must be for the plaintiff was correct.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

¶ 1396. It is not error to refuse to instruct the jury that the failure of an applicant for life insurance to disclose the fact that he consulted a physician and received a prescription on the day he made his application voids the policy, where plaintiff claims, and introduces testimony tending to show, that the call was for a prescription to relieve him from a slight disorder of the stomach, which was quickly relieved, it being at least a question for the jury.—Hann v. National Union, 97 Mich. 513.

§ 347. ——On increase of risk or hazard.

¶ 1397. Where insurance is expressly made void if the hazard is increased, a charge using term "materially increased" is not objectionable.—Grand Rapids Hydraulic Co. v. American Fire Ins. Co., 93 Mich. 396.

¶ 1398. Where machinery is insured by a policy expressly void in case of an increase in the hazard, or in case any product of petroleum of greater inflammability than kerosene be kept or used about the premises, if "reduced oil," shown to be less inflammable than kerosene, is subsequently substituted for coal as fuel, in an action on the policy an instruction is proper that it did not prohibit the use of such oil, and that the only question is whether the use and the manner of the use increased the hazard.—Grand Rapids Hydraulic Co. v. American Fire Ins. Co., 93 Mich. 396.

¶ 1399. In a suit on an insurance policy, a charge denying the right of recovery if the risk was increased at any time was held properly refused as an abstraction not pointing out the matters of increase and not confining the request to the defenses pleaded.—Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

§ 348. ——On notice and proof of loss or claim.

Notice and proofs of loss, see ante XV.

¶ 1400. An instruction to the jury in an action on a policy of accident insurance that a provision for written notice as soon as possible after an injury to the insured was inserted to protect the insurer against fraud and misrepresentation, without saying more, is not sufficient.—Hummer v. Midland Casualty Co., 181 Mich. 386.

¶ 1401. In an action on an accident and health insurance policy providing that the policy did not cover accidental injuries or death resulting from or caused directly or indirectly, wholly, or in part, by hernia or disease in any form, the evidence being conflicting as to whether the primary cause of the death of insured was due to a blow received upon the abdomen by the falling of a telescope, resulting in an ulcer and abscess, or to disease, an instruction that plaintiff should recover if death was due solely to the blow received and not partly to disease as a contributing cause, held proper.—Skinner v. Commercial Travelers' Mut. Acc. Ass'n, 190 Mich. 353.

¶ 1402. In an action to recover on a fire insurance policy on personal property, in which the defense was that the policy was void because of false swearing in the proofs of loss, held that an instruction that if the jury found that plaintiff had proven her case by that preponderance of the evidence which the court had defined they should render a verdict in her favor, not to exceed the amount claimed, but if the defendant had proven by "overwhelming" evidence, fraud or intention of fraud, then the verdict should be given for the defendant, was erroneous.—Barrett v. Connecticut Fire Ins. Co., 195 Mich. 209.

¶ 1403. Under a policy of accident insurance defining bodily injury as injury leaving on the body marks of contusion or wounds visible to the naked eye, it is proper to instruct the jury that the mark visible to the eye need not be a bruise, contusion, laceration or broken limb, but may be any visible indication of an internal injury which may appear within a reasonable time after the injury is received, such, for instance, as discoloration of the part of the body affected, and further that in legal medicine, the word "wounds" means injuries of every description that affect either the hard or soft parts of the body, and it comprehends bruises, contusions, fractures, luxations, etc. In law the word means any lesion of the body.—Thompson v. Loyal Protective Ass'n, 167 Mich. 31.

¶ 1404. The refusal to give a charge for defendant to the effect that if the jury believed that insured included in proofs of loss articles not in his store at time of fire with fraudulent intent there could be no recovery on the policy is not error in an action by insured on a fire insurance policy on a stock of goods where the substance of such charge was fully covered in another charge given for defendant.—Silverstone v. London Assurance Corporation, 187 Mich. 333.

¶ 1405. The refusal to instruct, in an action upon a policy, that the proofs of loss could not be taken as evidence of the facts therein stated, is not ground for reversal, where there was uncontradicted evidence of the loss and testimony that the proof of loss correctly shows the "losses sustained."—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

§ 349. ——As to amount or extent of loss.

Amount of loss, see ante XIV.

¶ 1406. It was error to charge that there was testimony that the value of the property on plaintiff's showing was $700, and that on the stand he claimed it worth that amount; where the proofs of loss were $422 or $472 and there was evidence from which the jury might fairly have concluded that the discrepancy was due to inclusion by the witness in the $700 of certain heirlooms besides the property valued at the lesser sum.—Walker v. Western Underwriters' Ass'n, 142 Mich. 162.

§ 350. Verdict, findings and judgment.

Directing verdict, see ante § 343.

General law of verdicts and findings, see Verdicts and Findings.

Special findings and general verdict and conflicts therein, see Verdicts and Findings, II, IV.

General law of judgments and costs, see Judgments; Costs.

Conflicts between special and general verdicts, see Verdicts, II.

Judgment upon insurance policy res adjudicata as to assignee of the claim, see Former Adjudication ¶ 382.

Judgment in action upon policy as res adjudicata in injunction to restrain its enforcement, see Former Adjudication ¶ 49.

Judgment against insurance company as bar or estoppel upon members, see Former Adjudication § 68.

Effect of consent decree to dismiss insurer which was nominal party to suit by adverse claimants, see Equity ¶ 762.

¶ 1407. Where an insurance policy provided that any award upon a submission thereunder should "not decide as to the validity of the contract or any other question except the amount of such loss or damage," plaintiff has the burden of proving his insurance and right to recover, and a finding in an action on the award must so describe the submission as to show its real nature; it is a mistrial if the finding treats the submission as covering all other questions concerning the right of recovery.—Haslinger v. Long Island Ins. Co., 62 Mich. 144.

INSURERS to INTENT.

Cross-References.

Insurers—
- See generally Insurance.
- Duty and liability incident to undertaking or relationship, see Bailments; Carriers; Negligence; and specific topics treating of negligence or the relationships, e. g., Highways, XII; Master and Servant, III; Railroads, VIII; Street Railways, IV.

Intangible Property—
- See Good Will; Trade Marks; Literary Property; Patents; Easements; and see Property; Real Property.
- Taxable property of intangible nature, see Taxes, II.
- Insurance on intangibles, see Insurance, IV, VII.
- Assignable and convertible property, see Assignments § 4 et seq.; Conversion § 7 et seq.

Intemperance—
- As breach of condition of insurance, see Insurance § 159; Fraternal Associations, II, V.
- See also cross-references under Intoxication.

Intent—
- Element in crimes, see Crimes § 2; Larceny; Homicide; Rape.
- Element in forming contract, see Contracts, III.
- Element in gifts, see Gifts, II.
- Element in executing instrument, see Execution of Instruments §§ 32, 33.
- Element in adverse possession or prescription, see Adverse Possession, III; Easements § 1 et seq.
- Element in dedication, see Dedication § 6 et seq.
- Element in election and waiver, see Election § 1.
- Element in estoppel, see Estoppel § 28.
- Element in fraud and deceit, see Fraud, I.
- Element in fraud upon creditors and takers, see Fraudulent Conveyances, I.
- Element in preferential assignments, see Assignments for Creditors §§ 11, 14 et seq.
- Element in conversion, see Conversion § 2.
- Element in trespass, see Trespass, I.
- As test in construction of contracts, deeds, wills, etc., see Contracts, VI, A; Deeds, III, A; Wills, VI, A.
- Averments as to intent in indictments and informations, see Indictment, I, B.
- Presumptions as to intent, see Evidence § 46; Indictment § 134; Homicide §§ 44, 45; Rape; Intoxicating Liquors § 65.
- Evidence of intent, see Indictment, VIII, B, 1; Evidence § 102; and see specific topics treating of that whereof intent is an element.
- Right to costs as determined by intentional act, omission or wrong of party, see Costs §§ 30, 44, 61, 98, 124.

INTEREST.

TREATS of compensation for the use or retention of money due to another either by express agreement for interest or by implication of right, and of the proper rate, computation and recovery of interest. It excludes usuriousness of agreements and the general law of usury (see Usury) and the liability of persons in fiduciary and accountable relationships to account for interest (see Estates of Decedents, X, C; Partnership, VII; Trusts, VIII, XI; and like topics) and interest as an element or measure of damages (see Damages, I). For further exclusions see references in the body of the topic.

Analysis.

I. Right to interest.

A. In General.

§ 1. Nature of right.
§ 2. Necessity and sufficiency of demand.
§ 3. Contracts not stipulating for interest.
§ 4. Sums equitably due on accounting or foreclosure.
§ 5. Moneys advanced to use or benefit.
§ 6. Money received and wrongfully withheld.
§ 7. Stock assessments.
§ 8. Unliquidated demands.
§ 9. Claims for goods sold.
§ 10. Demands against public.
§ 11. Judgments and decrees bearing interest.
§ 12. ——Interest on costs.
§ 13. Waiver, loss or bar to right.
§ 14. Payment or tender to stop interest.
§ 15. ——Excuse for nonpayment of principal.

B. Stipulations in Contract.

§ 16. In general.
§ 17. Necessity for demand.
§ 18. Construction of contract terms.

II. Rate, computation and recovery.

§ 19. Rate of interest.
§ 20. ——When legal rate applies.
§ 21. ——After maturity of debt.
§ 22. Terms of contract.
§ 23. Change of rate.
§ 24. Rates of discount.
§ 25. Computation and accrual.
§ 26. ——Computation from date of demand.
§ 27. ——From time of default.
§ 28. ——From commencement of suit or action.
§ 29. ——From rendition of judgment, decree or order.
§ 30. ——Suspension during pendency of suit.
§ 31. Computation in case of partial payments.
§ 32. Compound interest.
§ 33. ——Terms of contract authorizing.
§ 34. ——Interest on interest in default or arrears.
§ 35. ——Limitations upon right.
§ 36. ——Waiver or loss of right to compound interest.
§ 37. Recovery in suits and actions.

I. RIGHT TO INTEREST.

A. IN GENERAL.

§ 1. Nature of right.

Necessity and sufficiency of demand, see post § 2.
Contracts not stipulating for interest, see post § 3.
Sums equitably due on accounting or foreclosure, see post § 4.
Money advanced to use or benefit, see post § 5.
Money received and wrongfully withheld, see post § 6.
Stock assessments, see post § 7.
Unliquidated demands, see post § 8.
Claims for goods sold, see post § 9.
Demands against public, see post § 10.
Judgments and decrees bearing interest, see post §§ 11, 12.
Waiver, loss or bar to right, see post § 13.
Payment or tender to stop interest, see post §§ 14, 15.
Interest where stipulated for in contract, see post I, B.
Rate, computation and recovery, see post II.
Unlawful interest, see Usury.
Nature and indicia of usury, see Usury, I.
Interest as penalty for delinquent taxes, see Taxes, X.
Interest on inheritance tax in case of nonpayment, see Taxes, XIII.
Right to interest on recovery of money paid for illegal tax, see Taxes, VIII.
Interest on legacies, see Wills.
Interest on unpaid local assessments, see Local Improvements.
Right to interest on unpaid drain assessments, see Drains § 77.
Interest as element in determining jurisdictional amount in justice court action, see Justices of Peace, III.
Interest as damages, see Damages §§ 46, 47.
Interest as measure of damages on money contracts, see Damages § 52.
Presumption as to foreign interest laws, see Evidence § 59.
Changing rate or adding provisions for interest as alteration, see Alteration of Instruments § 8.
Right of representative to interest on value of goods transferred by decedent in fraud of creditors, see Estates of Decedents ¶ 321.

¶ 1. Interest is a charge for the loan or forbearance of money.—Eames v. Barber, 192 Mich. 1.

¶ 2. Interest in Michigan is purely statutory.—Kermott v. Ayer, 11 Mich. 181; Tousey v. Moore, 79 Mich. 564.

¶ 3. The regulation of interest between the state and an individual when money due the former is withheld is a proper subject of legislation.—Drennan v. Herzog, 56 Mich. 467.

¶ 4. For mere delay in payment, interest is in law regarded as a sufficient compensation.—Clark v. Craig, 29 Mich. 398.

¶ 5. Interest is given for the delay in the payment of money, and whether the sum is owing to an individual or to the state makes no difference.—Drennan v. Herzog, 56 Mich. 467.

§ 2. Necessity and sufficiency of demand.

¶ 6. After demand of payment and refusal by the mortgagor to pay he is not relieved from the payment of interest on the debt although he was entitled to relief from payment of interest before such demand was made.—Adams v. Greig, 126 Mich. 582.

¶ 7. In the absence of proof of demand by the claimant, and of any promise to pay interest, none should be allowed on a claim against a co-obligor's estate for contribution.—Weyburn v. Kipp's Estate, 63 Mich. 79.

§ 3. Contracts not stipulating for interest.

Implication of allowance of interest from allowance on previous transactions, see post ¶ 56.

¶ 8. Where a land contract is silent as to interest, it is not demandable so long as the vendee is not in default.—Allen v. Atkinson, 21 Mich. 351.

¶ 9. A debtor on certain promissory notes running at ten per cent, and all maturing together, gave his creditor a mortgage deed for a sum less than the amount of the notes. The deed was made eight months after the notes, and did not refer to them or expressly identify the debt, nor did it specify a time for payment nor make any provision for interest. Held, that it was due as soon as given, and by implication a security bearing interest from its date, or at least from the maturity of the notes; but as it was a distinct security in itself, interest on it could be implied only at the statutory rate of seven per cent.—Eaton v. Truesdail, 40 Mich. 1.

¶ 10. An allowance of interest on a subscription contract in aid of a railroad from the date of the completion of the road, where the promise to pay was one year after its completion, and nothing is expressed about interest, is error.—Stevens v. Corbitt, 33 Mich. 458.

¶ 11. Comp. L. 1897, § 4856, How. St., 2nd Ed., § 2869, declaring that the interest rate shall be 5 per cent per year, but that parties may stipulate for the payment of any rate not exceeding 7 per cent, was intended merely to regulate the legal rate of interest, and it does not mean that interest necessarily enters into and becomes a part of the contracts and shall in all events be paid, and contracting parties may designate any rate that is not usurious or agree that no interest whatever shall be paid, and their course

of dealings may be such as wholly to debar the recovery of interest in the absence of a stipulation to the contrary.—New York Trust Co. v. Detroit, T. & I. R. Co., 251 Fed. 514.

§ 4. Sums equitably due on accounting or foreclosure.

See also post ¶ 27.

Interest on trust accounting, see Trusts, XI.

Interest on partnership accounting, see Partnership, VII.

Interest on accounting between joint adventurers, see Joint Adventures.

Charging guardian with interest on his account, see Guardianship § 74.

Accountability of representative for interest, see Estates of Decedents, X, C.

Effect of pleadings to admit liability in accounting, see Accounting Suits ¶ 27.

Right to include interest in foreclosure decree, see Foreclosure § 93.

Interest on tax accounting between county and state, see Taxes, X.

Interest on tax accounting between county and township, see Taxes, X.

Interest against estates of decedents, see Estates of Decedents § 158.

¶ 12. An accounting in equity for loans made by a void corporation should be with interest after allowing all payments made upon the loan.—Burton v. Schildbach, 45 Mich. 504.

¶ 13. A partial accounting does not entitle the party in whose favor a sum is found due to recover interest upon the same; and an accounting omitting considerable items is not such a final accounting as makes interest chargeable.—Davis v. Walker, 18 Mich. 25.

¶ 14. Interest will not be denied upon the items in an accounting where the fault in making an accounting necessary is not so plain as to warrant the punishment of either party by denying interest and where interest was not compounded against the objecting party.—Crawford v. Osmun, 90 Mich. 77.

¶ 15. Interest upon rents of property and the unpaid value of its annual use during such time as it is not rented is properly chargeable in a decree for an accounting against defendants, who had obtained the property by unconscionable means, and whose deed is vacated by the decree.—Hack v. Norris, 46 Mich. 587.

¶ 16. A purchase-money mortgagee who had no title to the land he had assumed to convey to the mortgagor, but whose title was afterwards validated by patent to the mortgagor, was not allowed, in a suit to subject the land to the lien of his mortgage, to collect interest prior to the issue of the patent; it appearing that the value of the use of the land to the mortgagor in the interval arose because of improvements made by him thereon.—Toms v. Boyes, 59 Mich. 386.

§ 5. Moneys advanced to use or benefit.

General law of implied contracts, see Implied Contracts.

Interest on disbursements made by broker in behalf of principal, see Brokers ¶ 47.

¶ 17. Interest will not be allowed on advances made under a contract, without an express agreement for it.—Boyce v. Martin, 46 Mich. 239.

¶ 18. The interest chargeable on money advanced under an agreement to furnish funds for the purchase of land for the mutual benefit of the parties, determined.—Boeing v. Fordney, 184 Mich. 153.

§ 6. Money received and wrongfully withheld.

General law of implied contracts, see Implied Contracts.

¶ 19. Interest is recoverable in an action for money paid without consideration under a land contract, where the amount recovered does not adequately compensate for damages.—Davis v. Strobridge, 44 Mich. 157.

¶ 20. One to whom a certified check is delivered for use only on the happening of a certain event, who wrongfully withholds it for some time after the nonoccurrence thereof, is answerable to the maker for interest on money borrowed by him in order to make the check good to the bank certifying it.—Preston v. People's Sav. Bank of Traverse City, 182 Mich. 417.

¶ 21. Under an arrangement whereby parties, who had contracted to saw certain logs, were to sell the lumber and receive the proceeds thereof, they having no right to use the proceeds beyond paying themselves their saw bill and any other legitimate charges growing out of the business, it was their duty to pay over to the owner the proceeds of any sale within a reasonable time after they received the same, and, failing in this, they were properly chargeable with interest upon any balance found unaccounted for.—Youmans v. Heartt, 34 Mich. 397.

¶ 22. Interest will not be allowed on pension money of inmates of the Michigan Soldiers' Home, unlawfully withheld by the Board of Managers, except from the time of death or discharge of the inmate from the home.—Mason v. Board of Managers of Michigan Soldiers' Home, 181 Mich. 347.

§ 7. Stock assessments.

Liability of bank stockholder for interest on bank debts for which he is liable, see Banking § 66.

Stock assessments in general, see Corporations, VII.

¶ 23. Interest may be recovered upon an assessment on stock of an insolvent bank where not paid when due.—May v. Ullrich, 182 Mich. 6.

§ 8. Unliquidated demands.

Interest as tort damages, see Damages § 47.
Right to interest for delay in payment of claim against estate, see Estates of Decedents § 158.
Right to interest on claim against estate for value of property converted although interest not specifically included, see Estates of Decedents ¶ 476.

¶ 24. Interest does not run on an unsettled or unliquidated account unless there is an express or clearly implied agreement that it shall do so.—Sweeney v. Neely, 53 Mich. 421.

¶ 25. Judgment cannot be rendered for interest unless there are data showing how much is due as principal.—Bell v. Ardis, 38 Mich. 609.

¶ 26. Interest upon money withheld is allowed either because there is an express or implied promise to pay it or as damages; but no promise can be implied until the principal falls due, and it is not allowable as damages if there has been no final understanding as to how much money is to be paid.—Lake Shore & M. S. R. Co. v. People, 46 Mich. 193.

¶ 27. Where in a bill for an accounting it appears that complainant had demanded an accounting, but that defendant had furnished no statement or bill for services until the hearing, defendant is not entitled to interest.—Myers v. Radford, 167 Mich. 135, aff'd in 231 U. S. 725, 58 L. ed. 454, 34 Sup. Ct. Rep. 249.

§ 9. Claims for goods sold.

¶ 28. In assumpsit for goods sold and delivered where it may be assumed that the sale was for cash, if payment was not made interest should be allowed.—Knapp v. Hubbard, 176 Mich. 264.

¶ 29. Comp. L. 1897, § 4866, How. St., 2nd Ed., § 2874, providing that in all actions founded on contracts express or implied, whenever, in the execution thereof, any amount in money shall be liquidated or ascertained in form of either party "by verdict, report of referees, award of arbitrators, or by any other mode of assessment according to law," interest may be received upon such "amount so ascertained or liquidated, until payment thereof, or until judgment shall be thereupon rendered; and in making up and recording such judgment, the interest on such amount may be added thereto and included in the judgment," was designed to meet instances where an interval may have occurred between liquidation by special means, and the making up of a judgment thereon, and does not apply so as to authorize interest on the amount found due for lumber sold from the date of shipment to the date of rendition of the verdict.—Herman H. Hettler Lumber Co. v. Olds, 242 Fed. 456.

§ 10. Demands against public.

Right of county or officer to interest on public deposits, see Counties § 40.

¶ 30. Interest upon school-district orders is denied on granting a mandamus to compel payment, there being no authority to impose it.—Turnbull v. Alpena Township Board of Education, 45 Mich. 496.

¶ 31. Interest from the time of demand may be allowed in granting mandamus for the payment of a school order, when it is such a settled demand as would sustain a recovery of interest at law.—Martin v. Tripp, 51 Mich. 184.

¶ 32. A township is not liable for interest on damages appraised for laying out a highway.—People ex rel. Anderson v. La Grange, 2 Mich. 187.

¶ 33. Where city orders for work done under paving contracts contain no promise to pay interest, and are payable out of a particular fund, interest cannot be allowed, especially where the amount of the orders has been paid and accepted.—Talbot v. Bay City Common Council, 71 Mich. 118.

§ 11. Judgments and decrees bearing interest.

Interest on costs, see post § 12.
General law of judgments, see Judgments.
Computation of interest from rendition of judgment, see post § 29.
Necessity for certainty in statement of amount of interest in verdict or judgment, see Judgments, II.
Amendment of verdict to include interest omitted by mistake of jury, see Verdict, V.
As element of recovery on appeal bond, see Appeal, XVI.
Allowance of interest as damages for dilatory appeal, see Costs § 127.
Proper interest allowable in action on foreign judgment, see Foreign Judgments § 16.
Statutory provisions for interest on judgments, see Comp. L. 1915, § 5997 et seq.
Statutory provision for interest on decrees and judgments, see Jud. Act, chap. XXIII, § 20, Comp. L. 1915, § 12835.

¶ 34. Comp. L. 1871, § 6087, How. St. § 7672, permitting interest upon judgments, applies also to decrees.—Warner v. Juif, 38 Mich. 662.

¶ 35. Interest from date of forfeiture cannot be included in judgment upon forfeited recognizance.—People v. Hanaw, 106 Mich. 421.

¶ 36. Where a mortgage payable ten years after date was to bear interest at seven per cent for the first two years, and after

that ten per cent, and where, before the first two years had expired the payee elected under the interest clause in the mortgage to treat the entire amount as due, a decree entered upon the day after the two years expired should bear interest at seven per cent.—Shelden v. Barlow, 108 Mich. 375.

¶ 37. The statute providing for interest on judgments and decrees for money at 7 per cent, which was enacted in 1838, and was carried forward, with amendments, in various compilations and appears as Comp. L. 1897, § 4865, How. St., 2nd Ed., § 2873, was not repealed by a statute passed in 1891 to regulate the interest of money on account and interest on money judgments and fixing the "interest of money" at 6 per cent unless a higher rate not exceeding 8 per cent was stipulated for in writing.—Union Steamboat Co. v. Erie & Western Transportation Co., 189 U. S. 363, 47 L. ed. 854, 23 Sup. Ct. Rep. 504; affirming 108 Fed. 102.

¶ 38. Rev. St. 1838, chap. 6, § 8, as amended in 1855, providing that interest on judgments at law for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money may be allowed and received, and such interest may be collected on execution at the rate of seven per cent per annum, provided that on a judgment rendered on a written instrument bearing a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding ten per cent, was not repealed by Pub. Acts 1891, p. 197, entitled an act "to regulate the interest of money on account, interest on money judgments, verdicts, etc.," and providing that "the interest of money" shall be six per cent except that a greater rate not exceeding eight per cent may be stipulated for in writing, and repealing all acts inconsistent therewith.—The New York, 108 Fed. 102; affirmed in 189 U. S. 363, 47 L. ed. 854, 23 Sup. Ct. Rep. 504.

§ 12. ——Interest on costs.

Law of costs in general, see Costs.

¶ 39. On affirmance of a justice's judgment on certiorari, costs in the suit before the justice are treated as part of the judgment, and interest is allowed thereon (Comp. L. 1871, § 1635, How St. § 1597).—Whelpley v. Nash, 46 Mich. 25.

¶ 40. In suits between individuals the prevailing party is entitled to interest upon the costs awarded in his favor from the date of the judgment or decree.—Flint & P. M. R. Co. v. Board of State Auditors, 102 Mich. 500.

¶ 41. Under the general provisions of the statute relating to interest the state is not liable for interest on demands; but under How. St. §§ 7756, 8984, which indicate an intention to subject the state to the same liability for costs and for the incidents of a judgment as an individual is subject to, with a single exception relating to the method of collection of the demand, the prevailing party in a suit brought by the state is entitled to interest upon the costs awarded in his favor from the date of the decree.—Flint & P. M. R. Co. v. State Auditors, 102 Mich. 500.

¶ 42. Under U. S. Rev. Stats., § 966, authorizing interest on judgments in civil cases recovered in the circuit or district court where the laws of the state in which the court is held permits of it, and Comp. L. 1897, §§ 4865, 10308, How. 2nd Ed., §§ 2873, 13011, which authorize interest on costs from the date of judgment until they are taxed, in an action by a city against a paving contractor and his surety on a bond indemnifying the city against loss on account of the claimed infringement of a paving patent to recover costs in the federal district court paid after a judgment in favor of the patentee in the court of appeals reversing the judgment of the district court, upon taxation thereof, held, that the city was entitled to interest on the costs from date of the judgment in the district court and not simply from the date of taxation thereof.—City of Owosso v. Barber Asphalt Paving Co., 192 Mich. 122.

§ 13. Waiver, loss or bar to right.

Waiver or loss of right to compound interest, see post § 36.

Loss of interest through charging of unlawful rate, see Usury.

¶ 43. On a bill in aid of execution against land which had been sold in contemplation of the issue of execution interest claimed to have been paid by an execution purchaser upon a mortgage from which he redeemed was not allowed, his use of the land being enough to counterbalance it.—Rhead v. Hounson, 46 Mich. 243.

¶ 44. Interest was not allowed a claimant against a fund where the fund really consisted of property of which the claimant was in possession and enjoyment, and where, as against other claimants, the allowance would be inequitable as lessening their chance of payment.—Cicotte v. Stebbins, 49 Mich. 631.

¶ 45. Interest is not stopped by a bill of interpleader improperly filed.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

¶ 46. Where a complainant is decreed rent for premises not delivered to him according to agreement, he cannot be relieved from interest on unpaid purchase money.—Covell v. Cole, 16 Mich. 223.

§ 14. Payment or tender to stop interest.
Excuse for nonpayment of principal, see post § 15.
Sufficiency of payment or tender in general, see Payment, I.
Payment of interest due as nugatory consideration, see Contracts § 123.
Application of payments in excess of interest, see Payment, III.
Payment into court by garnishee to obtain release, see Garnishment § 117.

¶ 47. A sufficient tender stops interest.—Cowles v. Marble, 37 Mich. 158; Jones v. Shaw, 56 Mich. 332.

¶ 48. A sufficient deposit made with the register of deeds as a preliminary to filing a bill to redeem from an irregular foreclosure stopped interest when redemption was contested.—Sager v. Tupper, 35 Mich. 134.

¶ 49. A life insurance company is properly allowed to cut off interest upon the amount of an insurance policy by paying it into court to abide the result of a pending contest where it has no concern except to pay to the person entitled.—Lilley v. Mutual Benefit Life Ins. Co., 92 Mich. 153.

§ 15. ——Excuse for nonpayment of principal.

¶ 50. The nonresidence of a mortgagee is not alone sufficient to relieve the mortgagor from the payment of subsequently accrued interest where he had an opportunity to pay off the mortgage when due and for a time afterwards before mortgagee became a nonresident.—Adams v. Greig, 126 Mich. 582.

¶ 51. The mortgagor of a past due mortgage is not relieved from paying later accruing interest by the fact of having written after maturity for instructions where to pay it to which no reply was received, and the fact that mortgagee was out of the state.—Adams v. Greig, 126 Mich. 582.

¶ 51a. Complainant in a suit to redeem, being unable to find defendant, tendered to his son in the presence of his solicitor the amount due. The son was authorized to inform complainant that his father would not execute a deed until he had received a receipt in full of all demands, and such statement was made in the presence of defendant's solicitor. Held, that the tender was sufficient to excuse complainant from paying interest upon the amount after that date.—Crawford v. Osmun, 94 Mich. 533.

B. STIPULATIONS IN CONTRACT.

§ 16. In general.
Necessity for demand, see post § 17.
Construction of contract terms, see post § 18.
Forbearance as consideration for agreement to pay interest on interest, see Contracts § 113, ¶ 474.
Loan above charter rate as ultra vires contract, see Corporations ¶ 277.
On building association loans, see Building Associations § 11.
Interest as measure of damages on money contracts, see Damages § 52.

¶ 52. A provision in a promissory note drawing no interest if paid at maturity, for the payment of interest at ten per cent at its date if not so paid, is enforceable where the note was given for property sold at those terms.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 53. A note given for the balance due, with interest, on a land contract not drawing interest, on an understanding that the question of the liability to pay interest shall nevertheless remain open, is without consideration as to such interest.—Jennison v. Stone, 33 Mich. 99.

¶ 54. Where recovery is had upon a contract, interest may properly be allowed according to its terms, even though it does not appear that defendant had been notified of the performance of the contract.—Tower v. Detroit, L. & L. M. R. Co., 34 Mich. 328.

¶ 55. Accumulated interest on a principal note was not recoverable, where it appeared that plaintiff had assigned to defendant a certain note and mortgage, and defendant had agreed to pay such interest out of the first moneys paid as interest on said note, but where no interest was ever paid, as the mortgage was foreclosed by the defendant and less was realized than the principal due.—Collins v. Gordon, 122 Mich. 665.

¶ 56. The allowance of interest on a claim for settlement does not imply a contract to allow it thereafter.—University of Michigan v. Rose, 45 Mich. 284.

§ 17. Necessity for demand.
Institution of suit as demand, see post ¶ 98.
Necessity of demand for reserved interest, see Contracts § 232, ¶ 959.

¶ 57. Where interest is due by contract at a fixed time, without any conditions, and is unpaid, no special demand is necessary.—Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

§ 18. Construction of contract terms.
Construction of terms of contract as to rate of interest, see post ¶ 72.

¶ 58. An obligation reciting that there is a certain balance due, "and interest," bears interest.—Spring v. Perkins, 156 Mich. 327.

¶ 59. Where the complainant's intestate furnished funds for the purchase of land under a written agreement by which the defendant was entitled to a one-third interest

therein on payment of that proportion of the costs, taxes and charges, together with annual interest on the investment, simple interest only is chargeable against him, notwithstanding that on many similar contracts he had paid compound interest without objection.—Boeing v. Fordney, 184 Mich. 153.

¶ 60. A note made payable several years after its date with annual interest calls for payment of interest every year during the time it has to run.—Cook v. Wiles, 42 Mich. 439.

¶ 61. Complainant agreed to buy defendant's farm and to pay $1,750 down; to pay "$1,550 on November 1, 1907, with interest on $1,300 thereof, payable at Mutual Home and Savings Association, at $6.70 per month, together with interest on the remainder of the whole sum that shall be from time to time unpaid, at the rate of six per cent per annum, to be computed from April 1, 1907, and to be paid November 1, 190'." An arrangement was made for complainant to exchange in this deal his city house and lot, covered by a mortgage upon which complainant made monthly payments of interest, to the said Mutual Home and Savings Association. The court having found complainant in default in his suit for specific performance, held, that $6.70 monthly interest was payable on the $1,300.—Welling v. Strickland, 161 Mich. 235.

¶ 62. An agreement to allow interest on payments on a note that was not all paid meant no more than that interest would cease from the date of payment.—Foley v. Comstock, 122 Mich. 349.

¶ 63. Where three electric roads were sold for $1,400,000 payable in bonds bearing interest at 5 per cent and the construction and equipment of some of the roads were incomplete but the vendor and guarantors agreed to "complete and finish" the same in accordance with certain specifications at an expense not to exceed a fixed amount, and deposited bonds with a trustee "as a guarantee of the fulfillment of the work" and in case of failure then the vendee might finish the work and charge same to the vendors and might take from the trustee sufficient funds "to fully cover the costs of such completion," and the purchaser later took upon itself the completion of the work at a cost agreed upon by the parties in interest, exclusive of interest upon moneys expended, the purchasers were entitled to interest upon the amounts advanced for the cost of completion, inasmuch as the contract words "to fully cover the cost of such completion" must be construed to mean interest as well as advancements, in spite of the fact that the account for these advancements were unliquidated in the sense that they were required to be proved or admitted.—Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106.

¶ 64. Where the trust company holding certain bonds as trustee for the performance of the completion of an electric road which had been sold, had been appointed receiver of a bank which held a claim to the vendor's interest in the bonds deposited, had written a letter to the vendee expressing an opinion that the bonds should be turned into money and in consideration of the vendee's assent thereto to allow interest "at the rate of 5 per cent upon any and all sums expended by you in the fulfillment of the work designated and described in the said contract and loan, and which may be determined to be proper charges against said bonds and the proceeds thereof," such letter indicates an understanding that the payment should be made in bonds, and that interest at the rate provided in the bonds would be equivalent to payment in bonds, and the fact that the next day the vendee replied that it saw no objection to the sale of the bonds and holding the proceeds in lieu of the bonds is not a waiver of its right to be paid interest or the equivalent thereof.—Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106.

¶ 65. Where the buyer and the seller of several pieces of machinery enter into an agreement, whereby the buyer is given seven months in which to test one machine and return, if unsatisfactory, and it is provided that all unpaid portions of the purchase price shall be paid with interest at 7 per cent from date, and an additional clause provides that the notes for the particular piece of machinery, subject to test are to remain unexecuted until the expiration of the seven months, the seller is entitled to recover 7 per cent interest upon all moneys due from the date of the original agreement.—James Leffel & Co. v. Platt, 126 Mich. 443.

II. RATE, COMPUTATION AND RECOVERY.

§ 19. Rate of interest.

When legal rate applies, see post § 20.
After maturity of debt, see post § 21.
Terms of contract, see post § 22.
Change of rate, see post § 23.
Rates of discount, see post § 24.
Computation and accrual, see post §§ 25-30.
Computation in case of partial payments, see post § 31.
Compound interest, see post §§ 32-36.
Recovery in suits and actions, see post § 37.
Unlawful or excessive rate of interest, see Usury, I.
Nature and indicia of usury, see Usury, I.
Presumption that foreign state has adopted Michigan statute regulating interest rate, see Evidence § 59.
Sufficiency under statute of frauds of agreement to pay higher interest on mortgage, see Frauds, Statute of § 92.
On building association loans, see Building Associations § 11.
Rate of interest payable on municipal bonds, see Municipal Bonds.

Legal rate of interest, see Comp. L. 1915, § 5997.
Statutory limitation on rate of interest, see Comp. L. 1915, § 5997.
Rate of interest which pawnbroker may lawfully charge, see Pub. Acts 1917, No. 273, §§ 8, 9.
Necessity that stipulation for interest in excess of five per cent be in writing, see Comp. L. 1915, § 5997.
Interest on chattel mortgages, see Comp. L. 1915, § 6031 et seq.
Rate of interest on notes or contracts payable out of state, see Comp. L. 1915, § 6002 et seq.

¶ 66. Under statute interest can be implied at seven per cent, but not at ten.—Eaton v. Truesdail, 40 Mich. 1.

¶ 67. Interest cannot be allowed at ten per cent on an accounting if there has been no written agreement for that rate.—Godfrey v. White, 43 Mich. 171; University of Michigan v. Rose, 45 Mich. 284.

¶ 68. Ten per cent interest must be stipulated for in writing.—Eaton v. Truesdail, 40 Mich. 1; Nelson v. Dutton, 51 Mich. 416; Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474.

¶ 69. Whether any liability arises from a parol ratification of an oral agreement that the interest clause in a note may be so changed as to lengthen the period for which ten per cent interest shall be paid, quære.—Nelson v. Dutton, 51 Mich. 416.

¶ 70. There is nothing to prevent parties to a note from allowing back interest upon the debt at the same rate that would be lawful for the future.—Graham v. Chubb, 39 Mich. 417.

§ 20. ——When legal rate applies.

Legal rate governing instruments made in one state and payable in another, see Conflict of Laws ¶¶ 51, 52.
Legal rate of interest, see Comp. L. 1915, § 5997.

¶ 71. Seven per cent is the highest per cent that can be awarded on an accounting unless there is an express contract for a higher rate, or some special reason in the case for exacting more.—Henderson v. Sherman, 47 Mich. 267.

¶ 72. If no rate of interest is fixed in a note payable "with interest," seven per cent is collectible (Act 138 of 1887 fixes the rate at six per cent unless another rate not higher than ten per cent is specified).—First Nat. Bank v. Carson, 60 Mich. 432.

§ 21. ——After maturity of debt.

¶ 73. Interest at the contract rate is allowed as well after as before the maturity of the debt.—Warner v. Juif, 38 Mich. 662.

¶ 74. A bank may take a seven per cent mortgage for a debt due, though its charter prohibits it from taking more than six per cent per annum in advance on its loans or discounts.—Bailey v. Murphy, W. 424.

§ 22. Terms of contract.

Construction of contract terms, see ante § 18.
Terms of contract authorizing compound interest, see post § 33.

¶ 75. Where a mortgage provides that the mortgagor shall pay interest "at the rate of six per cent if the mortgagee pays the taxes, or otherwise if the mortgagor pays all taxes assessed on the mortgage, to be computed at five and one-half per cent," the mortgagee is entitled to interest at six per cent where no assessment whatever is made upon the mortgage.—Rauch v. Seip, 112 Mich. 612.

¶ 76. A mortgage note, payable ten years after date, bore interest at the rate of seven per cent for the first two years, after which it was to bear ten per cent interest. Before the two years had expired, the payee elected, under the interest clause in the mortgage, to treat the entire amount of the note as due. Held, that a foreclosure decree, entered upon the day following the expiration of the two-year period, should bear interest at the rate of seven per cent.—Shelden v. Barlow, 108 Mich. 375.

¶ 77. Where ten per cent interest is exacted the rate need not be expressly stated in writing; it is enough if the contract clearly expresses the sum to be paid.—Cameron v. Merchants' & Manufacturers' Bank of Detroit, 37 Mich. 240.

¶ 78. A mortgagee may stipulate for ten per cent interest as a condition to extending time of payment, and if paid and applied as interest the application will not be disturbed.—Havens v. Jones, 45 Mich. 253.

¶ 78a. A mortgagee is estopped from charging 8 per cent interest on the mortgage debt after maturity though the mortgage provided for 8 per cent upon all overdue interest or principal from the time of maturity, where two years after the mortgage became due he furnished a statement in which the rate was computed at 7 per cent, which statement was objected to because of certain charges for disbursements, and he was asked to furnish "a correct statement of the amount due eliminating such items," and such corrected statement was later furnished with the interest again computed at 7 per cent.—Barnard v. Paterson, 137 Mich. 633.

§ 23. Change of rate.

¶ 79. An oral promise without consideration to reduce the rate of interest specified in the mortgage is invalid.—Harris v. Creveling, 80 Mich. 249; Tousey v. Moore, 79 Mich. 564.

¶ 80. An agreement in writing made with the mortgagee, by a purchaser from the mortgagor, to pay a higher rate of interest after due, in consideration of forbearance, is valid.—Smith v. Graham, 34 Mich. 302.

¶ 81. Courts possess no power, legal or equitable, to change contracts as to the rate of interest, fixed by the parties within the statutory limit, no fraud or misrepresentation being charged.—Curtiss v. Sheldon, 91 Mich. 390.

¶ 82. Under Comp. L. 1871, § 1632, How. St. § 1594, fixing the rate of interest at seven per cent, but making it lawful for parties to stipulate in writing for the payment of any rate not exceeding ten per cent per annum, the rate of interest in a note can be changed from seven to ten per cent, if at all, only by a stipulation in writing.—Swift v. Barber, 28 Mich. 503.

¶ 83. A writing signed by the payee in a note then past due, and bearing interest at 10 per cent, by which the payee agrees to let the maker "have all the money at 8 per cent," may be well construed to be an open proposition to the maker to retain the money, at least until further demand, at the reduced rate of interest, and, when acted upon by the maker, the payee cannot be permitted to exact a greater rate.—Vereycken v. Vanden Brooks, 102 Mich. 119.

§ 24. Rates of discount.

Loans and discounts in general, see Banking § 43.
Interest chargeable by banks in loans, discounts and rediscounts, see Banking §§ 43, 44.
Lawful discount rates in banking, see also Banking § 43.
Rate allowable to bank on mortgage loans as distinguished from ordinary loans and discounts, see Banking § 43.
Computation of interest on specific bequests and general legacies, see Wills, VI.

¶ 84. Ten per cent interest for discounts on loans can be taken under the general banking law (Comp. L. 1871, § 2185, How. St. § 3138).—Cameron v. Merchants' & Manufacturers' Bank of Detroit, 37 Mich. 240.

§ 25. Computation and accrual.

Computation from date of demand, see post § 26.
From time of default, see post § 27.
From commencement of suit or action, see post § 28.
From rendition of judgment, decree or order, see post § 29.
Suspension during pendency of suit, see post § 30.
Computation in case of partial payments, see post § 31.
Compound interest, see post §§ 32-36.
Discounts and commissions incident to loan as usury, see Usury, I, B.
Fictions to cover excessive interest rate, see Usury, I, C.
Computation of interest in trust accounting, see Trusts, XI.
Computation of interest on accounting between joint adventurers, see Joint Adventures.
Computation of interest on partnership accounting, see Partnership, VII.
Computation of damages and present worth in actions for death, see Death by Wrongful Act § 38.
Evidence as to mode of computing present worth, see also Damages § 831.
Date from which computed on negotiable instruments which do not specify date, see Comp. L. 1915, § 6058.

¶ 85. Interest upon an account stated is allowable from the time of statement.—Graham v. Myers, 67 Mich. 277.

¶ 86. When a payment of principal is not equal to the interest due at the time the payment is made, the interest is to be computed at the time when the payment shall be equal to all the accrued interest; or if there has been no such payment, then to the time of liquidation.—Payne v. Avery, 21 Mich. 524.

¶ 87. In foreclosure interest on the mortgage bonds should be allowed only from the date when they were delivered to the owners and holders of them.—Washburn v. Green, 133 U. S. 30, 33 L. ed. 516.

¶ 88. Where money is paid under a contract for legal services and a subsequent agreement is made whereby a smaller sum is allowed for such services, and the amount given in excess of such sum is to be repaid, interest should be allowed on the amount to be repaid only from the time of such subsequent agreement and it is improper to allow interest from the time when the money was paid under the contract.—Nelson v. Stewart, 174 Mich. 127.

¶ 89. Where notes which are secured by a mortgage fall due at different dates each must be treated as a separate debt for purposes of computation of interest.—Lowe v. Schuyler, 187 Mich. 528.

§ 26. ——Computation from date of demand.

¶ 90. Where credit is given for a specified period, without any agreement as to interest, interest is not allowable until the term of credit has expired. And if the term of credit is for an indefinite time, interest is not allowable until after demand of payment.—Beardslee v. Horton, 3 Mich. 560.

¶ 91. Where a note is payable "on demand after date" with interest at a specified rate "after maturity," interest does not begin to run thereon until demand is made for payment.—In re King's Estate, 94 Mich. 411.

¶ 92. Where a demand note was renewed by indorsement to avoid the bar of the statute of limitations, demand is regarded as made at the date of such indorsement. —In re King's Estate, 94 Mich. 411.

¶ 93. Where an administrator by bill demands property held by a defendant, and claimed by her under an alleged gift inter vivos, interest is allowed only from the date of demand upon her by the administrator. —Chamberlain v. Eddy, 154 Mich. 593.

§ 27. ——From time of default.

¶ 94. Interest may be recovered from time of default on moneys due under a contract requiring monthly payment.—Manistee Nav. Co. v. Filer, 185 Mich. 302.

¶ 95. Where a promise is made to pay in labor and material in annual payments, interest does not begin to run until the year is completed in which any given payment is to be made, and the debtor is in default.— Fredenburg v. Turner, 37 Mich. 402.

§ 28. ——From commencement of suit or action.

¶ 96. Interest upon an obligation may run from the beginning of suit if the date of a previous demand for payment is not shown. —Brion v. Kennedy, 47 Mich. 499.

¶ 97. In an action upon an insurance policy it is proper to compute interest upon the amount of the loss from the date of commencement of suit, and to add such interest to the amount of such loss in making up the verdict.—Marthinson v. North British & Mercantile Ins. Co., 64 Mich. 372.

¶ 98. Where a note is payable "on demand after date" with interest at a specified rate "after maturity" institution of suit is a sufficient demand to commence the running of interest.—In re King's Estate, 94 Mich. 411.

¶ 99. Where a certificate of deposit provides for the payment of interest if the deposit is left for a stated time, and suit is brought upon the certificate before the expiration of said period and without previous demand, interest should only be allowed from the date of the commencement of suit.—Beardsley v. Webber, 104 Mich. 88.

¶ 100. Where in a proceeding to enforce a vendor's lien, the bill stated inability of complainant to give the amount of interest and it was not clear as to the amount of interest to be paid, interest from the date of filing the bill was allowed.—Kulling v. Kulling, 124 Mich. 56.

§ 29. ——From rendition of judgment, decree or order.

Interest on judgments, see ante § 11.

Right to interest on costs from date of judgment, see also ante ¶ 42.

Necessity for certainty in statement of amount of interest in verdict or judgment, see Judgments, II.

¶ 101. Where a report on an order of reference must be confirmed before a decree can be carried into effect, interest runs from the date of confirmation.—Match v. Hunt, 38 Mich. 1.

¶ 102. Upon a judgment for costs in favor of one who has appealed from the probate of a will interest runs from the date of rendition.—Hayden v. Hefferen, 99 Mich. 262.

¶ 103. Under a contract of indemnity against liability for personal injury or death caused by the operation of street cars, the judgment in the supreme court, and not that in the circuit court, fixed the time of liability, and therefore interest was only chargeable from the date of the supreme court judgment, in an action on the contract to recover the amount of a judgment rendered against the assured.—Stephens v. Pennsylvania Casualty Co., 135 Mich. 189.

§ 30. ——Suspension during pendency of suit.

¶ 104. Prior to commencing a suit to foreclose a contract as a mortgage, complainant, claiming to own the premises in question, had instituted summary proceedings to recover possession, but was defeated, the court holding that the relation of the parties was that of mortgagor and mortgagee. Held, that the defendant in the foreclosure suit, not having tendered the amount due, was not entitled to a suspension of interest during the pendency of the former suit.—Anderson v. Smith, 108 Mich. 69.

¶ 105. A creditor of an insolvent corporation is equitably entitled to interest upon a dividend payable to him from the date of the order directing the dividend, where payment has been delayed by an unsuccessful contest by the receiver.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

¶ 106. Interest upon interest is not authorized by How. St. § 1599 for the period during which payment is suspended by litigation to determine title to the land, pending which the rate of interest is reduced by agreement.—Jones v. Shaw, 56 Mich. 332.

§ 31. Computation in case of partial payments.

Statutory provisions relating to interest upon instalments, see Comp. L. 1915, § 6001.

¶ 107. The rule adopted in this state for the computation of interest in case of partial payments is to apply the payment in discharge of the matured interest, and the surplus, if any, upon the principal, after which interest is computed on the new principal; but if the accrued interest exceeds the payment, the surplus must not be added

to the principal, but interest will be computed on the former principal until the aggregate payments exceed the interest due, when the surplus will be applied upon the principal, after which interest will be computed on the new principal.—Wallace v. Glaser, 82 Mich. 190.

¶ 108. Where moneys paid out by one of two parties having dealings together but not as partners, in their various transactions including taxes paid upon lands held in common, were to be considered as payments upon amounts owed to the other, upon settlement interest upon the several items should be computed on the partial payment rule.—Gay v. Berkey, 137 Mich. 658.

§ 32. Compound interest.

Terms of contract authorizing, see post § 33.
Interest on interest in default or arrears, see post § 34.
Limitations upon right, see post § 35.
Waiver or loss of right to compound interest, see post § 36.
Construction of contract as to whether interest is compound, see ante ¶ 59.
Right to compound interest against fraudulent trustee, see Trusts, XI.
Allowance of compound interest on partnership accounting for wrongful refusal to account, see Partnership, VII.
Right to compound interest against guardian, see Guardianship ¶ 255.

¶ 109. Interest cannot be compounded by virtue of any provision in the obligation on which it accrues, in the absence of any statute providing for it.—Hoyle v. Page, 41 Mich. 533.

¶ 110. Past-due instalments of interest do not, certainly not without the debtor's express agreement, draw interest.—Van Husan v. Kanouse, 13 Mich. 303.

¶ 111. A valid written agreement may be made to pay interest upon interest after the indebtedness becomes due, in consideration of forbearance.—Lowe v. Schuyler, 187 Mich. 526.

¶ 112. Comp. L. 1897, § 4859, How. St., 2nd Ed., § 2874, authorizing interest upon interest in certain cases does not include verbal contracts.—Lowe v. Schuyler, 187 Mich. 526.

¶ 113. Interest upon a note the entire principal of which matures at a given date runs from the date of the note until paid, and cannot be added to the principal at maturity as in the case of a note payable in instalments.—Buchtel v. Mason, 67 Mich. 605.

¶ 114. In granting specific performance to a vendee in a land contract who has been in default in his payments, a court of equity may require him to pay compound interest if justice demands it.—Richards v. White, 44 Mich. 622.

¶ 115. How. St. § 1599, authorizing interest upon past-due instalments of interest at the rate specified in the contract, does not apply where there is no written agreement as to interest.—Clapp v. Galloway, 56 Mich. 272.

¶ 116. A vendee who seeks specific performance after default in paying instalments of principal and interest will be required to pay interest on the instalments of interest from the time they fell due.—Morris v. Hoyt, 11 Mich. 9.

¶ 117. Annual rests directed in adjusting accounts between mortgagor and mortgagee, and interest computed on each item of the account, where this course was found to be warranted by the practice of the parties.—Emerson v. Atwater, 12 Mich. 314.

¶ 118. Where redemption is decreed from a mortgage securing notes that bear interest payable semiannually, interest on unpaid instalments of interest should be allowed, even though the notes were dated and executed in another state.—Millard v. Truax, 73 Mich. 381.

§ 33. ——Terms of contract authorizing.

¶ 119. Where a tender of more than was due upon a mortgage was made and refused, and the mortgagor filed a bill to redeem before Laws 1869, p. 12, How. St. § 1599, took effect, the mortgagor will not be allowed, in a computation of the amount due, to compound the interest, there being no agreement, express or implied, authorizing him to do so.—Fosdick v. Van Husan, 21 Mich. 567.

¶ 120. Agreement to compound interest in their mutual dealings is not shown by the fact that in dealing with a corporation in which both parties were interested, they assented to such interest; nor does the fact that each in preparing a statement of account, adopted a different mode of computing compound interest thereon amount to an agreement to compound interest upon the basis of a valid agreement therefor made after the interest had become due.—Gay v. Berkey, 137 Mich. 658.

¶ 121. Where coupons have been detached from the bonds of a city, they are also a promise to pay a certain sum, and interest is recoverable on the sum named where not paid when due.—Hollingsworth v. Detroit, 3 McLean 472, Fed. Cas. No. 6613.

¶ 122. Where the interest on bonds of a city was made payable in the coupons to bearer, the coupons passed by delivery which was intended to give them currency, and

being a promise interest is allowed under the Michigan statute, providing that in all actions founded on contracts where any amount shall be ascertained in favor of either party it shall be lawful to receive and allow interest until payment thereof.—Hollingsworth v. Detroit, 3 McLean 472, Fed. Cas. No. 6613.

§ 34. ——Interest on interest in default or arrears.

¶ 123. An interest clause in a bond provided that "in case any sum of principal or interest shall not be paid when due the obligators shall pay interest thereon, at the rate of ten per cent per annum, during all the time the same may remain overdue and unpaid." Held, that this did not authorize the compounding of interest; unpaid principal or interest would draw interest until paid, but without rests.—Morgan v. Michigan Air Line R. Co., 57 Mich. 430.

¶ 124. Where, by the terms of a written contract, interest is payable by instalments at fixed periods, and separate from the principal, How. St. § 1599 allows simple interest on each instalment at the contract rate until paid; but where no interest is payable until the principal becomes due, no interest will be allowed except on the principal.—Hoyle v. Page, 41 Mich. 533; Voigt v. Beller, 56 Mich. 140; Rix v. Strauts, 59 Mich. 364; Buchtel v. Mason, 67 Mich. 605.

¶ 125. Interest cannot be allowed on past-due interest in the case of an obligation payable at a future date "with interest."—Hoyle v. Page, 41 Mich. 533; Voigt v. Beller, 56 Mich. 140; Rix v. Strauts, 59 Mich. 364; Buchtel v. Mason, 67 Mich. 605.

¶ 126. After interest has accrued a promise to pay interest upon it may be valid, and interest may perhaps be recovered upon separate or several contracts for future interest to become due at a certain time, such as coupons attached to negotiable paper.—Hoyle v. Page, 41 Mich. 533.

§ 35. ——Limitations upon right.

¶ 127. An agreement before interest becomes due to compound it is void and unenforceable.—Gay v. Berkey, 137 Mich. 658

¶ 128. Computation of interest on interest can only continue until the debt matures and from that time simple interest must be cast upon the principal until the time of liquidation under Comp. L. 1897, § 4859, How. St., 2nd Ed., § 2874.—Lowe v. Schuyler, 187 Mich. 526.

¶ 129. Under How. St. § 1599, allowing interest to be computed upon interest after it matures, such computation can continue only until the debt matures, after which simple interest is to be cast upon the principal until the time of liquidation.—McVicar v. Denison, 81 Mich. 348; Wallace v. Glaser, 82 Mich. 190.

§ 36. ——Waiver or loss of right to compound interest.

Waiver, loss or bar of right to interest, see ante § 13.

¶ 130. Interest upon interest is waived where, without insisting on its payment, simple interest is accepted.—Wetherbee v. Kusterer, 41 Mich. 359.

¶ 131. A mortgage discharged by mistake will not be reinstated to secure an extortionate sum made up by semiannual computations of compound interest.—Sheldon v. Holmes, 58 Mich. 138.

§ 37. Recovery in suits and actions.

Recovery permitted in usurious contract, see Usury.

Usury as defense, see Usury, II.

Recovery of usurious interest voluntarily paid, see Usury, II.

Presumptions and evidence as to usury, see Usury, II, B.

As part of recovery on bail bond, see Arrest § 56.

Interest as measure of damages on money contracts, see Damages § 52.

Effect of decree to liquidate prior accounts and extinguish prior interest, see also Former Adjudication ¶ 218.

Decree declaring lien upon land for instalments of interest as merging subsequent instalments, see Former Adjudication § 41.

Amendment of verdict to include interest omitted by mistake of jury, see Verdicts, V.

¶ 132. Where the evidence was conflicting as to whether the sum of $25 paid when an extension was given but receipted for as "interest" had not been given as a bonus for the extension because the loan drew no interest, although running sixty days, a charge to allow in such case out of this sum ten per cent interest during the running to maturity of the note securing the loan was not error.—Briggs v. Norris, 67 Mich. 325.

INTERESTED PERSONS to INTERNAL MANAGEMENT.

Cross-References.

Interested Persons—

Disqualification by reason of interest, see specific topics treating of the capacity or character or office affected by the interest, e. g., Judges § 10; Jury, III.

Interest of person entitling him to sue, defend or seek relief, see specific topics treating of the right or action involved, e. g., Injunctions § 101 et seq.; Nuisances, III; Trusts, XII; Estates of Decedents; Receivers; Parties.

Effect of personal interest on representative capacity, see Agency; Estates of Decedents, X, A; Trusts, VIII; Partnership, IV, V.
Credibility and competency of interested witnesses, see Witnesses.
Interests in Property—
See Property; Real Property; and specific topics which treat of classes of property, e. g., Easements; Landlord and Tenant; Estates of Decedents.
Transfers and conveyances, see Deeds; Vendors and Purchasers; Sales; Executions; Gifts; Frauds, Statute of.
Descent and succession, see Descent; Wills.
Joint and several interests, see Tenants in Common; Partnership; Joint Adventures; Husband and Wife, II, B.
Interference—
With process or legal custody as contempt, see Contempt, I.
With property as conversion or trespass, see Conversion, I; Trespass, I.
With custody of receiver or administrator, see Receivers, III; Estates of Decedents, V.
With property or rights as ground for injunction, see Injunctions, II.
Interlineations—
As alterations of instruments, see Alterations §§ 4, 6.
Mode of amendment of pleadings, see Pleading, VI; Equity § 141.
Execution of instruments showing alterations, see Execution of Instruments § 10; Wills, IV.
Interlocutory Proceedings and Orders—
See Motions and Orders; Judgments; Accounting Suits §§ 8, 9; Injunctions, IV; Partition, II, III; Divorce, VII.
Reviewableness and appealability, see Appeal, III; Certiorari § 10 et seq.
Finality for purpose of res adjudicata, see Former Adjudication § 16.
Costs on interlocutory proceedings, see Costs §§ 46, 58, 103, 121.
Stay of proceedings, see Stay.
Interlocutory Writs and Process—
See Attachment; Garnishment; Civil Arrest; Replevin; Injunctions, IV; Ne Exeat; Mandamus; Habeas Corpus.
Intermeddlers—
With estates of decedents, see Estates of Decedents, V, F, X, F.
With property as trustees, see Trusts.
Nonliability for injury to volunteer or intermeddler, see Negligence; Master and Servant, III, A, IV; Railroads, VIII, B; Highways § 217.
Intermediaries—
See Agency; Brokers.
Interment and Sepulture—
See Corpses and Burial; Cemeteries.
Intermingled Goods—
See Accession and Confusion.
Following trust property, see Trusts, XIII.
Internal Improvements—
Constitutional limitations on, see Constitutional Law § 281 et seq.
Making and assessing for cost of local improvements, see Local Improvements; Drains, II.
Internal Management of Corporations—
See Corporations; Associations; Religious Societies; Fraternal Associations, I.

INTERNAL REVENUE AND CUSTOM LAWS.

TREATS of United States customs duties and internal revenues.

Analysis.

§ 1. In general.
§ 2. Stamp tax laws.
§ 3. Forfeiture for violations.

§ 1. In general.

Relative state and Federal jurisdiction, see Courts § 98.
Statutes relating to acquisition of lands for custom houses and government purposes, and fixing jurisdiction over same, see Comp. L. 1915, § 283 et seq.

§ 2. Stamp tax laws.

Stamp tax law as encroachment on state sovereignty, see Constitutional Law § 125.
Necessity for stamps on bills of lading, see also Carriers §§ 40, 41.
Necessity of stamps on process, and effect of lack of stamps, see Process, I.
Validity of execution of instruments as affected by affixing of revenue stamps, see Execution of Instruments § 4.
Lack of stamp as effecting admissibility of document in evidence, see Evidence § 494.
Evidence of want of stamp to impeach title to cigars in trover, see Conversion ¶ 168.
Stamps on document as indicium of consideration or value passed, see also Evidence ¶ 398a.
Revenue stamp as presumptive evidence of amount of debt secured, see Mortgages, III.

¶ 1. An instrument not stamped at the time of execution was stamped afterwards by the collector of internal revenue, who appended a certificate as required by the act of congress of 1866. Held, that the instrument was properly stamped, and no inquiry could be gone into of the propriety of the collector's action.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

¶ 2. The provision of the internal revenue law requiring internal revenue stamps to be affixed to an instrument before an action can be maintained thereon is applicable only to Federal courts and not to State courts.—Amos-Richia v. Northwestern Mut. Life Ins. Co., 143 Mich. 684.

¶ 3. Where a case appealed from a justice had been dismissed in the circuit court because the appeal papers had not been stamped the dismissal was reversed, as the appeal was taken before any act of Congress requiring such stamping.—Flower v. Kellum, 14 Mich. 300.

§ 3. Forfeitures for violations.

¶ 4. Forfeitures under the revenue laws of the United States relate back to the time of the offense and defeat any title subsequently acquired.—Dean v. Chapin, 22 Mich. 275.

¶ 5. The title of the United States to goods sold in violation of the internal revenue laws is not consummated until judicial condemnation, when it relates back to the time of the commission of the offense.—Wessels v. Beeman, 87 Mich. 481.

¶ 6. A judgment of forfeiture under the United States revenue laws, though pro forma in rem, does not conclude parties who were without notice upon the facts found, where it was virtually a judgment against the claimant.—Dean v. Chapin, 22 Mich. 275.

INTERNATIONAL.

Cross-References.

International—
Extradition of fugitives from justice, see Extradition.
Private international law, see Conflict of Laws.

INTERPLEADER.

TREATS of bills by persons standing as indifferent holders of money or property to interplead conflicting claimants so as to determine the rightful claim.

Analysis.

§ 1. Nature and grounds of remedy in general.
§ 2. Persons entitled to the remedy.
§ 3. ——Interpleader by bank.
§ 4. Claimants subject to be interpleaded.
§ 5. Necessary and proper parties.
§ 6. Intervention and new parties.
§ 7. Payment into court and offer of equity.
§ 8. Payment over to claimant's hands.
§ 9. Bill and other pleadings.
§ 10. Verification.
§ 11. Judgment to interplead and further proceedings.
§ 12. Injunction ancillary to interpleader.

§ 1. Nature and grounds of remedy in general.

Conflict of claims as essential basis for bill, see also post § 4.
Offer of equity or tender of payment or other conditions, see post § 7.
Sufficiency of the bill to show equities, see post § 9.
Persons entitled to relief by interpleader, see post §§ 2, 3.
Persons subject to be interpleaded, see post § 4.
Available remedy by defense at law as bar to interpleader, see post ¶ 15.
Interpleader of equitable claims, see also post ¶ 19.
Statutory interpleader in garnishment suits, see Garnishment §§ 114, 115.
When bill may be regarded as interpleader bill, necessity of fund or stake and conflicting claims, see also Equity ¶ 586.
General law of equity procedure and equitable rights, see Equity.

¶ 1. A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the

same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter; and it will not lie where complainant has incurred an independent liability under an express agreement with some of the defendants.—Sprague v. Soule, 35 Mich. 35.

¶ 2. A bill of interpleader lies only where complainant is, in good faith, and without collusion or fault, so placed that he cannot safely decide between adverse claimants of a fund or right under his control. It is only upheld upon full merits.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

¶ 3. A bill of interpleader is not the proper proceeding to enable a township treasurer to determine the right to the amount of specific drain taxes assessed against particular pieces of property and paid under protest, where the several property owners on the one hand claim that the taxes are illegal and should be refunded, and, on the other, those individuals who have received township orders against the specific sums so paid, but whose interests are not themselves conflicting, present their orders to the township treasurer to be cashed.—Wallace v. Sortor, 52 Mich. 159.

¶ 4. A bill alleged that on a certain date complainant, as bailee of defendant Hughes, had an automobile in its possession on which it had a lien; that defendant Cotter replevied the same, sold the machine, paid complainant the amount of his lien, and kept the surplus; and that defendant Hughes had sued complainant in trover for the machine. The bill asked that the surplus money be paid into court and a decree entered determining to whom the money belonged, and that the suits at law against complainant be enjoined. Held, such bill was one of strict interpleader, and not a bill in the nature of an interpleader.—Grant Bros. Auto Co. v. Cotter, 161 Mich. 521.

§ 2. Persons entitled to the remedy.

See also ante ¶¶ 1, 2.

Interpleader by bank of claimants to deposits, see post § 3.

Interpleader to determine rights to fraternal benefits, see Fraternal Associations § 81.

Interpleader by insurer of claimants of loss payable, see Insurance § 284.

Interpleader ancillary to bill to redeem from mortgage, see Mortgages, IX.

Statutory right of warehouseman to interplead claimants, see Comp. L. 1915, § 6579.

Interpleader in garnishment proceedings, statutory provisions, see Jud. Act, chap. XXVIII, § 28; Comp. L. 1915, § 13149.

¶ 5. Courts of equity are generally very liberal in protecting mere naked trustees or stakeholders against conflicting claims.—Grand Haven School Dist. No. 1 v. Weston, 31 Mich. 85.

¶ 6. A party is not entitled to maintain a bill of interpleader unless it fairly appears that, without his fault, he is placed in a position where it is impossible to decide safely between two claimants.—Vogle v. Union Central Life Ins. Co., 147 Mich. 333.

¶ 7. A bill of strict interpleader can only be filed by one in possession or control of the fund or thing in dispute.—Grant Bros. Auto Co. v. Cotter, 161 Mich. 521.

¶ 8. Where a deceased owner of land could not, on account of being an interested party, have maintained a bill of interpleader against his lessee's assignee and a contractual vendee, a guardian representing the heirs of the owner is in the same position.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

¶ 9. A special administrator who, when ordered to pay over funds in his hands to the general administrator, appeals from such order, thereby takes sides in the matter, and cannot have the general administrator and the executrix of their intestate's widow interplead to determine which estate is entitled to the funds.—Atkinson v. Flannigan, 70 Mich. 639.

¶ 10. It is not a valid objection to a bill of interpleader by a trustee sued by claimants to the trust fund, that the complainant would be completely protected by the judgments in the respective suits against it, by paying them in succession till the fund is exhausted; a mere trustee against whom two legal processes are going on at once has the most obvious equity to insist that those who claim that to which he makes no claim should settle that contest among themselves.—Grand Haven School Dist. No. 1 v. Weston, 31 Mich. 85.

¶ 11. It is no objection to a bill of interpleader that another suit in chancery is pending in which complainant is defendant, especially where there is more than one such suit pending in equity, besides several at law, and where such suit is one of the very grievances complained of, and neither of the pending suits could determine the rights of all parties or the right to the whole fund.—Grand Haven School Dist. No. 1 v. Weston, 31 Mich. 85.

¶ 12. A school district contracted for the building of a schoolhouse. After drawing large sums of money, the contractor failed, owing largely for material and labor, and it was arranged that he should be released from further liability on his contract, and that on account of work completed the district should pay a specified sum at a stated

time pro rata to those to whom the contractor had given orders on the district, and to those who had claims for material and labor furnished for the building. Before the money fell due some of the materialmen began proceedings to enforce their claims as mechanics' liens against the school building and its site; others sued the contractor and garnished the district; some presented their claims to the district and demanded pay in full, and others assented to taking their pro rata share; outside creditors having procured judgments against the contractor filed judgment creditors' bill and enjoined the district from paying over the fund; and still others were threatening suits. Held that, under the circumstances, the district sustained the relation of trustee or stakeholder, holding this fund for the benefit of those entitled under the arrangement between it and the contractor, and that a bill of interpleader would lie on its behalf against those entitled to the fund, and those who had begun proceedings against the district to have their claims satisfied out of it.—Grand Haven School Dist. No. 1 v. Weston, 31 Mich. 85.

¶ 13. The attorney for several creditors having obtained from the debtor an assignment of certain policies of insurance then payable to him, thereupon executed a paper reciting that he was to pay from the proceeds of the claims held by him, and pay over the residue to the attorneys for certain other creditors. Before this was done he was garnished by still other creditors, but the attorneys to whom he was to pay the residue insisted that their claim thereto could not be affected by the garnishment. Held, that he could maintain a bill of interpleader against them and the other creditors to determine which was entitled to the fund.—Moore v. Barnheisel, 45 Mich. 500.

¶ 14. A bill of strict interpleader, brought by a bailee of an automobile to settle a dispute as to its ownership between the complainant's bailor and a stranger, will not lie where the bill does not show a claim of title by the claimants through a common source.—Grant Bros. Auto Co. v. Cotter, 161 Mich. 521.

¶ 15. A bill of strict interpleader alleged that on a certain date complainant had an automobile in its possession, as bailee of defendant Hughes; that defendant Cotter replevied the same, sold it, paid complainant the amount of the lien, and kept the surplus; and that defendant Hughes had sued in trover for the machine. Held, the complainant had an adequate remedy at law under Comp. L. 1897, § 10675, by means of his defense of the replevin suit and the bill would not lie.—Grant Bros. Auto Co. v. Cotter, 161 Mich. 521.

¶ 16. An owner of real estate leased the same and thereafter contracted to sell it to another person. The contractual vendee claimed that the lessee forfeited his rights under the lease by attempting to assign same and demanded of the lessor that he terminate the lease and deliver possession to the vendee in accordance with the terms of the contract. Held, said owner could not maintain a bill of interpleader against the lessee's assignee and the vendee to settle the controversy, since he was an interested party.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

§ 3. ——Interpleader by bank.

Rights between interpleaded claimants to bank deposits standing in two or more names, see Banking § 6.

¶ 17. Where money has been deposited in a bank payable to either of two persons, one of whom on the death of the other claims the fund, which is also claimed by decedent's executor and by a third person, the bank may file a bill of interpleader whether as to the parties interpleaded it stands as a debtor for the deposit or a bailee of the money.—People's Sav. Bank v. Look, 95 Mich. 7.

¶ 18. A bill of interpleader may be filed by a bank, where one of its depositors, after giving an order which, upon its face, only authorized his wife to draw money for him, died, and where the money was claimed both by the depositor's administrator and by the administrator of the wife, the latter claiming on the ground that the order was an assignment given under such circumstances as to transfer the title to the wife.—Wayne County Sav. Bank v. Airey, 95 Mich. 520.

§ 4. Claimants subject to be interpleaded.

Occasion and propriety of interpleader, see also ante § 1.

Claimants to bank deposits, see ante ¶¶ 17, 18.

Necessary and proper parties, see post § 5.

¶ 19. That the interest of one or more of the parties is equitable merely is no objection to interpleader.—People's Sav. Bank v. Look, 95 Mich. 7.

¶ 20. A township treasurer's bill of interpleader to determine the right of two persons who paid drain taxes under protest and then sued to recover the amount so paid will not lie, since there is no common interest in the several sums sued for.—Wallace v. Sortor, 52 Mich. 159.

¶ 21. Interpleading cannot be ordered unless the claims threatening complainant negative each other; if one cannot be legally enforced without implying the other's invalidity there is nothing to be settled by

interpleader.—Moore v. Barnheisel, 45 Mich. 500.

¶ 22. It is abstractly true that a bill of interpleader will not lie where one appears to be entitled to the fund claimed to the exclusion of all others.—Grand Haven School Dist. No. 1 v. Weston, 31 Mich. 85.

¶ 23. An absolute identity in conflicting claims is not requisite to a bill of interpleader; where the amount claimed by all the claimants together greatly exceeds the fund against which the claims stand, it is not a valid objection to the remedy by such a bill that the several claimants do not claim from the complainant the same debt, fund or duty.—Grand Haven School Dist. No. 1 v. Weston, 31 Mich. 85.

§ 5. Necessary and proper parties.

¶ 24. A legatee is a proper party to a bill of interpleader filed by the holder of certain funds against executors and another person to determine who is entitled to the funds.—Wineman v. Wayne Circuit Judge, 117 Mich. 320.

§ 6. Intervention and new parties.

Petition by complainant to make new parties as mark of collusion, see post ¶ 29.
Right to intervene as party in general, see Parties.

¶ 25. A bill of interpleader was filed against two persons, one of whom disclaimed any right to the fund in dispute. A stranger was afterwards admitted, on petition, to contest the interest of the remaining defendant, in which he claimed a partnership right. Held, that there was no practice which would allow him to get into the cause by petition; that bringing him in without an amendment to the bill put nothing in issue; that his claim was not one against which the bill was filed, and that the bill could not be amended so as to reach him, because it was filed to guard against known and not unknown claims.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

§ 7. Payment into court and offer of equity.

Right of claimant to payment to him, see post § 8.
General law of payment of money into court and effect thereof, see Payment.

¶ 26. One who files a bill of interpleader must offer to bring into court the money or thing in controversy, and an injunction should not be granted until the offer is complied with; but the omission to make such offer does not render the bill demurrable.—Bliss v. French, 117 Mich. 538.

¶ 27. Where, upon a bill of interpleader, it is ordered that the complainant pay the fund into court for distribution pursuant to the terms of the decree, and, in default, that the bill be dismissed with costs to defendants, it is complainant's duty to comply with the order, and he cannot excuse his failure to do so upon the ground that a defendant has threatened to appeal.—Look v. McCahill, 106 Mich. 108.

§ 8. Payment over to claimant's hands.

¶ 28. Any improper delay after answer to a bill of interpleader, in preparing the cause for hearing, will authorize the party who has answered to apply for the money, if there is any fraudulent purpose or collusion.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

¶ 29. It is a suspicious circumstance, if, after one of only two defendants to a bill of interpleader has disclaimed, complainant seeks for delay, and complainant's agent petitions in behalf of a stranger for leave to contest the interest of the other defendant; and an order of court that the fund remain in the register's hands, and that defendant and petitioner interplead is irregular.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

§ 9. Bill and other pleadings.

Necessary allegations as to claim by defendant, see also ante ¶ 14.
Delay after answer as ground for ordering payment to claimant, see ante ¶ 28.
Verifying the bill and affidavit of noncollusion, see post § 10.
General law of equity pleadings, see Equity, VII.

¶ 30. A bill of strict interpleader should state distinctly the nature and character of the conflicting claims.—Grant Bros. Auto Co. v. Cotter, 161 Mich. 521.

¶ 31. Where complainant in an interpleader bill avers the assignment of the claim to one of the defendants, who admits it, good pleading requires that, if the other defendant means to dispute the fact, he should notice it in some way in his answer.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

¶ 32. A bill of interpleader which set up that complainants were in possession of a fund in which they claimed no interest, and to which there were two different claimants, and others asserting labor liens was held to present equities.—Bliss v. French, 117 Mich. 538.

¶ 33. A complainant administrator alleged in its bill that defendant McNamara had obtained a judgment against the estate; that complainant was ready and willing to pay such judgment; that the other defendants had served notice of their claims on the judgment money for services rendered as attorneys for defendant McNamara; that defendant McNamara and the other defend-

ants were not agreed as to their respective rights; and that complainant could not without hazard to itself undertake to decide between the defendants. Held, the facts alleged gave equity jurisdiction of the bill as a bill of interpleader.—Michigan Trust Co. v. McNamara, 165 Mich. 200.

¶ 34. As against the demurrant to a bill of strict interpleader, the court cannot consider the allegations of the answer in support of the bill, but must determine the issue from the bill alone.—Grant Bros. Auto Co. v. Cotter, 161 Mich. 521.

§ 10. Verification.

¶ 35. A bill of interpleader sworn to by one of the two copartners who filed it, his affidavit stating: "This bill is not filed in collusion with or at the instance of any or either of the said defendants, but merely by your orator's own accord for relief," etc., shows a sufficient compliance with the rules of practice.—Bliss v. French, 117 Mich. 538.

§ 11. Judgment to interplead and further proceedings.

Decree for payment into court or dismissal of interpleader bill failing so to do, see ante ¶ 27.
Costs to interpleading parties, see Costs § 35.
Appealability of decree awarding interpleader, see Appeal § 36, ¶ 145.
Appealable interest in decree, see Appeal §§ 61, 62.
Binding force of decree in unnecessary interpleader suit, see Former Adjudication ¶ 39.

¶ 36. Entering a separate decree or order of interpleader, though the better practice, is not necessary where the decree in the bill fully settles the rights of the parties.—People's Sav. Bank v. Look, 95 Mich. 7.

¶ 37. Where it is determined on a bill of interpleader that one of only two conflicting claimants has no claim, or where the bill is taken as confessed by one, it follows that the fund indisputably belongs to the other.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

¶ 38. An appeal by complainant from a decree awarding the fund to one of the defendants, and not in any manner charging the complainant, is not within the rules of interpleader and has no basis to support it.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44; Atkinson v. Flannigan, 70 Mich. 639.

¶ 39. Where oral testimony indicates that a beneficiary of an insurance policy agreed with the insured to hold the proceeds in trust and distribute same to certain persons, equity will, in a bill of interpleader, determine the terms of said trust in its decree, although said beneficiary does not on the face of her answer admit a limitation upon her right to the fund.—Ladies of Modern Maccabees v. Daley, 166 Mich. 542.

§ 12. Injunction ancillary to interpleader.

Withholding injunction until payment into court, see ante ¶ 26.

¶ 40. Where an insurance company has been garnished in the circuit court of one county for moneys admitted to be due under a policy, and has subsequently been sued by an assignee of the insured in the circuit court of another county, an injunction restraining the parties from prosecuting their several suits may properly issue upon a bill of interpleader filed by the company upon the equity side of the court in which suit was first brought, and which thereby obtained jurisdiction of the question in controversy in both cases, namely, the ownership of the fund.—Hogan v. Wayne Circuit Judge, 106 Mich. 254.

¶ 41. A bill to enjoin an action at law for a real estate commission brought by one of the defendants and to compel the two defendants to interplead to determine which is entitled to the commission in question cannot be maintained where it appears that complainant made contracts with defendants different in date, in the number of acres to be sold and perhaps in the commission, since defendants are not claiming the same "thing, debt or duty," but their claims for compensation are under separate independent contracts.—Lanning v. Stiles, 176 Mich. 275.

INTERPRETATION to INTIMIDATION.

Cross-References.

Interpretation—
- See Contracts, VI; Deeds, III; Statutes, V; Wills, VI.
- Of the constitution, see Constitutional Law.
- Parol evidence to aid in construction, see Evidence, V.

Interpreters—
- Use in examining witnesses, see Examination of Witnesses § 19.
- Use in taking depositions, see Depositions § 12.
- Use in taking acknowledgments, see Acknowledgments § 6.
- As agents for purpose of receiving notice, see Agency ¶ 423d.
- Statements by interpreters as admissions by party to conversation, see Evidence § 403.

Interrogatories—
- In contempt proceedings, see Contempt § 30.
- In depositions, see Depositions § 9.
- Special questions to juries, see Verdicts, II.

Interstate Commerce—
- See generally Commerce.

Combinations in commerce, see Combinations § 5.
Reports of Interstate Commerce Commission as documentary evidence, see Evidence § 533.
Interstate Extradition—
See Extradition.
Interurban Railways—
Duties and liabilities as carriers, see Carriers.
Operation on street or highway, see Street Railways.
Operation on private right of way akin to general railroads, see Railroads.
Employers' liability to employees, see Master and Servant, III; Workmen's Compensation Law.
Judicial notice as to terminals, see Evidence ¶ 91.
Intervening Causes—
Causes intervening between negligence and injury, see Negligence, III.
Damages produced by intervening cause additional to direct and proximate damages, see Damages, I.
Intervention of Parties—
See parties.
Inter Vivos Gifts—
See gifts.
Intestacy—
Devolution of estates, see Descent.
Construction of wills, see Wills, VI.
Disposal of residue of estate under will, see Wills, VI, E.
Intimidation—
As element in crime, see Crimes, II (robbery); Indictment.
As means of effecting conspiracy, see Conspiracy § 3.
As duress, see Duress.
Of witnesses as error, see Indictment § 393; Trial, II, V.
As rendering confession incompetent, see Indictment § 257 et seq.

INTOXICATING LIQUORS.

TREATS of the laws and regulations relating to the traffic in intoxicants, excepting constitutional questions (see Constitutional Law), and also treats of the local option system and elections under it. The effect of intoxication on the legal capacity of persons or on their capacity to have a specific intent or liability is treated in specific topics such as Contracts; Crimes; Homicide; Negligence; Wills; Incompetents.

Analysis.

I. In general; public control and regulation.

§ 1. Police power in general.

II. Classification of dealers and traffic; and taxes and licenses.

A. In General.

§ 2. Statutory classes; "dealers," "wholesalers," "saloons," etc.
§ 3. Keepers and servants or agents of keepers.

B. Applications, Licenses, Taxes and Bonds.

§ 4. Requisites and sufficiency of applications.
§ 5. Hearing or consideration and decision on application.
§ 6. ——Discretion in granting and preferences.
§ 7. Nature of license and rights of licensee.
§ 8. Nature and classes of taxes.
§ 9. Assessment, levy and collection of tax.
§ 10. Necessity and purpose of bond.
§ 11. Form, contents and sufficiency of bond.
§ 12. Consideration and approval or rejection of bond.
§ 13. ——Protests against approval.
§ 14. Receiving and filing bond.
§ 15. Construction, effect and obligation of bond.

C. Surrender or Transfer of License; Death of Licensee.

§ 16. Surrender or cancellation.
§ 17. Rebate of license.
§ 18. Assignment, transfer or succession.
§ 19. Effect of death of licensee.

III. Local option; prohibited traffic.

A. Statutes; Elections and Other Procedure.

§ 20. Statutory provisions in general.
§ 21. Petitions for and calling of election.
§ 22. ——Action on petition and resolution for election.
§ 23. ——Conclusiveness and finality of order for election.
§ 24. ——Posting, publication and proofs thereof.
§ 25. Local option elections and ballots.
§ 26. Procedure to declare result and put law into operation.
§ 27. Effect of irregularities on election.
§ 28. Evidence and proof of adoption of local option law.
§ 29. Repeal of local option.
§ 30. Resubmission and new petitions.

B. Operation and Effect of Prohibition.

§ 31. In general.
§ 32. Of local option prohibition.
§ 33. Exceptions from prohibition.

IV. Restrictions or prohibition as to persons, places and times.

§ 34. Persons eligible to license.
§ 35. Number of licenses allowable.
§ 36. Wholesale and retail trade relations and contracts.
§ 37. Prohibition of "saloons."
§ 38. Vicinity of church.
§ 39. Residence district restrictions.
§ 40. Sale by druggists.
§ 41. ——Reports and records.

V. Transportation, marking and branding.

§ 42. In general.

VI. Unlawful traffic; crimes and penalties.

A. In General; Crimes and Defenses.

§ 43. Effect of illegality on contracts and civil rights.
§ 44. Crimes and defenses.
§ 45. ——Construction of statutes.
§ 46. ——What are intoxicating liquors.
§ 47. ——What is a "sale."
§ 48. Responsibility and complicity; principalship.
§ 49. Sale in violation of local or general prohibition.
§ 50. Sale without license, bond or payment of tax.
§ 51. Sales by druggists or physicians.
§ 52. Sale to minors.
§ 53. Sale to students.
§ 54. Sale to Indians.
§ 55. "Giving" or "furnishing" liquor.
§ 56. Selling at prohibited times and days.
§ 57. ——Sunday closing.
§ 58. ——Unlawful hours.

B. Information and Complaint, Prosecution, Trial, Evidence and Punishment.

§ 59. Complaints and warrants.
§ 60. Charging and describing offense.
§ 61. ——Negativing exceptions.
§ 62. ——Sales by druggists.
§ 63. ——Duplicity.
§ 64. Issues and variance.
§ 65. Presumptions and burden of proof.
§ 66. Admissibility of evidence.
§ 67. ——Other sales or gifts or acts to show knowledge, intent or system.
§ 68. ——Sales by druggists.
§ 69. Weight and sufficiency of evidence.
§ 70. Trial practice; questions of law and fact.
§ 71. Instructions and requests.
§ 72. Verdicts, judgments and punishments.

C. Forfeiture of License and Actions for Penalties.

§ 73. Forfeiture or revocation of license.
§ 74. Actions for penalties.

VII. Civil liability for injuries from sale.

§ 75. In general; nature of liability and right of action.
§ 76. Wrongfulness of sale, injury, and proximate cause.
§ 77. Defenses.
§ 78. Who may sue.
§ 79. Persons liable or responsible.
§ 80. Liabilities of sureties.
§ 81. Form of action.
§ 82. Joining sureties and principal in single action.
§ 83. Pleading.
§ 84. Issues, proof and variance.
§ 85. Presumptions and burden of proof.
§ 86. Admissibility of evidence.
§ 87. ——Habits of person made drunk or of his family.
§ 88. ——Other sales or intoxications.
§ 89. Weight and sufficiency of evidence.
§ 90. Questions for jury and instructions.
§ 91. Damages, verdict and judgment.

VIII. Drunkenness as an offense or incapacity.

§ 92. In general.

[Note. Owing to the adoption of the Prohibition Amendment to the United States Constitution and also that to the Michigan Constitution, the greater portion of the matter in this topic may be regarded as obsolete except for analogy. Nevertheless the matter is presented without any editorial attempt to select or discard. No references to statutes have been made, however, and the cross-references are few and somewhat general in terms.]

Restrictions on uses of property by tenants, see Landlord and Tenant, IV, A.

I. IN GENERAL; PUBLIC CONTROL AND REGULATION.

§ 1. Police power in general.

Operation and effect of local and general prohibition, see post III, B.

Police and licensing powers of municipalities as such, see Municipal Corporations, IX, C.

Powers of township boards as such, see Townships, II.

Delegation of power to regulate, see Constitutional Law §§ 90, 91.

Police power of regulation under the constitution, see Constitutional Law § 108.

Due process in liquor laws and regulations, see Constitutional Law §§ 168, 169.

Interstate commerce regulation by licensing, see Commerce § 10.

¶ 1. In the absence of a provision in the constitution of a state restricting the power of the legislature in reference to the sale of liquor, the legislature has the power to regulate the mode, manner, and circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions and limitations as it may deem proper.—People v. Schafran, 168 Mich. 324.

¶ 2. Under its comprehensive police power the legislature may authorize the city council by charter to determine, in licensing sale of intoxicating liquors, place where saloon may be kept.—Sherlock v. Stuart, 96 Mich. 198.

¶ 3. The regulation or suppression of the sale of intoxicating liquors is within the police powers of the state or municipality.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 4. The state in the exercise of the police power may regulate or prohibit the manufacture and sale of spirituous and intoxicating liquors within its territory.—People v. Eberle, 167 Mich. 477. Affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 5. Section 35, Act No. 291, Pub. Acts of 1909, providing that no license shall be issued to any one to engage in the retail liquor business who has twice been convicted of violating the liquor laws of Michigan, and that any licensee twice violating the provisions of said acts forfeits his license, is not unconstitutional as disturbing a vested property right, but is a proper exercise of the police power by the state.—People v. Schafran, 168 Mich. 324.

II. CLASSIFICATION OF DEALERS AND TRAFFIC; AND TAXES AND LICENSES.

A. IN GENERAL.

§ 2. Statutory classes; "dealers," "wholesalers," "saloons," etc.

Classes of taxes, see post § 8.

Taxing and licensing of "saloons" as compatible with prohibition of licenses to deal in intoxicating liquors, see post § 31.

Persons eligible to license, see post § 34.

What are intoxicating liquors and what is a sale, see post §§ 46, 47.

¶ 6. A single sale in gross of a stock of liquors does not make one a dealer; and, therefore, such a sale by one who has not paid a tax as a wholesale dealer is not illegal so as to invalidate a note given for the price.—Overall v. Bezeau, 37 Mich. 506.

¶ 7. Where a person furnishes three glasses of liquor at the request of an officer, and three glasses at the request of another person, such sales are sufficient to constitute him a dealer, or a person engaged in the business of selling liquor at retail.—People v. North, 153 Mich. 612. (Minority opinion of Hooker and Montgomery, JJ., and Grant, C. J.)

¶ 8. A sheriff, in making a sale of intoxicating liquors under an execution, is not "engaged in the business of selling intoxicating liquors" within the liquor law. (Pub. Acts 1887, No. 313.)—Wildermuth v. Cole, 77 Mich. 483.

¶ 9. "Wholesaler" does not include a manufacturer who keeps his goods at the place of manufacture for the purpose of sale when receiving orders.—People v. Voorhis, 131 Mich. 398.

¶ 10. A manufacturer of brewed or malt liquors who sells his product at the brewery is not a wholesaler within the meaning of Comp. L. 1897, § 5379, providing a tax on the business of selling such liquors at wholesale.—People v. Voorhis, 131 Mich. 398.

¶ 11. The wholesaler's tax provided by Comp. L. 1897, § 5379 upon the sale of brewed or malt liquors, must be paid by a brewer who establishes a warehouse from which liquors are delivered, at a place other than the brewery.—People v. Voorhis, 131 Mich. 398.

¶ 12. Under U. S. Stats. at Large 313, a manufacturer of brewed or malt liquors who sells at wholesale from a warehouse in another state, is subject to the laws of such state applicable to such liquors produced in the state.—People v. Voorhis, 131 Mich. 398.

¶ 13. A wholesale dealer is defined by the dictionaries as one who sells in large quantities to dealers rather than to customers.—People v. Cain, 171 Mich. 279.

¶ 14. Under Act No. 170, Pub. Acts of 1911, § 1, providing that wholesale dealers cannot sell liquor in less quantities than three gallons, and from the definition of

the word "wholesale," a dealer who sells beer in single pints, even though to be consumed off the premises, cannot be said to be selling at wholesale.—People v. Cain, 171 Mich. 279.

¶ 15. It is a matter for the legislature to determine whether the definition of a "wholesaler" of liquor, as laid down in Act No. 291, Pub. Acts 1909, gives too wide a latitude to the sales of liquor that a wholesaler may make, and it is not a matter for the courts.—Boos v. Scudder, 163 Mich. 678.

¶ 16. Under Comp. L. 1897, § 2769, subd. 7, the word "saloon" refers to places where persons come to buy drinks of liquor to be drunk in said places.—Boos v. Scudder, 163 Mich. 678.

¶ 17. A room in a hotel or tavern set apart for the sale of intoxicating liquors at retail is a saloon within Comp. L. 1897, § 2769, subd. 7, authorizing villages by ordinance to suppress saloons for the sale of intoxicating liquors and license taverns.—Rattenbury v. Common Council of Village of Northville, 122 Mich. 158.

¶ 18. A social club which distributes liquors among its members, receiving pay therefor as distributed by the glass, the proceeds going into the club treasury to be used in purchasing other liquors or in paying expenses, is required to pay a liquor tax as a retail dealer.—People v. Soule, 74 Mich. 250.

¶ 19. Domestic purposes in contemplation of Pub. Acts 1909, No. 291, § 2, as amended by Pub. Acts 1912 (Second Extra Session), No. 1, How. 2nd Ed., § 5056, providing that no tax shall be required from any person for the manufacture or sale of wine or cider made from fruits for domestic purposes, are purposes relating to or belonging to the home or household, or its affairs.—People v. Palasz, 191 Mich. 556.

§ 3. Keepers and servants or agents of keepers.

¶ 20. A brewing company, which had paid the tax and given the bond required by law, entered into a contract by which respondent was appointed agent for the company at and in a certain township for the sale of its beer. He was to collect and remit to the company all money due for beer sold, was to pay the freight on all beer shipped to him, and the company agreed to pay him, as commission, on every barrel of beer sold by him, the difference between five dollars with the freight deducted and whatever price the beer might sell for above that amount, which was to be compensation in full for all services performed by him for the company, and which commission he was authorized to retain. The company retained title to the beer, with the right of possession, until it was sold, and all moneys received by respondent were to belong to the company. Held, that there was practically a sale of the beer to respondent, and that he was liable to pay the tax and give the bond required by law of wholesale liquor dealers.—People v. Newman, 99 Mich. 148.

¶ 21. One Forler secured a license to do business at a certain address as a saloonkeeper and while waiting to have the store at said place repaired was employed by a duly licensed saloonkeeper at another address to look after the latter's saloon. The evidence indicated that Forler was employed at said latter place merely as a manager or clerk and had nothing to do with the running of said place except in said capacity of employee. Held, mandamus brought by the prosecuting attorney to set aside an order of the trial court quashing an information against Forler for violating Act No. 291, Pub. Acts of 1909, in running a saloon without a license, should be denied.—Weimer v. Kalamazoo Circuit Judge, 168 Mich. 498.

B. APPLICATIONS, LICENSES, TAXES, AND BONDS.

§ 4. Requisites and sufficiency of applications.

Procedure on the application and subsequent proceedings, see post § 5 et seq.

Persons eligible for license, see post § 34.

¶ 22. An application for a retail liquor license is required by § 4, Act 291, Pub. Acts 1909 (How. St., 2nd Ed., § 5058), merely to state the ward, village or township in which it is proposed to carry on the business.—Gable v. Township Board of Three Oaks, 182 Mich. 659.

¶ 23. The requirement of the Warner Crampton Act, § 37, that the consent of all property owners within three hundred feet of the proposed bar or saloon must be obtained is not applicable to a bar or saloon existing at the time the act took effect.—Rohde v. Wayne Circuit Judge, 168 Mich. 683.

§ 5. Hearing or consideration and decision on application.

Consideration of and action upon bond, see post §§ 12, 13.

Vote required for municipal action, see Municipal Corporations, IV.

Mandamus to compel action on application, see Mandamus, III.

Enjoining issuance of saloon licenses, see Injunctions, § 55.

¶ 24. An application for a license to sell intoxicating liquor must be considered and passed upon prior to the consideration of the applicant's bond.—Gable v. Township Board of Three Oaks, 182 Mich. 659.

¶ 25. Where a petitioner for a saloon license tenders his application and his bond,

in accordance with the statute and the ordinance, the council is under duty to pass on them at an early date, and to give its reasons therefor, if disapproved.—Cox v. Jackson Common Council, 152 Mich. 630.

§ 6. ——Discretion in granting, and preferences.

Discretion to approve or reject bonds, see post § 12.

¶ 26. A village council has no right to refuse to grant a license for the wholesaling of liquors merely because an ordinance has forbidden the keeping of saloons or bars.—Boos v. Scudder, 163 Mich. 678.

¶ 27. A village council has no power, under Act No. 291, Pub. Acts 1909, to refuse an applicant a saloon license upon proof that the applicant had previously sold liquor to school children.—Hanold v. Common Council Village of Stambaugh, 163 Mich. 242.

¶ 28. An ordinance regulating the licensing of saloons, provided that a saloonkeeper's license should be revoked if he should be convicted within one year of a violation of the ordinance and of "the state law." A saloonkeeper agreed in his application for a license that if so convicted he should not be entitled to a renewal of the license. Held, that where the convictions secured against the saloonkeeper were not such as to call for a revocation of the license, under the ordinance, they were for that reason not sufficient to authorize a refusal by the city to renew the license, since the application was no broader than the ordinance.—Cox v. Jackson Common Council, 152 Mich. 630.

¶ 29. Relator had previously kept a saloon licensed by the respondent city council. The respondent passed an amendatory ordinance naming certain places as permissible locations for saloons, but not including relator's place. Relator brings mandamus to compel respondent to approve his bond, and issue a license. Held, that in view of relator's bad past record and the adaptability of his building for law-breaking purposes, the respondent was justified in passing the amendatory ordinance and refusing relator the license.—Mills v. Common Council of City of Ludington, 158 Mich. 493.

¶ 30. Under the Warner Crampton Law, if the number of eligible applicants for saloon licenses exceeds the number of licenses which can be granted, preference should first be given to those whose applications are filed on or before April 15, and after that to applications in the order in which the same are filed; and where the number of eligible applications for licenses made prior to April 15 exceeds the number of licenses to be issued, the authorities have a right, subject to said limitations, to determine to whom licenses shall be granted.—Rohde v. Wayne Circuit Judge, 168 Mich. 683. (Blair, J., dissenting.)

¶ 31. Under the Warner Crampton Law, a person filing an application for a saloon license prior to April 15, and who is the first to apply for a license, is entitled to the same, and persons already conducting saloons but who have not yet applied for a renewal of licenses, are not entitled to preference over said person so first applying.—Rohde v. Wayne Circuit Judge, 168 Mich. 683. (Blair, J., dissenting.)

¶ 32. Upon rehearing, held, a new applicant for a saloon license is not entitled to take the place of the holder of the license where the old holder declines, for any reason, to ask for a renewal thereof, and where the ratio of saloons to population is greater than one to five hundred.—Ploof v. Bangor Township Board, 168 Mich. 697.

¶ 33. Since Act No. 291, Laws of 1909, § 39, points out the instances in which applicants for saloon licenses in a city shall be preferred, no other preferences can be claimed outside the instances specified.—Bryant v. Common Council of Detroit, 169 Mich. 299.

¶ 34. Where the number of applications for saloon licenses in a city exceeds the number of saloons permitted by Act No. 291, Laws of 1909, § 39, the city council in making selections of applicants is not bound to give an applicant preference by virtue of the fact that he is already and has been conducting a licensed saloon in said city.—Bryant v. Common Council of Detroit, 169 Mich. 299.

§ 7. Nature of license and rights of licensee.

Right to rebate on license, see post § 17.
Surrender or assignment of bond, see post §§ 16, 18.
Effect of death of licensee, see post § 19.
Number of licenses allowable, see post § 35.
Revocation for violation of law, see post § 73.

¶ 35. A retail liquor license is a mere privilege to carry on a business subject to the will of the grantor, and it is not property in the sense which protects it under the Constitution.—People v. Schafran, 168 Mich. 324.

¶ 36. A retail liquor licensee has no vested property right in his license; it would not be in the power of the legislature to make an irrevocable contract as to that which affects public morals or public health so as to limit the exercise of the police power over the subject-matter.—People v. Schafran, 168 Mich. 324.

¶ 37. The word "licensing," as used in the title of Act 291, Pub. Acts 1909, How. Ann.

St., 2nd Ed., § 5055, in connection with the word "regulation," merely expresses some features of the permission granted to carry on the sale of liquor after all the statutory conditions precedent have been complied with, and does not amount to the granting of a license.—McCabe v. Township Board of Burnside, 181 Mich. 683.

¶ 38. An agent of a firm engaged in selling liquors cannot under the tax paid by his principals sell liquors at a place separate from and not connected with the saloon occupied by his principals. (Laws 1887, Act No. 313.)—People v. Lester, 80 Mich. 643.

§ 8. Nature and classes of taxes.

Nature of licenses and taxes, see Licenses § 1; Taxes, I.

¶ 39. The state tax imposed upon liquor dealers is not a mere debt, but a condition precedent to making sales.—Doran v. Phillips, 47 Mich. 228.

¶ 40. While the fee to be paid as a condition precedent to entering upon the business of selling intoxicating liquors is called a tax, there are other conditions precedent that are inconsistent with a purely tax system.—Sherlock v. Stuart, 96 Mich. 193.

¶ 41. A manufacturer of beer cannot sell his own product at retail without paying retail, or wholesale and retail, tax, even though he has paid manufacturer's tax; since while How. St., § 1281, makes the manufacturer's tax cover the wholesale tax, it does not cover the retailer's tax.—People v. Greiser, 67 Mich. 490.

§ 9. Assessment, levy and collection of tax.

Priority of lien for taxes over other liens, see Taxes, IX.

Mode and medium of payment of license taxes, see Taxes, X.

Adjustment and accounting for tax moneys received, see Taxes, X.

¶ 42. Under an ordinance for a saloon tax whereby the assessor must, after completion of the assessment roll for this special tax, give ten days' published notice to persons aggrieved by the assessment to come in and have the same reviewed, such a notice as to the general tax is not enough, and want of separate notice of review of the assessment will invalidate a saloon tax levied under the ordinance.—Dool v. Village of Cassopolis, 42 Mich. 547.

¶ 43. Before a person's bond as liquor dealer has been filed his tax cannot be received and receipted for by the county treasurer.—Attorney-General v. Huebner, 91 Mich. 486.

¶ 44. Under How. St. § 2283d1 (section 8 of the Act), which requires the payment, by any person engaged in or intending to engage in the sale of intoxicating liquors as a beverage, of the statutory tax "on or before May 1 in each year" and section 4 of the same act which calls for payment "in advance," he does not have May 1 on which to pay; and the fact that a person may have been engaged in making such sales during the year preceding May 1 will not render lawful sales made by him on May 1 without having paid the tax for the ensuing year.—People v. Gault, 104 Mich. 575.

§ 10. Necessity and purpose of bond.

Sufficiency of the bond and consideration thereof to approve or reject it, see post §§ 11-13.

Filing bond, see post § 14.

Construction and obligation of bond, see post § 15.

Crime of selling without bond, see post § 50.

¶ 45. It is the duty of a saloonkeeper to see that proper bond is furnished, and the giving of such bond is the condition precedent to his conducting the saloon business and avoiding criminal responsibility.—Kirkpatrick v. Phillips, 162 Mich. 251.

¶ 46. A druggist is punishable under the general liquor law for the sale of liquor without giving the bond required of retail liquor dealers under Comp. L. 1897, § 5386, unless he has given the bond of different form prescribed for druggists under section 5381.—People v. Utley, 129 Mich. 628.

¶ 47. Proceedings by a county treasurer to determine whether a new bond should be required of a liquor dealer were quashed on certiorari, the liquor law of 1889 being wholly void, and that of 1887 being defective because it provided no method for ascertaining the facts by a hearing before any one.—Dunham v. Hough, Treasurer of Barry County, 80 Mich. 648.

§ 11. Form, contents and sufficiency of bond.

Validity of bonds and effect of defective or irregular bonds, see post § 15.

Estoppel in civil damage action to question bond, see post ¶ 565.

Bond of married woman as liquor dealer, see Husband and Wife ¶¶ 264, 265.

Validity of bond by brewing corporation to indemnify sureties on saloonkeeper's bond, see Corporations ¶ 269.

¶ 48. In order to satisfy the requirements of § 8 of Act No. 291, Pub. Acts 1909 (How. St., 2nd Ed., § 5062), the place where the business of selling liquor at retail is to be carried on must be so described in a liquor dealer's bond so that the exact building, lot, location or place is pointed out so that it can be distinguished from all others.—Gable v. Township Board of Three Oaks, 182 Mich. 659.

¶ 49. Where a liquor dealer gives a bond payable to the city, the condition being that he shall conduct his saloon in conformity with the laws of the state and the ordinances of the city, and save harmless the city from all loss or damage growing out of the running of the saloon in question, the bond is not the statutory bond prescribed by Comp. L. 1897, § 5386.—Kirkpatrick v. Phillips, 162 Mich. 251.

¶ 50. Comp. L. 1897, § 5386, providing that a retail liquor bond shall be subject to the determination as to "sufficiency" of the common council, etc., and that the bond shall be in a sum stated "with two or more sufficient sureties," leaves it to the principal to have more than two sureties, if he wishes, but does not entitle the council to require more if those who do sign are sufficient.—Power v. Common Council of Village of Litchfield, 141 Mich. 350.

¶ 51. The statute precluding a person from becoming surety on more than two liquor bonds at the same time is valid, being equal and uniform in operation.—Wolcott v. Superior Court Judge, 112 Mich. 311.

¶ 52. A statute which provides that the board of trustees of a certain village is "authorized and empowered" to accept the bond of a surety company in lieu of the bond required of liquor dealers, by the provisions of Pub. Acts 1887, Act No. 313, is not mandatory, and mandamus will not lie to compel the acceptance of such a bond.—Hicks v. Perry Board of Trustees, 151 Mich. 88.

¶ 53. Local Acts 1907, No. 532, providing among other things that a village might accept a surety company's bonds in lieu of bonds required of liquor dealers, under the provisions of Comp. L. 1897, § 5383, does not repeal such provision.—Hicks v. Perry Board of Trustees, 151 Mich. 88.

¶ 54. A surety's personalty was not to be excluded in determining his pecuniary responsibility.—Post v. Sparta Township Board, 63 Mich. 323.

¶ 54a. An affidavit of justification of the sureties on a liquor bond is legally sufficient though it omits to state—as unconstitutionally required by Laws 1887, Act No. 313, § 8—that each surety is not engaged in the sale of liquors, and that neither is a surety upon any other bond required by the provisions of said statute.—Kuhn v. Detroit Common Council, 70 Mich. 534.

§ 12. Consideration and approval or rejection of bond.

Protest as suspending power to approve, see post § 13.

Discretion as to receiving and filing bond, see post § 14.

Consideration of application for license, see ante § 5.

Nonliability of public officers for injurious exercise of discretion, see Officers, VI, A.

Mandamus to compel action on bond, see Mandamus, III.

Parties to bill to enjoin officers from approving bonds for liquor licenses, see Injunctions § 102.

¶ 55. Under How. St., § 2278, which makes it lawful for any one residing within any place not within the village local option law, to carry on the liquor business upon paying to the county treasurer an annual tax, and filing with him the required bond, with two resident freeholders as sureties, who are required to justify in the form fixed by statute, and have the bond approved by the common council, or other local trustees, nothing is left to such council upon the filing of such bond except to pass upon the sufficiency of the sureties.—Potter v. Common Council of Village of Homer, 59 Mich. 8.

¶ 56. In passing upon a liquor bond the town board may consider competent testimony as to the value of the sureties' property. But it must do so fairly and in good faith, and must not act capriciously or against evidence; and while a surety should be allowed to make a further showing if an issue is raised as to the value of property which he has reported to a sufficient amount, he is entitled to no particular consideration when he has intentionally kept silent as to his property. His conduct in withholding information from the assessors is open to scrutiny.—Post v. Sparta Township Board, 63 Mich. 323.

¶ 57. A municipal board cannot arbitrarily refuse to approve a bond that is in the statutory form with sufficient sureties; it must give the applicant a hearing, and, if it rejects his bond, must give valid reasons, which should appear of record.—Potter v. Village of Homer, 59 Mich. 8; Amperse v. City of Kalamazoo, 59 Mich. 78.

¶ 58. A township board may not arbitrarily reject a liquor bond because executed by a surety company, without reference to its legal sufficiency, or without honestly and in good faith investigating and determining the actual responsibility of the surety.—Gable v. Township Board of Three Oaks, 182 Mich. 659.

¶ 59. Where the answer of the village board shows that after investigation, and from their own knowledge, one of the sureties on a proposed liquor dealer's bond is not responsible for the penalty, a mandamus to compel its approval will be denied.—Palmer v. President, etc., Village of Hartford, 78 Mich. 96.

¶ 60. Laws 1887, Act No. 313, gives a village board the power to reject a liquor

dealer's bond on the ground of the pecuniary irresponsibility of the sureties, or either of them, and the board is not bound by the affidavit of the sureties.—Palmer v. President, etc., Village of Hartford, 73 Mich. 96.

¶ 61. The relator, a saloonkeeper, conveyed property to one Allen, who later signed relator's bond. The circumstances in evidence tended to show that the conveyance was not made for an adequate consideration, but only to enable Allen to qualify as relator's bondsman. In mandamus to compel the city council to accept relator's bond, held, the council acted in apparent good faith, and the writ was properly denied. —Knabush v. Common Council Village of Britton, 158 Mich. 577.

¶ 62. Pub. Acts 1895, No. 266, declaring that any bond required by law to be given with surety or sureties may be executed by a surety company, and that such execution shall be in all respects a full and complete compliance with every requirement as to the execution of such bond by sureties, and that in those cases where, by the laws of the state, more than one surety is required, it shall be lawful to approve and accept a bond with but one surety, provided the surety is a corporation duly qualified, and that the certificate of the insurance commissioner shall be conclusive proof of the solvency and credit of such company for all purposes, and of its right to be accepted as sole surety, and of its sufficiency as such, does not operate to compel those charged with the duty of accepting and approving bonds of saloonkeepers to accept a bond with a foreign corporation as sole surety, where their refusal is based on an honest doubt as to the sufficiency of the surety proposed.—Schmitt v. Common Council of Village of Clinton, 111 Mich. 99.

¶ 63. Approval of bond as a retail liquor dealer offered by a hotel proprietor and properly describing his hotel as the "place" of business (Laws 1887, Act No. 313) cannot be refused on the ground merely that he proposes to operate two bars in the hotel under one license.—Courtright v. Village of Newaygo, 96 Mich. 290.

¶ 64. A liquor dealer presenting the statutory bond for approval is entitled to prompt action upon it.—Amperse v. Kalamazoo Common Council, 59 Mich. 78.

¶ 65. As the bonds of liquor dealers are required by statute to be filed before May 1, a municipal board must approve a sufficient bond seasonably filed before that date, and an ordinance prohibiting saloons which does not take effect until after that date is no excuse for refusing approval.—Warner v. Village of Lawrence, 62 Mich. 251.

¶ 66. A resolution regularly passed by the common council of a village, having power to suppress saloons for the sale of intoxicating liquors, fixing the saloon bonds at $3,000 with two sureties, stands until modified or repealed, and while such resolution is in force the council has no power to suppress saloons by refusing to accept the bond.—Hawkins v. Common Council of Village of Litchfield, 120 Mich. 390.

¶ 67. An applicant for a license to sell intoxicating liquor who knows that at a meeting of the township board, consisting of the supervisor, township clerk and two senior justices of the peace, his application was rejected by an equally divided vote and that one of such justices was opposed to the approval of the bond, procures counsel after its rejection, induces the supervisor to call another meeting, knows that such justice was not at such meeting and that his place was taken by a junior justice, which was permissible when a senior justice was unable to act, is not an innocent party who will be protected by the face of the record showing approval of his bond, where it appears that three votes were cast in favor of the approval of the bond, including that of the junior justice, the other justice protesting that the meeting was illegal, and that the other senior justice was able to come but was not called. —Jones ex rel. Hall v. Turner, 197 Mich. 523. (Ostrander, Brooke and Steere, JJ., dissenting.)

¶ 68. The favorable report of a committee of a common council to which a bond is referred does not preclude a member of the council from voting against approval.—Amperse v. Winslow, 75 Mich. 234.

¶ 69. The approval of a liquor bond by the mayor is unnecessary, where the charter does not require it; and the fact that under the charter all ordinances and resolutions must receive the approval of the mayor, and that a provision enacted subsequent to the general liquor law confers upon the council the power to regulate, license, prohibit, and suppress saloons, does not necessitate the mayor's approval of the bond, where no action has been taken by the council under the power so conferred.—O'Halloran v. Jackson, 107 Mich. 138.

¶ 70. The certificate of a township clerk indorsed upon a liquor bond filed with the county treasurer, to its approval by the township board, is made authentic evidence of such fact by Laws 1887, No. 313, § 8, which provides for such approval and certificate.—Smith v. Anderson, 82 Mich. 492.

§ 13. ——Protests against approval.

¶ 71. Act No. 321, Pub. Acts 1907, provides that "Whenever a majority of the qualified electors of any * * * village equal to a majority of the votes cast for governor at the last general election shall file a petition" protesting against the acceptance

of liquor bonds, such bonds shall not be accepted by the village officials. Held, that the majority required was a majority of the number of qualified voters existing at the last general election, and not of the number existing at the time of the filing of the petition.—Village of Wolverine v. Cheboygan Circuit Judge, 162 Mich. 713.

¶ 72. Where a majority of the electors of a village filed a protest with the common council against the acceptance of a bond offered by a prospective saloonkeeper under Public Acts 1907, No. 321, the vote of the village at the last election for Governor may, in the absence of evidence to the contrary, be determined by the poll list as Public Acts 1907, No. 321, providing for a protest by the majority of electors of a village against the acceptance of a bond offered by a prospective saloonkeeper contemplates only the filing of a petition of protest, a favorable petition cannot be considered by the council although bearing more names than the petition of protest.—Covell v. Common Council of Village of Fife Lake, 179 Mich. 151.

¶ 73. Where the majority of the electors of a village filed a protest under Public Acts 1907, No. 321, with the common council against the acceptance of a bond offered by a prospective saloonkeeper, such bond cannot be approved although there is no method indicated in the Act by which the council may determine with accuracy the vote of the village electors in the last election for Governor as provided in the Act.—Covell v. Common Council of Village of Fife Lake, 179 Mich. 151.

¶ 74. Under Act No. 321, Pub. Acts 1907, the decision of a village council on the sufficiency of a petition of protest by electors against accepting saloon bonds and issuing licenses, is not controlling but is open to the review of the courts.—Village of Wolverine v. Cheboygan Circuit Judge, 162 Mich. 713.

§ 14. Receiving and filing bond.

¶ 75. No discretion in regard to the receipt and filing of a liquor-dealer's bond is lodged in the county treasurer, who is bound to receive and file it, when presented with the approval of the town board indorsed thereon.—Brockway v. Petted, 79 Mich. 620.

¶ 76. The bond of a liquor dealer, when filed relates back to its date and covers the time prior to its filing. Filing is not essential to validity.—Brockway v. Petted, 79 Mich. 620.

§ 15. Construction, effect and obligation of bond.

¶ 77. The liability of sureties upon a liquor dealer's bond attaches upon the acceptance and approval of the instrument and notwithstanding any failure to file it with the county treasurer.—Brockway v. Petted, 79 Mich. 620.

¶ 78. A liquor dealer's bond in Bay City cannot be enforced until approved by the common council; and the report of a committee approving it will not be sufficient unless the report is adopted by the council.—Garrison v. Steele, 46 Mich. 98.

¶ 79. Where a saloonkeeper gave a bond under sec. 5386, Comp. L. 1897, and judgments were recovered against him and his surety for the full amount for violations of the liquor law (sec. 5389, Comp. L. 1897), the fact that judgments for the full amount of the bond have been recovered does not bar the recovery of future judgments for the violations of said law—the surety not being discharged until he has individually paid the amount of the bond, the principal being liable for any amount, as the bond was only intended as additional to his individual responsibility.—Squires v. Miller, 173 Mich. 304.

¶ 80. The neglect of the sureties to annex the statutory affidavits to a liquor dealer's bond will not relieve them from liability.—People for use of Clinton v. Laning, 73 Mich. 284.

¶ 81. The acceptance by the common council of a liquor dealer's bond, unaccompanied by the statutory affidavits of the sureties, may render them liable for neglect of duty, but such neglect will not invalidate the bond. People for use of Clinton v. Laning, 73 Mich. 284.

¶ 82. A surety upon a liquor bond cannot discharge himself by removing from the corporation limits, nor is he relieved by the county treasurer's notifying the principal to file a new bond and to close his saloon until he does so.—Wright v. Treat, 83 Mich. 110.

¶ 83. The liability of the sureties upon a liquor bond does not extend to the acts and conduct of a firm succeeding that whose members were principals in the bond, although one of such principals is a member of the new firm.—Mathews v. Garman, 110 Mich. 559.

¶ 84. A liquor dealer's bond, where the penalty has by mistake been left in blank, will be held valid at the lowest statutory penalty when the sureties have justified at that sum in accordance with the statute requiring the justification to conform to the penalty.—Garrison v. Steele, 46 Mich. 98.

¶ 85. A liquor bond executed prior to the passage of the liquor law of 1887, and covering a period of one year from May 1, 1887, must be held good in so far as it embraces provisions in the new law which were taken from the former act.—Gullickson v. Gjorud, 89 Mich. 8.

¶ 86. The fact that the law of 1887 differs from the prior law in requiring that the sureties must be male persons and not office-

holders, and must not be sureties upon more than two bonds, and must justify in real estate in the proper county, does not affect the liability upon bonds given under the former law, nor the conditions thereof.—Gullickson v. Gjorud, 89 Mich. 8.

C. SURRENDER OR TRANSFER OF LICENSE; DEATH OF LICENSEE.

§ 16. Surrender or cancellation.

Revocation for violation of law, see post § 78.

¶ 87. Section 39, Act No. 291, Pub. Acts of 1909, provides that saloon licenses shall not exceed the number of saloons doing business in a given township in the month of April, 1909, and that if said number exceeded the ratio of one for every five hundred inhabitants, no license should be issued to take the place of licenses revoked or voluntarily surrendered until the ratio of saloons should not exceed one for every five hundred inhabitants. In the township in question of 1,249 inhabitants, six saloons were doing business in April, 1909. Later three of these failed to apply for renewal of licenses at the expiration of the license term. Held, such failure to apply for renewal of licenses was a voluntary surrender of licenses within the meaning of said section and the complainant's mandamus to compel the issuance of a license in excess of the three licenses remaining in effect should be denied.—Ploof v. Bangor Township Board, 168 Mich. 697.

¶ 88. The death of one holding a license to sell intoxicating liquors constitutes a voluntary surrender of his license within the meaning of Pub. Acts 1909, Act No. 291, How. 2nd Ed., § 5055, known as the Warner-Crampton law.—Hartingh v. Bay Circuit Judge, 176 Mich. 289.

§ 17. Rebate of license.

See also post ¶ 219.

Right to recover payment made under protest, see Payment, VI; Taxes, VIII.

¶ 89. In the absence of a statute authorizing it, a retail liquor licensee is not entitled to a rebate for the unexpired term upon revocation; such a right is dependent upon the statute, and where there is no statute, the licensee must be held as taking his license subject to such laws as prevail.—People v. Schafran, 168 Mich. 324.

§ 18. Assignment, transfer or succession.

¶ 90. A license to sell intoxicating liquors is personal and cannot be transferred to another.—Kennedy v. Stimming, 192 Mich. 600.

§ 19. Effect of death of licensee.

Death as surrender by operation of law, see also ante ¶ 88.

¶ 91. In the absence of legislation to the contrary, upon the death of a person licensed to sell intoxicating liquors, the privileges conferred by the license do not pass to or vest in his personal representatives.—Hartingh v. Bay Circuit Judge, 176 Mich. 289.

¶ 92. Under Pub. Acts 1911, Act No. 170, How. 2nd Ed., § 1976, amending Pub. Acts 1909, Act No. 291, known as the Warner-Crampton law, the administrator of a deceased person licensed to sell intoxicating liquors can continue the business under certain conditions during the period of the license but no such right existed where a licensee died prior to the passage of the amendatory act.—Hartingh v. Bay Circuit Judge, 176 Mich. 289.

III. LOCAL OPTION; PROHIBITED TRAFFIC.

A. STATUTES; ELECTION AND OTHER PROCEDURE.

§ 20. Statutory provisions in general.

Effect of local and general prohibition, see post §§ 31-33.

General law of statutes and statutory construction, see Statutes.

¶ 93. The Local Option Law of 1889 (How. St., §§ 2283a-2283c3) is valid.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 94. General liquor law of 1887 (Laws 1887, Act No. 313, How. St., §§ 2283c4-2283f7) held valid and enforceable as to the new taxes and penalties not involving peculiar disabilities, and as to the new method of prosecution in the upper instead of in the justices' courts.—Robison v. Miner, 68 Mich. 549; Luton v. Newaygo Circuit Judge, 69 Mich. 610.

¶ 94a. A city council may refuse approval of a liquor bond for a license in a territory covered by a "no license" ordinance even if it provides no penalty, since such an ordinance is self-executing in its prohibition.—Johnson v. Common Council of City of Bessemer, 143 Mich. 313.

¶ 95. Under the Act of 1899 (Pub. Acts 1899, No. 183) amendatory of the Local Option Act of 1889, the prohibitory features of the old act were not changed and the only additional requirement imposed on druggists was that they report sales of liquor to the prosecuting attorney, and the act became effective without its submission to a vote of the people.—People v. Henwood, 123 Mich. 317.

§ 21. Petitions for and calling of election.

Petition for resubmission after adverse vote, see post § 30.

¶ 96. Under Comp. L. 1897, § 5415, How. 2nd Ed., § 5020, only one petition for the submission of the question of local option to the electors may be circulated on a township, ward or election district.—Heyer v.

Board Sup'rs of Shiawassee County, 190 Mich. 184.

¶ 97. Under Comp. L. 1897, § 5415, How. 2nd Ed., § 5020, where there are duplicate petitions for submission of the local option question to the electors all are void, and it is immaterial that one of them is regular on its face.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

¶ 98. While but one petition may be circulated in any one township, ward or election district, yet, such petition may be circulated in the form of several sheets headed alike, if such sheets are subsequently attached together as one petition, and a copy thereof, thus attached, is duly posted.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

¶ 99. Under Comp. Laws 1897, § 5415, How. 2nd Ed., § 5020, any number of headings of a petition for submission of local option question to electorate may be circulated in a precinct and signed, and, if all the headings are alike and in the proper form, and attached together, and a copy thereof posted. and filed as one petition, the statute is complied with.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

¶ 100. Under Comp. L. 1897, §§ 5414-5417, How. 2nd Ed., §§ 5019-5022, where poll lists of the last preceding general election from all the voting precincts do not accompany the petitions to the board of supervisors for a referendum of the local option question to the voters the petitions are sufficient if the total number of petitioners, as ascertained by the returns or county canvass of the vote at the last general election, equals one-third of the votes cast as such general election.—Graham v. Board Sup'rs of Manistee County, 190 Mich. 162. (Kuhn, Bird and Brooke, JJ., dissenting.)

¶ 101. A qualified elector, within the meaning of the Local Option Statute (Act No. 207, Pub. Acts 1889, as amended by Act No. 183, Pub. Acts 1899), is one who meets the requirements of section 1, art. 3 of the Constitution of Michigan (1909).—Rutledge v. Board Sup'rs Marquette Co., 160 Mich. 22.

¶ 102. A registered elector is a qualified elector within the meaning of the local option law, although his name does not appear upon the poll lists.—Werstein v. Board Sup'rs Calhoun Co., 156 Mich. 63.

¶ 103. The signers of a petition for the submission of the question of prohibiting the sale of liquor in a county cannot make a withdrawal of their names after the petition has been posted.—Lewis v. Board Sup'rs Montmorency Co., 164 Mich. 595.

¶ 104. One signing his name on a local option petition under Act No. 207, Pub. Acts 1889, as amended by Act No. 183, Pub. Acts 1899, which makes no provision for withdrawal by a petitioner, is not permitted, after the posting of the petition lists, to withdraw his name therefrom.—Rutledge v. Board Sup'rs Marquette Co., 160 Mich. 22.

¶ 105. A signer of a local option petition could not have his name removed after the petition had been filed, when his signature was genuine and voluntary.—Kern v. Board Sup'rs St. Clair Co., 160 Mich. 11.

¶ 106. Persons signing a local option petition, under Pub. Acts 1899, No. 183, cannot be permitted to withdraw after the petition is filed in the office of the clerk.—Fischer v. Board Sup'rs Washtenaw Co., 156 Mich. 1; Werstein v. Board Sup'rs Calhoun Co., 156 Mich. 63.

¶ 107. Section 5415, Comp. L. 1897, gives to one whose name has been fraudulently attached to a petition for the submission of the question of prohibition to the vote of the people, the right to have it erased; but it confers no right upon one whose name is attached of his own volition, and without any fraud, to demand such withdrawal.—Koerber v. Board Sup'rs Ionia Co., 155 Mich. 677.

¶ 108. After adequate local option petitions under Act No. 207, Pub. Acts 1889, as amended by Act No. 183, Pub. Acts 1899, had been posted, the board of supervisors permitted enough petitioners to withdraw their names to make the petition insufficient in number. Held, mandamus would lie to compel the board to submit the question to the voters.—Rutledge v. Board Sup'rs Marquette Co., 160 Mich. 22. (Blair, McAlvay and Brooke, JJ., concurring, recommending an additional order that the board reconvene and act upon the evidence required by the statute.)

¶ 109. Petitions to a board of supervisors asking a submission of the local option question to the electors may be filed prior to, presented at, and acted upon at an adjourned term of a board of supervisors, instead of at its regular annual meeting.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

¶ 110. The affidavit which Laws 1889, Act No. 207 (How. St. § 2283a3), relative to the calling of a special election to determine the question of local option, provides shall accompany the petition for such election, need only allege, when accompanied by the poll-list required by the statute, the then residence of the petitioners; but if there is no poll list then the affidavit must show that petitioners are qualified electors.—Friesner v. Common Council of City of Charlotte, 91 Mich. 504.

¶ 111. Where several identical headings of a petition for submission of local option question to the voters are circulated in a pre-

cinct the affidavit or affidavits of the genuineness of the signatures and that the signers are qualified electors may be attached to each heading.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

§ 22. ——Action on petition and resolution for election.

Action upon the election and declaration of result, see post § 26.

Mandamus to compel action on petition, see Mandamus, III.

¶ 112. It is competent for the board of supervisors, when convened for the purpose of determining whether or not an election under the local option law has been prayed for by the requisite number of electors, to collect and collate the required statutory facts through a committee appointed for that purpose.—Giddings v. Van Buren County Treas., 99 Mich. 221.

¶ 113. Under Comp. L. 1897, §§ 5414-5417, How. 2nd Ed., §§ 5019-5022, relative to the presentation of petitions for a referendum of the local option question to the voters and the determination of the sufficiency thereof by the board, it is not the duty of the board or of the county clerk, where the transcripts of the poll lists of the last preceding general election do not accompany the petitions, to consult the poll lists, where they are available and not defective, in order to determine the sufficiency of the petitions, but the returns or county canvass at the last general election may be resorted to.—Graham v. Board Sup'rs of Manistee County, 190 Mich. 162. (Kuhn, Bird, and Brooke, JJ., dissenting.)

¶ 114. Under Comp. L. 1897, § 5417, requiring an examination and determination of the sufficiency of local option petitions by the board of supervisors, a finding by the clerk that one-third of the qualified electors of the county have prayed for submission of the question is not a jurisdictional prerequisite to the action of the board of supervisors, and his failure to make such finding does not affect the validity of the election.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 115. The provisions of Comp. L. 1897, § 5417, How. 2nd Ed., § 5022, relating to local option elections, are mandatory, and the board of supervisors has no jurisdiction to order an election until it has by resolution determined and declared that the submission of the question has been petitioned for by the requisite number of electors.—Ehinger v. Graham, 190 Mich. 132.

¶ 116. It is not within the discretion of the board of supervisors to refuse to call an election for a resubmission of the question of prohibition of the manufacture and sale of liquors upon presentation of a petition answering the requirements of the statute.—Keefer v. Hillsdale County Sup'rs, 109 Mich. 645.

¶ 117. Act No. 183, Pub. Acts 1899, governing local option elections, provides for affidavits of the genuineness of the signatures on the petitions submitted, and states that where upon its face the petition is sufficient, the board of supervisors shall submit the question of prohibition. Held, the board has no authority to inquire into the genuineness of the signatures by extrinsic evidence, the affidavits being conclusive, and mandamus will not lie to compel them so to do.—Kern v. Board Sup'rs St. Clair Co., 160 Mich. 11. (Ostrander, McAlvay and Brooke, JJ., concurring, in separate opinions.)

¶ 118. In passing upon the sufficiency of a local option petition under Act No. 207, Pub. Acts 1889, as amended by Act No. 183, Pub. Acts 1899, the board of supervisors may not, by extrinsic testimony, enter upon the sufficiency of the posting of the notices, or the questions whether the signatures were fraudulently obtained or were the signatures of qualified voters.—Rutledge v. Board Sup'rs Marquette Co., 160 Mich. 22.

¶ 119. The board of supervisors in passing on the sufficiency of petitions filed under the Local Option Statute, decided by extrinsic evidence that 224 of the names were not those of qualified voters, and should be stricken off, thereby leaving less than the requisite number. Held, the board had no power to do this, and mandamus would lie to reconvene and submit the question of prohibition to the voters.—Flanders v. Board Sup'rs Van Buren Co., 160 Mich. 27.

¶ 120. There can be no legal objections for a board of supervisors to combine in a single resolution the successive resolutions finding that a petition to submit a local option law was sufficient under the law and the order calling the election.—People v. Hamilton, 143 Mich. 1.

¶ 121. A resolution of the board of supervisors ordering a local option election which fails to determine what the petitions for the election contained or whether they complied with the law is insufficient under Comp. L. 1897, § 5417, How. 2nd Ed., § 5022.—Ehinger v. Graham, 190 Mich. 132.

¶ 122. An order of the supervisors directing the submission of the question of local option to the electors of the county on a named date is sufficient under Pub. Acts 1899, No. 183, § 6 requiring "that such question shall be voted upon at the next annual township election," where as a matter of fact the date fixed is the date of such election, but the order fails so to state.—Attorney General v. Van Buren Circuit Judge, 143 Mich. 366.

¶ 123. An order of the board of supervisors submitting the question of local option

to the electors is not insufficient, although it contains no recital of the number of names on the poll lists, or of the number of electors who signed the petition, where it does state that the election has been prayed for by the requisite number, to wit, by not less than one-third of all the qualified electors of the county as shown by the poll lists.—Attorney General v. Van Buren Circuit Judge, 143 Mich. 366.

¶ 124. The statute does not provide for the filing or keeping of any separate order, distinct from that entered upon the journal, and the provision that the board "shall thereupon issue an order directing that such election be held," is complied with by the service upon the officers named in the act of copies of the order, and the publication of the same. —Thomas v. Abbott, 105 Mich. 687.

¶ 125. Under Laws 1889, Act No. 207, § 6, which provides that the order of the board of supervisors directing that an election be held "shall be entered in full upon the journal of the proceedings of the board for that day, and the same shall be signed by the acting chairman and clerk of the board before final adjournment," it is sufficient if the journal for the day, including other matters, is signed after the close of the session.—Thomas v. Abbott, 105 Mich. 687.

§ 23. ——Conclusiveness and finality of order for election.

Mandamus to compel action, see Mandamus, III.

Conclusiveness on certiorari of finding of facts warranting submission, see Certiorari § 55.

¶ 126. Under Laws 1889, Act No. 207 (local option law), the determination by the board of supervisors upon questions preliminary to the holding of a special election on local option (e. g., whether or not a sufficient number of electors had petitioned for such election) is final and cannot be reviewed; nor can it afterwards be shown that some of the petitioners were not qualified electors.—Friesner v. Common Council City of Charlotte, 91 Mich. 504; Covert v. Munson, 93 Mich. 603.

¶ 127. Where a resolution of the board of supervisors to submit the question of local option to the electors has been adopted in conformity to law and the record is regular, it is conclusive as to the preliminary steps necessary to set the board in motion, and a mandamus to show cause to compel the board to vacate such an order because the petition signed by the electors was not in proper form, that the affidavits of posting were prematurely made, and copies of the petitions were not in fact properly posted is properly refused.—Attorney General v. Van Buren Circuit Judge, 143 Mich. 366.

¶ 128. On a contention that the board of supervisors had not complied with the proceedings provided for by Pub. Acts 1899, No. 183 and that their procedure was not sufficient to authorize the submission of a local option law to the vote of the electors in the county, in that they did not before adopting the order of submission determine and declare by resolution that, upon the face of the petition and by reference to the transcripts of the poll lists or by the returns and canvass of the last general election, such submission has been prayed for by the requisite number of electors of the county; while it might perhaps be more in accord with the letter of the statute if the board had adopted a distinct resolution determining "that such submission of said question has been prayed for by the requisite number of electors," yet the proceedings were sufficient to comply with the statute where the question whether the requisite number had signed was directly presented to the board for the decision by a majority and minority report, and the board had adopted the minority report and thereby determined that there was a sufficient number, and explained in the preamble its interpretation of the effect of its action and declared as a matter of fact "that the highest vote cast for any state officer in and at the said last general election was 4,324 votes, and that said petition had been signed by 2,344 electors." The board having determined this fact, which it was its duty to determine, it will be presumed that the law was complied with.—People v. Hamilton, 143 Mich. 1.

¶ 129. The adoption of the report of the committee, and of a resolution included therein, declaring and determining that such election has been prayed for by the requisite number of electors, is, in legal effect, a declaration and determination by the board of supervisors of that fact, and it cannot be presumed that the fact that the report was made excluded every other inquiry, or that the members of the board did not verify the facts set forth in the report, or possess or avail themselves of any other means of information.—Giddings v. Van Buren County Treas., 99 Mich. 221.

¶ 130. The resolution of the board of supervisors, adopted in conformity to law, and the record thereof being regular, that an election under the local option law has been prayed for by the requisite number of electors, is conclusive of the preliminary steps necessary to set the board in motion.—Thomas v. Abbott, 105 Mich. 687.

¶ 131. Under Comp. L. 1897, § 5417, requiring an examination and determination by the board of supervisors as to the sufficiency of local option petitions, the duty of determining whether the requisite number of electors have signed the petitions rests finally upon the board of supervisors, and their action thereon is final.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 132. A determination of the board of supervisors as to the sufficiency of local

option petitions, and as to the requisite number of electors signing the same, is final, and not subject to review by the courts.—Werstein v. Board Sup'rs Calhoun Co., 156 Mich. 63.

¶ 133. Under section 5417, Comp. L., 1897, a determination of the board of supervisors that the proper steps have been taken for submitting the question of prohibiting the sale of intoxicating liquors to a vote of the people, and that the requisite number of electors have signed the petition for such submission, is final, and cannot be reviewed by the courts.—Koerber v. Board of Sup'rs Ionia Co., 155 Mich. 677.

¶ 134. Where there is more than one separate and distinct petition for the submission of the local option question to the voters from a township the determination of the board of supervisors as to the sufficiency of the petition is not conclusive, and may be reviewed by the courts.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

§ 24. ——Posting, publication and proofs thereof.

Computation of time for posting, first and last days, see Time.

¶ 135. Under Comp. L. 1897, § 5415, neither the posting of copies or the filing of the local option petition need be done on any particular day.—Crawford v. Board Sup'rs Gratiot Co., 160 Mich. 31.

¶ 136. The law does not, in terms, require the posting of the certified copy of the order served upon the township clerk, and it is sufficient if said order is embodied in the notice of election posted by that officer.—Thomas v. Abbott, 105 Mich. 687.

¶ 137. Where, in the record of the day's proceedings, other matters appear besides the resolution or order of the board directing the holding of a local option election, it is proper to omit such irrelevant matter from the notices served and posted, and to append thereto the signatures of the clerk and chairman found at the close of the day's proceedings as recorded.—Thomas v. Abbott, 105 Mich. 687.

¶ 138. Under Comp. L. 1897, §§ 5422, 5425, relating to the publication of a resolution of the board of supervisors ordering a local option election, the failure of the board to specify the newspaper in which the resolution is to be published does not vitiate the proceedings, where, on discovering their mistake the next day, the board unanimously passed a resolution directing publication in designated newspapers.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 139. An affidavit as to posting a petition for submission of local option question to the electors which states that one of the three notices posted in a township was posted "at J. L. Seelhoff on telephone pole," is defective.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

¶ 140. An affidavit as to posting a petition for submission of the local option question to the electors which states that each of the three notices posted in a certain ward of a city was posted at the "corner" of designated intersecting streets is insufficient in description.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

¶ 141. The Local Option Statute, Comp. L. 1897, § 5415, did not specify any particular day on which the petition for the submission of the prohibition question should be filed with the county clerk. It required affidavits to be made that copies of the petition had been posted ten days before the petition was filed. The copies were posted on various days from December 23d to December 27th. The petition was filed January 8th. The affiants, on the days the copies were posted or on the day thereafter, made affidavits that they had been posted ten days before the filing with the county clerk. Held, such affidavits were insufficient, since at the time they made them the affiants could not have known the fact they swore to; and that mandamus to compel the board of supervisors to submit the question to vote should be denied.—Crawford v. Board Sup'rs Gratiot Co., 160 Mich. 31.

¶ 142. Under Comp. L. 1897, § 5415, How. 2nd Ed., § 5020, where several identical headings of petition for submission of local option question are circulated in each precinct the affidavit or affidavits as to the posting should be attached to the completed petition after the headings have all been attached together as one petition, and should refer to it as such.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

§ 25. Local option elections and ballots.

Effect of irregularities in election, see post § 27.

General law of elections and ballots, see Elections.

¶ 143. Pub. Acts 1913, No. 109, regulating nomination and election expenses, and requiring accounts thereof was intended to regulate and control all elections, and election expenses wherever the electors are called upon to decide any measure or measures that may be before the people to be voted upon, and includes the voting upon the question of local prohibition.—People v. Gansley, 191 Mich. 357. (Brooke, Bird, Kuhn and Ostrander, JJ., dissenting.)

¶ 144. Though Laws 1889, Act No. 207, § 8, provides for the printing of the ballots by the county clerk for a local option election, the commissioners of election have authority, under the more recent Australian ballot law, to provide ballots for a local

option election, containing both "yes" and "no" votes to be indicated by a cross.—Thomas v. Abbott, 105 Mich. 687.

¶ 145. Where on the question of prohibition, there is a clear majority of the votes cast in favor of license, excluding the votes rejected as illegal, the board of supervisors has no power to go behind the returns of the inspectors of election to determine whether the votes rejected as illegal were properly so rejected, but must determine the question of majority solely upon the legal vote cast as shown on the face of the returns. (Hooker, J., dissenting.)—Attorney General v. Board Sup'rs Genesee Co., 166 Mich. 61.

§ 26. Procedure to declare result and put law into operation.

Repeal of resolution and vote, see post § 29.
Resubmission after adverse vote, see post § 30.
Evidence and proofs of adoption of law, see post § 28.
Going behind returns, see also ante ¶ 145.

¶ 146. The statutory provisions in regard to the making up of the record of the proceedings for election on local option, and as to stating and certifying the result of the vote, are mandatory, and a failure to comply with them vitiates such election.—Covert v. Munson, 93 Mich. 603.

¶ 147. Where the record of the proceedings of the board of supervisors upon a petition for an election on local option was not entered upon the journal until some weeks after adjournment, and was not signed by the chairman of the board until after he had gone out of office, it was held that there was no such record as the law requires to put the local option law in operation within the county.—Covert v. Munson, 93 Mich. 603.

¶ 148. Under Comp. L. 1897, § 5417, requiring an order for a local option election to be entered in full upon the journal of the proceedings of the board "that day," and signed before the final adjournment, it is not necessary that the proceedings leading up to the order shall be entered and signed on the very day thereof, but only that they be entered upon the journal of the proceedings for that day, and signed before final adjournment.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 149. Where the clerk receives the original affidavit of publication, indorses the fact of filing on its back, and pastes the same in the record immediately following the resolution of the board of supervisors adopting the local option act, there is a sufficient compliance with the provisions of said Act (Comp. L. 1897, § 5425) respecting the spreading of record of said affidavit.—People v. Fisch, 164 Mich. 680.

¶ 150. In pasting on the record the original affidavit of publication required by the Local Option Act, the clerk in his entry stated that said affidavit was affixed on the 2d day of May but did not state the day of filing. It appeared that the affidavit was not on file May 1st. Held, there was a sufficient compliance with the said statute requiring the clerk to record the date when the affidavit was entered for record.—People v. Fisch, 164 Mich. 680.

¶ 151. A rule of a county board of supervisors, that if the board remains in session for the space of two hours without any business it shall adjourn for the term, is not applicable to an adjournment or recess taken to allow time for the clerk of the board to enter local option proceedings in the record book as required by Comp. L. 1897, § 5417.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 152. Record of proceedings of board of supervisors in ordering election under local-option law and declaring result thereof is fatally defective if not containing designation by board of newspaper in which resolution of prohibition is to be published.—Moran v. Darby, 97 Mich. 186.

¶ 153. Under Laws 1889, Act No. 207, § 14 (How. St., § 2283b3), the paper in which a resolution of prohibition is to be published must be "designated by the board" of supervisors adopting the resolution; and a previous letting by the board of the county printing to certain newspapers is not a sufficient designation.—Moran v. Darby, 97 Mich. 186.

¶ 154. A board of supervisors in their resolution adopting the local option act provided for "publication in every newspaper within the county," which provision was amended to read "in the Presque Isle News and all the other newspapers in the county." Held, either provision was a sufficient compliance with the statute.—People v. Fisch, 164 Mich. 680.

¶ 155. An affidavit that a local option resolution was published "for four successive weeks; that the first of such publications was on the 3d day of March, 1894, and the last on the 31st day of March, 1894,"—shows that the publication was for four successive weeks, and complies with the requirements of the statute.—People v. Whitney, 105 Mich. 622.

¶ 156. Under Comp. L. 1897, § 5426, providing that the prohibitory provisions of the Local Option Act shall take effect on the first day of May following the adoption by the board of supervisors of a resolution ordering such prohibition, and upon the publication of the notice of the adoption thereof, such adoption and publication are the only conditions to put the local option law in

force, and the failure of the clerk to properly record the resolution, and the affidavits of publication does not affect the enforcement of the prohibition law pursuant thereto.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 157. On certiorari to review the action of a board of supervisors in recounting votes at a local option election under Pub. Acts 1913, No. 352, and to set aside the preamble and resolution declaring that the general liquor law had been suspended, held, that as the original and subsequent canvass of votes supported the preamble and resolution, the writ should be quashed.—Alward v. Board Sup'rs of Oakland County, 187 Mich. 573.

§ 27. Effect of irregularities on election.

¶ 158. The neglect of an officer to perform a mere ministerial duty cannot be permitted to defeat an election at which a local option law was adopted.—People v. Hamilton, 143 Mich. 1.

¶ 159. The fact that the clerk of the board of supervisors had not spread the original affidavit of publication on the records of the board following the record of adoption of the resolution of prohibition as required by Pub. Acts 1899, No. 183, § 14, but it followed after some intervening pages cannot be held fatal to the proceedings so as to invalidate a local option law adopted at an election.—People v. Hamilton, 142 Mich. 1.

¶ 160. A local option election is not invalidated by the fact that the county clerk published the first notice of the election 17 days prior to the election, instead of 21 days, as required by section 5417, Comp. L., 1897, where the issue was thoroughly discussed throughout the county, and a majority of all the voters in the county voted for prohibition.—Bauer v. Township Board of Denmark, 157 Mich. 395.

¶ 161. A board of supervisors cannot nullify the effect of a vote of the electors to adopt prohibition in the county by a faulty compliance with the statutory requirements with respect to filing affidavits of publication.—Paul v. Benzie Circuit Judge, 169 Mich. 452.

¶ 162. An unconstitutional provision of a city charter providing for a central polling place, with but one board of election inspectors, will not vitiate a local option election, where notice of the subject to be voted upon was properly given, the result of the election honestly declared, and no elector was deceived or misled.—Holt v. Board Sup'rs of Ogemaw County, 186 Mich. 241. (McAlvay, J., dissenting.)

¶ 163. The consideration by the board of supervisors, in determining the result of an election under the Local Option Law, of illegal returns from certain townships, will not invalidate the election, where the exclusion of such returns will not destroy the majority in favor of the proposition submitted to the electors.—Giddings v. Wells Van Buren County Treas., 99 Mich. 221.

¶ 164. The requirements of Comp. L. 1897, § 5422, that the canvass, determination, and declaration of the result of a local option election shall be entered in full upon the journal of the proceedings of the board of supervisors for that day, and signed by the acting chairman and clerk, is merely directory, and the will of the electors cannot be defeated by the omission or inability of the board to perform the duty on the precise day fixed.—Madill v. Common Council of City of Midland, 156 Mich. 56.

¶ 165. Under the Local Option Law, Act No. 207, Pub. Acts of 1889, as amended by Act No. 183, Pub. Acts of 1899, the board of supervisors in declaring for local option in a county exercise no legislative power but merely a ministerial duty, and a resolution declaring for local option passed by it, which fails to include the preamble contained in said Act of 1889, § 13, to the effect that the board has canvassed the election returns and found a majority of votes in favor of prohibition, is not a fatal omission making said resolution inoperative.—Paul v. Benzie Circuit Judge, 169 Mich. 452. (Ostrander, Blair and Stone, JJ., dissenting.)

¶ 166. The objection that the resolution of prohibition prohibits the sale of wine for sacramental purposes, and prohibits druggists or registered pharmacists from selling for purposes allowed by Local Option Act § 15, which provides "that nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes nor shall anything herein contained prohibit druggists or registered pharmacists from selling or furnishing pure alcohol for medicinal art, scientific, and mechanical purposes," does not affect the rights of a respondent charged with keeping a saloon in violation of the provisions of said act, as the resolution may be proper with those provisions eliminated.—People v. Whitney, 105 Mich. 622.

¶ 167. The operation of the local option law in a given county (Laws 1889, Act No. 207, § 6) depends on the making of the record in the journal and not upon the forwarding, without delay, by the county clerk to the secretary of state, of a certified transcript of the resolution of prohibition, and of so much of the journal of the proceedings of the board of supervisors as pertains to the election, including the tabular statement of votes, together with a copy of the affidavit of publication of the notice of the adoption of the resolution; and the failure of the clerk to comply with said provision will not defeat the proceeding.—Giddings v. Wells Van Buren County Treas., 99 Mich. 221.

§ 28. Evidence and proof of adoption of local option law.

Alleging adoption of law in information for violation, see post § 60.

Court and jury questions, see post § 70.

¶ 168. The jurisdiction being shown by a valid record and canvass, the determination of the board of supervisors as to the result of a local option election is final.—Thomas v. Abbott, 105 Mich. 687.

¶ 169. Under How. St. §§ 2283b2, 2283b6, a resolution of the board of supervisors prohibiting the sale of liquor, but omitting the required preamble reciting that an election was duly called and held, etc., is not sufficient evidence that the "local option" law is in force in the county to sustain a conviction for violation thereof.—People v. Murphy, 93 Mich. 41.

¶ 170. The existence of the local option law within a county is sufficiently proved by the introduction in evidence of a certified copy of the preamble and resolution of the board of supervisors, ordering prohibition in the county.—People v. Whitney, 105 Mich. 622.

¶ 171. Where, in a prosecution for violation of the Local Option Law, Act No. 207, Pub. Acts of 1889, the resolution of the board of supervisors declaring for prohibition is faulty in failing to include the preamble that the election returns have been canvassed and prohibition duly carried, and where therefore said resolution does not afford evidence, as provided by section 17 of said act, of the adoption of prohibition by the voters, proof of said adoption may be made by evidence outside the record of said resolution.—Paul v. Benzie Circuit Judge, 169 Mich. 452.

§ 29. Repeal of local option.

¶ 172. Where prohibition under the local option act has been in force, and the electors vote to discontinue the same, the board of supervisors, under section 13, Act No. 183, of 1899, which provides that the board "may repeal" prohibition, have no discretion in the matter, and must comply with the decision of the electors.—In re Wilson, 1(Mich. 42.

¶ 173. On the question of prohibition, the vote was in favor of it, 6,832, against it 6,857, blank and rejected votes, seventy-one. Held, that under section 13, Pub. Acts 1899, No. 183, providing that previous resolution of the board of supervisors determining the question of prohibition shall not be repealed unless a majority of the electors of the county voting on such proposition at a subsequent election declared against prohibition, the said vote cast was a sufficient majority to authorize the resolution of the board of supervisors declaring for license, since the vote in favor of liquor was a majority of all the legal votes cast.—Battle Creek Brewing Co. v. Board Sup'rs Calhoun County, 166 Mich. 52. (Hooker and Moore, JJ., dissenting.)

§ 30. Resubmission and new petitions.

¶ 174. The provisions of Pub. Acts 1889, No. 207, §§ 9, 13, to the effect that the proposition to prohibit the manufacture and sale of liquors, having been once submitted and decided, shall not be again submitted within a period of two years thereafter, do not operate to require that the action of voters in preparing petitions for a resubmission of the question, or of the board of supervisors in calling an election, must await the lapse of two years.—Keefer v. Hillsdale County Sup'rs, 109 Mich. 645.

¶ 175. Act No. 183, §§ 6, 9, provides that the question of prohibition shall be submitted at the annual township election, and having been submitted and decided either way, it shall not be submitted again for two years. Where an election was held April 5, 1909, deciding for prohibition and another April 3, 1911, deciding against it, held, the latter election was not void as being held two days short of the two-year period the word "year" in the statute meaning a political and not a calendar year.—Battle Creek Brewing Co. v. Board Sup'rs Calhoun Co., 166 Mich. 52. (Hooker, J., dissenting.)

B. OPERATION AND EFFECT OF PROHIBITION.

§ 31. In general.

Effect of local option prohibition, see post § 32.

Exceptions from the prohibition, see post § 33.

Restrictions on sales to specific classes of persons or at specific times and places, see post IV.

Effect of illegality on contracts, see post § 43; Contracts, IV, D.

Unconstitutionality of laws on grounds other than violation of constitutional prohibition, see Constitutional Law.

¶ 176. Const. art. 4, § 47, prohibiting any act authorizing license to sell spirituous liquors, was not violated by Laws 1851, Act No. 178, prohibiting sales by any person before giving bond to pay the damages that should be occasioned by his traffic.—Langley v. Ergensinger, 3 Mich. 314.

¶ 177. The provision in the Act of 1855 authorizing druggists, under certain restrictions, to sell liquors for medicinal, mechanical and sacramental purposes, was not an act authorizing license to sell, and, therefore, was not repugnant to Const. art. 4, § 47.—People v. Gallagher, 4 Mich. 244.

¶ 178. Whether the authority to sell under the prohibitory law of 1853 was to be regarded as a license to sell within the con-

stitutional prohibition, thus avoiding the statute, quære.—People v. Collins, 3 Mich. 343.

¶ 179. The taxation of the business of selling intoxicating liquors is no license of such business, and therefore the liquor tax laws of 1875 (Acts 226 and 228) were not invalid as repugnant to said constitutional prohibition.—Youngblood v. Sexton, 32 Mich. 406; People v. Walling, 53 Mich. 264; Reversed 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

¶ 180. A city ordinance requiring saloon-keepers generally to take out a licence and pay a substantial license tax did not violate the constitution forbidding the licensing of the traffic.—Kitson v. City of Ann Arbor, 26 Mich. 325.

¶ 181. The constitutional provision against licensing the sale of liquors did not prevent municipalities from licensing "saloons." A saloon is not necessarily or exclusively a place for liquor selling.—Kitson v. City of Ann Arbor, 26 Mich. 325; Wolf v. City of Lansing, 53 Mich. 367.

¶ 182. A city ordinance which required all saloon-keepers to obtain licenses, and then used terms excepting from its operation all not engaged in the sale of intoxicants, but including all who were or should be so engaged, was invalid.—Dewar v. People, 40 Mich. 401.

¶ 183. The removal of the constitutional prohibition against licensing the sale of liquor does not authorize a city or village council to license drinking saloons under a charter granted before the constitutional amendment.—Westinghausen v. People, 44 Mich. 265; Village of Mount Pleasant v. Vansice, 43 Mich. 361.

¶ 184. The liquor business is as lawful (since the repeal of the prohibitory law) as any other when conducted within the restrictions imposed by the legislature, and rights thereunder should be respected and protected by the courts to the same extent as those under other kinds of business.—Amperse v. City of Kalamazoo, 59 Mich. 78; People v. Scranton, 61 Mich. 244.

¶ 185. Even while the prohibitory statute was in force the law recognized beer as property and brewing as a lawful business, and protected this property as it protected any other lawful product.—Kreiter v. Nichols, 28 Mich. 496.

¶ 186. Under the statutes forbidding sale as a beverage and avoiding contracts of sale, a mortgage of liquors under which possession had been taken by the mortgagee could not be treated as void as between the parties, or as between the mortgagee and the creditors of the mortgagor.—Bagg v. Jerome, 7 Mich. 145.

§ 32. Of local option prohibition.

Criminality of acts in violation of local option law, see post § 49.

¶ 187. A prohibitory law limited to the territory of one county must have the same rules of law applied to it in its construction as would be applied were it state wide in its application.—People v. Eberle, 167 Mich. 477. Affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 188. The suspension of the general liquor law in a given county by the adoption of the local option law therein will not prevent the trial of a respondent who had been held for trial for a violation of the general law prior to its suspension.—People v. Wade, 101 Mich. 89.

¶ 189. Where a brewing company has a quantity of beer on hand at the time of the adoption of the Local Option Law (Act 207, Pub. Acts 1889, as amended) it cannot thereafter manufacture beer for the sole purpose of using the same to preserve the said old beer without being guilty of a violation of said statute.—People v. Eberle, 167 Mich. 477. Affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

§ 33. Exceptions from prohibition.

See also ante ¶ 189.

¶ 190. Under the Local Option Law (Act 207, Pub. Acts 1889 as amended), the exception permitting the manufacture of wine and cider in a county adopting said law, and the sale thereof at wholesale to parties residing outside of the county, applies only to wine and cider manufactured from home-grown fruit.—People v. Eberle, 167 Mich. 477. Affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

IV. RESTRICTIONS OR PROHIBITION AS TO PERSONS, PLACES AND TIMES.

Validity of condition against sale of liquor on premises conveyed, see Deeds § 82.

Admissibility in ejectment of evidence of violation of condition against liquor selling on premises, see Ejectment ¶ 160.

§ 34. Persons eligible to license.

¶ 191. Section 36, Act No. 291, Pub. Acts 1909, providing that two convictions for violation of the liquor laws of the state shall render a person ineligible for a license, if the convictions are had after the new act takes effect, is prospective in its operation, and has no bearing upon prosecutions pending at the time the new statute became law, nor is a conviction had after the new law took effect, for an offense committed before that time, a conviction within the meaning of section 36 so as to count as one of the two convictions which would render the offender ineligible for a license.—People v. Schoenberg, 161 Mich. 88.

§ 35. Number of licenses allowable.

¶ 192. Section 39, Act 291, Pub. Acts 1909, provides that village boards may license liquor dealers "not to exceed the number doing business in the month of April, 1909." At that date a village had no saloons and had a population in excess of five hundred. Held, the language in said section 39 was not intended to apply to a municipality which on that date had no saloons doing business, and such a municipality had the same right to grant licenses as those which on that date had saloons already doing business.—Brown v. Common Council of Sparta, 167 Mich. 492.

§ 36. Wholesale and retail trade relations and contracts.

¶ 193. Act No. 1, 2nd Extra Session 1912, approved April 9, 1912, cannot be construed not to affect a contract between a wholesale liquor dealer and a retailer made during the preceding April.—Lynch v. Val Blatz Brewing Co., 179 Mich. 355.

§ 37. Prohibition of "saloons."

¶ 194. Respondent village passed an ordinance forbidding the keeping of saloons or bars for the sale of liquor, or the selling of liquors in saloons or bars. Held, such ordinance did not prevent the selling of liquor at wholesale in places other than saloons or bars.—Boos v. Scudder, 163 Mich. 678.

§ 38. Vicinity of church.

¶ 195. Under the provisions of Act No. 291, Pub. Acts of 1909, prohibiting the location of a saloon within four hundred feet of a church, to the effect that said provisions shall not apply to any bar or saloon established or existing at the time the act took effect, a saloon or bar is a "new" one, within the meaning of such provisions, if opened, after a period of prohibition in a county, during the subsequent period of license at a place occupied as a saloon when the law went into effect.—People v. Schneider, 170 Mich. 150.

¶ 196. Where a church has a common entry or lobby at one corner of the building, with doors opening onto intersecting streets, with one of the doors less than four hundred feet along the street lines, from the entrance to a saloon, § 37 of Act No. 291, Pub. Acts 1909, § 5091, How. St., 2nd Ed., is violated.—George v. Travis, 185 Mich. 597.

¶ 197. Under Act No. 291, Pub. Acts of 1909, § 37, making it criminal to open a saloon having its front entrance within four hundred feet along the street line from the front entrance of a church, in determining the distance, the street line, the dividing line between private property and the highway, is the line to be measured, and it is to be taken from a point in such street line nearest to the front entrance of the saloon to a point in such line nearest to the front entrance of the church; the distance from such street line to the door of either structure or place is not to be measured.—People v. Schneider, 170 Mich. 150.

¶ 198. Where measurements are taken under section 37, Act 291, Pub. Acts 1909, prohibiting the establishment of a saloon within a certain distance of a church or school, they should be made from the front entrance to the saloon and a measurement from the entrance to a hotel through which entrance to the saloon may be gained is unauthorized.—Starks v. Presque Isle Circuit Judge, 173 Mich. 464.

¶ 199. Where a room in a business block has been hired for the purpose of conducting church services but is not occupied until a few days subsequent to the issuing of a license to conduct a saloon within the distance thereof prohibited by section 37, Act 291, Pub. Acts, 1909, a mandamus will not lie to compel the circuit judge to issue an injunction to restrain the usé of the premises for saloon purposes. Brooke and Bird, JJ., giving as a reason that the said act does not apply where the church is established subsequent to the issuing of the license. Stone, J., Moore, C. J., Stone, McAlvay, Brooke, Kuhn and Ostrander, JJ., giving as a reason that such room or hall, in a business block, used for occasional church services is not a church within the meaning of said act.—Starks v. Presque Isle Circuit Judge, 173 Mich. 464.

¶ 200. Under Act No. 291, Public Acts of 1909, prohibiting the opening of a saloon with its front entrance within four hundred feet of an entrance of a church, the fact that the consent of all property owners within three hundred feet is obtained will not excuse the establishment of such a saloon or bar within four hundred feet of the front door of a church.—People v. Schneider, 170 Mich. 150.

§ 39. Residence district restrictions.

¶ 201. A verdict should be directed for defendant in a prosecution of a saloon keeper for violation of the Warner-Cramton Act of 1909, No. 291, § 37, How. 2nd Ed., § 5091, relative to the establishment of any saloon or bar in any residence district unless the consent of all the property owners within three hundred feet of such saloon or bar first be obtained, when the place in which defendant's saloon was established had been used for business purposes a good many years and where the buildings in the section in which the saloon was located were mostly of a business character.—People v. Kirchoff, 201 Mich. 100.

§ 40. Sale by druggists.

Criminality of sales, see post § 51.

¶ 202. Payment of a liquor tax for the coming year does not exempt the dealer from the operation of a subsequent law passed during the year, forbidding the sale of liquor on specified days.—Reithmiller v. People, 44 Mich. 280.

¶ 203. Under How. St., § 2282, regulating the sale by druggists of "spirituous, malt, brewed, fermented or vinous" liquors, the sale of fermented or "hard" cider is included, and bond is required.—People v. Foster, 64 Mich. 715.

§ 41. ——Reports and records.

¶ 204. Public Acts 1899, Act No. 183, § 25, requiring druggists to make reports to the prosecuting attorney giving the name and residence of any person procuring liquor, the kind and quantity of liquor procured and the date and object of its procuring, did not forbid the use of ditto marks to indicate residence, kind and quantity, and the word "medicinal" was a sufficient statement of the object of the purchase.—People v. Remus, 135 Mich. 629.

¶ 205. A blank affidavit on a report to the prosecuting attorney, of sales of liquor, containing nothing but the signature of a notary public, was not a compliance with the local option law requiring the druggist to "make and swear to" the report.—People v. Remus, 135 Mich. 629.

¶ 206. Failure of the report required by druggists to the prosecuting attorney as to the sales of liquors in local option territory to comply with the law (Pub. Acts, 1899, No. 183, § 25) does not at all affect the record required to be kept by Comp. L. 1897, § 5381, by the druggist himself.—People v. Thompson, 147 Mich. 444.

¶ 207. The report required by Pub. Acts, 1899, No. 183, § 25, requiring druggists in local option territory to make report of sales of liquors to the prosecuting attorney, need not be made contemporaneously with the sale and is not required to be a copy of the record kept by the druggist, but is an independent report of sales for the apparent purpose of furnishing a public record from which interested persons may ascertain whether the provisions of the law relating to liquor sales by druggists are being observed.—People v. Thompson, 147 Mich. 444.

V. TRANSPORTATION, MARKING AND BRANDING.

§ 42. In general.

Place of sale of shipped liquors for purpose of settling duty to pay tax and have license, see also post ¶¶ 255, 258.

What constitutes "keeping" place at point of destination of shipped liquors, see post ¶ 308.

Crime of taking intoxicants into prohibited territory, see post § 49.

Necessary and proper labeling and marking as involved in crime of shipping into local option territory, see post § 49.

Place where sale is regarded as having taken place of liquor shipped into prohibited territory, see post § 49.

Original package doctrine, see Commerce § 5.

VI. UNLAWFUL TRAFFIC; CRIMES AND PENALTIES.

A. IN GENERAL, CRIMES AND DEFENSES.

§ 43. Effect of illegality on contracts and civil rights.

Civil liability to persons injured by sale, see post VII.

Public policy of contracts to evade regulations and licensing conditions, see also Contracts § 50.

Presumption as to legality of contract for liquors, see also Contracts § 305.

Effect of prohibitory law on contracts and rights collateral to illegal one, see Contracts § 93.

Effect of adoption of local option as terminating lease for saloon purposes, see Landlord and Tenant, II.

Liability for unlawful sales by agent, see also Agency ¶ 317.

Law governing liquor contracts between residents of different states, see Conflict of Laws §§ 18-20.

Injunction to enforce contracts respecting sale of liquors, see also Injunctions §§ 25, 30.

Denial of relief to partner seeking accounting or contribution in illegal liquor business, see Partnership, VII, E.

Nuisances and abatement thereof by injunction or otherwise, see Nuisances; Injunctions, II.

¶ 208. Intoxicating liquors illegally kept for sale may lawfully be insured from destruction by fire.—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

¶ 209. Plaintiff presented to defendant an account, for what purported to be foreign wines and ales, opposite each item of which were added the words "imported and sold in the original packages"; and defendant admitted the correctness of the account. Held, that this was not such "positive proof" that they were "imported under the laws of the United States, and in accordance therewith, and contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe," as is required by the prohibitory liquor law, to entitle the seller to recover therefor.—Niles v. Rhodes, 7 Mich. 374.

§ 44. Crimes and defenses.

[Note. It is not intended here to collect decisions on the general law of crimes or criminal procedure, but only those which are ruled by laws or principles peculiar to this topic. Accordingly the general law of crimes is treated in Crimes, although announced in a case arising under the liquor laws, and the matter relating to the indictment or information, arraignment and trial, evidence and review are treated in Indictment and Prosecution, whenever controlled by principles not peculiar to intoxicating liquor crimes.]

Persons responsible for violations, see post § 48.
Particular violations of law, see post §§ 49-58.
Intent as element in various crimes and good faith as defense, see post §§ 49-58.
Complaint or information or indictment for crime, see post §§ 59-63.
Evidence, questions for jury and instructions, see post §§ 65-71.
Keeping saloon within prohibited distance of church or in residence district, see ante § 38.
Drunkenness as an offense, see post § 92.
Good faith and intent as immaterial factors in civil liability, see post § 77.
Entrapment into sale as defense, see also Crimes § 17.

¶ 210. It is doubtful if the rule that there can be no crime without a criminal intent would hold true under Pub. L. 1881, p. 350 (How. St. § 2271), the purpose of which is to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril.—People v. Roby, 52 Mich. 577.

¶ 211. Unsurveyed lands within the boundaries of the various counties and townships of the state are not exempt from the operation of the general liquor law.—People v. Rush, 113 Mich. 539.

¶ 212. The fact a barroom is also used as a hotel office does not exempt the proprietor of the place from the operation and effect of Pub. Acts 1887, No. 313, § 31 (How. St. § 2283f4), providing that all curtains, screens, partitions, and other things obstructing the view from the sidewalk, street, alley or road in front of or at the side or end of the building, in which liquors are sold or kept for sale, of the bar or place where such liquors are sold or kept shall be removed, and that any person violating such provisions shall be punished.—People v. Carrel, 118 Mich. 79.

¶ 213. In a criminal prosecution, the fact that a license is issued to carry on the saloon business in a hotel and that the saloon was at that time and had been for years located in a room which could not be seen from the street, is not a waiver of the law requiring the removal of all obstructions between the saloon and the public street (Comp. L. 1897, § 5409), where the statute gives no discretion in the person issuing the license and where there are plenty of places in the hotel where the business could have been carried on in compliance with the law.—People v. White, 127 Mich. 428.

¶ 214. A room on the first floor of a hotel building, although locked, in which intoxicating liquors were found, is within the prohibition of Act No. 381, Pub. Acts 1913, relating to the keeping and storing of liquors where such room was surrounded by and was accessible from other rooms of public resort.—People v. Wheeler, 185 Mich. 164.

§ 45. ——Construction of statutes.

Who regarded as dealers, wholesalers, etc., see ante § 2.

¶ 215. The word "actions" in section 13 of the Local Option Act, which provides that all actions which have been brought and all rights of action which have accrued, before the repeal of the act, shall not be affected by its repeal, applies to both criminal actions under section 16 and civil actions under section 19.—In re Adler, 171 Mich. 263.

¶ 216. In a prosecution for the violation of the Local Option Law (Act No. 207, Laws of 1889) as amended, if sentence is pronounced after the repeal of the act, such sentence is invalid unless the case comes within section 13, the saving clause of the act.—In re Adler, 171 Mich. 263.

¶ 217. Under R. S. 1846, p. 184, § 1, presuming or professing to be a seller of whisky was forbidden, although that kind of spirituous liquor was not therein specifically mentioned.—People v. Webster, 2 D. 92.

¶ 218. Pub. Acts 1909, No. 107, § 38, How. 2nd Ed., § 5053, providing that the having or keeping in any house or building, or in any room or place occupied by any person, except a private residence occupied as such, intoxicating liquors for the purpose of selling, giving away, or furnishing to those frequenting such place, or to others, shall be held to be the keeping of a place where intoxicating liquors are sold, furnished or given away, and § 1, How. 2nd Ed., § 5017, providing that it shall be unlawful for any person to manufacture, sell, keep for sale, give away or furnish any intoxicating liquor or keep a saloon or any other place where any such liquors are manufactured, sold, stored for sale, given away or furnished, must be read together, and as such, construed that if the offense of keeping a place where intoxicating liquors are stored, given away and furnished is shown to have been in a private residence, something more must be shown than simply the keeping or having any of the liquors mentioned in § 1.—People v. Lester, 195 Mich. 477.

¶ 219. Under Act No. 291, Pub. Acts of 1909, § 1, where a retail liquor dealer has been twice convicted of violating said act, it is not a condition precedent to his prosecution for making sales after the date of the second conviction that his license fee be refunded to him.—People v. Schafran, 168 Mich. 324.

§ 46. ——What are intoxicating liquors.

As jury question, see post § 70.
Hard cider as intoxicant, see also ante ¶ 203.

¶ 220. Strong beer and ale are "intoxicating," and were, therefore, within the prohibition of the act of February 12, 1853.—People v. Hawley, 3 Mich. 330.

¶ 221. Under Comp. L. 1897, §§ 5379 and 5380, a sale of malt liquor containing about two per cent of alcohol constitutes an unlawful sale, where the tax required by such sections has not been paid.—People v. North, 153 Mich. 612. (Minority opinion of Hooker and Montgomery, JJ., and Grant, C. J.)

§ 47. ——What is a "sale."

Giving or furnishing liquor as crime, see post § 55.

Single sale as selling, see also post ¶ 288.

¶ 222. In a criminal prosecution under Comp. L. 1897, § 5380, there is a sale of a quantity less than one dozen quart bottles of beer, where the transaction purports to be a sale of 18 bottles with the privilege of taking any smaller part at one time and no special 18 quarts were set aside for the purchaser and the whole evidence tends to show such sale a subterfuge.—People v. Luders, 126 Mich. 440.

§ 48. Responsibility and complicity; principalship.

Permitting adult to buy and then give liquor to minor, see post ¶ 295.

General law of principalship and responsibility for crimes, see Crimes § 10 et seq.

Civil responsibility for acts of servants, see post § 79.

¶ 223. A liquor dealer cannot be held criminally responsible for the sale of liquor by his clerk, and without his knowledge or concurrence, to habitual drunkards.—People v. Parks, 49 Mich. 333.

¶ 224. Under Pub. Acts 1889, No. 207, governing the sale of intoxicating liquors and providing that "Any person who by himself, or by his clerk, agent or employee, shall violate, etc.," it is no defense to the prosecution of a druggist for violating its provisions, that the sale was made by his clerk contrary to his general instructions.—People v. Longwell, 120 Mich. 311.

¶ 225. A conviction of a saloonkeeper for keeping his saloon open on a legal holiday, was sustained although the barkeeper opened the saloon in disregard of the saloonkeeper's instructions.—People v. Kriesel, 136 Mich. 80.

¶ 226. A liquor dealer is not criminally responsible for the sale of liquor by his clerk, without his knowledge or concurrence, to habitual drunkards.—People v. Parks, 49 Mich. 333. [Note. In People v. Roby, 52 Mich. 577, a doubt was thrown on this case, it being said that the facts were not fully reported in the earlier case, and that there was positive evidence negativing respondent's intent that the criminal act should be committed. Editor.]

¶ 227. The provisions of Laws of 1887, Act No. 313, § 14, making the proprietor or keeper of a saloon liable for the acts of his clerks or agents in permitting any student, or any minor to play cards in his saloon does not comprehend the liability under section 15 of the saloonkeeper to acts of his clerks or agents, because in the latter section these are not mentioned.—People v. Hughes, 86 Mich. 180.

¶ 28. A saloonkeeper who has paid the tax imposed upon the business of selling malt liquors only is not criminally liable for the act of his bartender in selling spirituous liquors without his knowledge or direction, and during his absence from the saloon.—People v. Metzger, 95 Mich. 121.

¶ 229. All persons engaged in the sale of liquor in an open saloon on a legal holiday are made principals by the liquor law of 1887, § 24, and all may be punished for violating the statute.—People v. Ackerman, 80 Mich. 588.

¶ 230. An employee of one who has paid tax for sale of malt liquors only may be convicted as a principal for selling whisky.—People v. Metzger, 95 Mich. 121.

¶ 231. Under How. St. § 2283d, an employee of one who has paid tax for the sale of malt liquors may be convicted in a criminal prosecution for selling two glasses of whisky without payment of tax, as under How. St. § 2283c5, all persons who sell any spirituous liquors by the drink are retail dealers.—People v. Metzger, 95 Mich. 121.

¶ 232. As all who aid and assist in keeping a place where intoxicating liquor is sold in violation of the local option law, whether owner or clerk, are principals, it is not ground for acquittal that another person has been convicted of keeping the place at the time covered by the complaint.—People v. Barnes, 113 Mich. 213.

¶¶ 233, 234. One who sells liquors at retail as the agent, clerk or servant of a corporation which has not paid tax or complied with the statute is properly informed against as a principal, under § 24 of the liquor law of 1887 (How. St. § 2283e7).—People v. Soule, 74 Mich. 250.

¶ 235. One who sells liquor as agent of a corporation that has not paid the tax or filed the bond required by law may be informed against as principal.—People v. De Groot, 111 Mich. 245.

¶ 236. Bartender may be charged as principal for aiding and assisting to keep a place where intoxicating liquors are sold contrary to the local option law.—People v. Rice, 103 Mich. 350.

¶ 237. Employment in a saloon as a bartender to sell, both in the presence and absence of the proprietor, is aiding and assisting to maintain said place; and, in a prosecu-

tion under the local option law for keeping a saloon where liquors of the prohibited kinds were sold and furnished as a beverage, a bartender so employed may be charged as a principal.—People v. Rice, 103 Mich. 350.

¶ 238. A partner is not criminally liable for the illegal selling of intoxicating liquors to a minor by his copartner, even though at the time of the sale he was close to his partner and could have seen what was going on. —People v. Bronner, 145 Mich. 399.

§ 49. Sale in violation of local or general prohibition.

See also ante ¶ 218.
"Giving" or furnishing defined, see post § 55.
Sales by druggists in violation of local option law, see post § 51.
Sales by clerks or agents, see ante § 48.

¶ 239. The local option law in the use of the words, "sell, give away or furnish" contemplates that the offending party shall be the owner or have some interest other than that of a carrier.—People v. Driver, 174 Mich. 214.

¶ 240. The local option law is not violated by defendant, who, at the request of his neighbor, in good faith merely to serve such neighbor, orders beer shipped to himself and advances money therefor, which is subsequently repaid, though he takes the beer to his own home where the neighbor gets it, since the contract is executed where the order is received and defendant has no interest therein.—People v. Driver, 174 Mich. 214.

¶ 241. Where, in a prosecution for violating the local option law respondent is shown to have kept and furnished liquors in his shop for others who might come there to drink, the offense is complete and the intent is immaterial.—People v. Bacon, 117 Mich. 187.

¶ 242. A conviction may be had for selling intoxicating liquors in violation of the Local Option Law (Act 207, Pub. Acts 1889 as amended by Act 183, Pub. Acts 1899) though defendant has no intent to violate such law. —People v. Hatinger, 174 Mich. 333.

¶ 243. Where liquor is shipped into a prohibition county, C. O. D., to a person ordering it from defendant vendor, and the express agent receiving same refuses to deliver it to the consignee, but returns it to the place of shipment, the transaction is not a sale, and defendant is not liable to conviction under section 36, Act No. 107, Pub. Acts of 1909, which provides that such a shipment shall be held to be a sale made at the place of destination.—People v. C. Kern Brewing Co., 166 Mich. 292.

¶ 244. Intoxicating liquor is not sold at the place where an order is taken by a salesman for a wholesale liquor dealer of another county for subsequent shipment therefrom to the purchaser.—People v. Meloche, 186 Mich. 536.

¶ 245. A sale of intoxicating liquor is not made at the place where an order for it was given, where it was afterwards shipped from the seller's place of business in another city to the purchaser by common carrier, and the pay subsequently collected by the seller in person at the place where the order was taken.—People v. Perenchio, 181 Mich. 314.

¶ 246. One who takes orders for intoxicating liquors in a town other than that in which he is licensed to sell at wholesale, and who afterwards ships by common carrier from his place of business to the several purchasers the liquor so ordered, and from whom he afterwards in person collects the pay therefor, is not guilty of selling liquor without a license in the town where the orders were taken, since the sale was made at his place of business, and not where the order was taken.—People v. Perenchio, 181 Mich. 314.

¶ 247. Prior to the adoption of local option in Calhoun County, the brewing company of which defendant was secretary was manufacturing and selling beer in said county. After the adoption of said law the company's business was reorganized in the County of Kalamazoo. It established an office there, bought its beer at Detroit, and stored the same at its place of business in Kalamazoo County. It continued to maintain an office in Calhoun County with a bookkeeper in charge. Said bookkeeper took an order for beer and received cash payment therefor in Calhoun County. The order stated that it was subject to the approval of defendant and the same was approved by defendant in Kalamazoo County. Held the sale took place in Calhoun County so as to make defendant liable under Comp. L. 1897, § 5412, as amended by Act No. 183 of the Laws of 1899.—People v. Martin, 169 Mich. 113.

¶ 248. Respondent together with several persons in Ionia County, where the local option act was in force, made up a sum of money with which respondent was to buy a quantity of liquor in another county, where said act was not in force. Respondent purchased a keg of liquor and brought the same to Ionia County, where said persons drank each as much as he wanted out of the keg. Held, respondent was guilty of violating the Local Option Act.—People v. Curry, 163 Mich. 180.

¶ 249. Comp. Laws 1897, § 6412, making it unlawful to keep for sale, sell, or furnish any intoxicating liquors in local option counties, does not, either in terms or by construction, prohibit common carriers from transporting or delivering intoxicating beverages within a local option county when pur-

chased outside thereof; and no liability attaches to express companies or their agents for transporting or delivering liquor to consignees in local option counties.—People v. Converse, 157 Mich. 29.

¶ 250. One who purchases liquor in a county where the purchase and sale are lawful and transports the same in his own conveyance into a local option county for his own personal use without having the packages labeled, in accordance with Pub. Acts 1913, No. 381, § 2, is neither a consignor nor a consignee and is not subject to the penalties of such act.—People v. Bola, 197 Mich. 370.

¶ 251. A conviction for violation of § 2 of the Pray Act, Pub. Acts 1913, No. 381, § 2, providing that it shall be unlawful for any person to consign, ship, or transport intoxicating liquors into a dry territory, unless properly labeled, and imposing the penalty of the act upon any consignee accepting or receiving any package containing liquors not properly labeled, or any person consigning, shipping, transporting, or delivering any such package, knowing that the statement on the package is false, for going to a wet county and obtaining liquor shipped to such county from another state and consigned in the name of a fictitious person, and conveying such liquor to his home town in a hired auto truck, was affirmed by a divided court.—People v. Spaulding, 201 Mich. 58.

§ 50. Sale without license, bond or payment of tax.

¶ 252. Selling a single pint of liquor without having given the bond required of dealers by Pub. Laws 1881, Act No. 259, § 9 (How. St. § 2270), is a violation of the statute, whatever the seller's intent was as to becoming a liquor dealer.—People v. Kropp, 52 Mich. 582.

¶ 253. The law forbidding the selling of liquors without first paying the tax thereon (Laws 1887, Act No. 313, § 17) has for its object the taxation of the business wherever found or by whomsoever carried on; regardless of whether the place be or be not a social club.—People v. Soule, 74 Mich. 250.

¶ 254. A liquor saloon proprietor who, in confident expectation of a court decision invalidating a local option law, keeps on hand a stock of liquors, ready for production and sale immediately on the announcing of the decision, may, notwithstanding the decision when made and announced, be prosecuted and convicted under a law forbidding the business of selling and keeping for sale spirituous, etc., liquors at retail without first having paid the required license.—People v. Hicks, 79 Mich. 457.

¶ 255. Where orders for beer are taken by an agent at Z. and sent to the principal, a brewery company, at G., and the goods are shipped in gross to the agent, who delivers the same and collects the money therefor, the sales are made at Z., so as to subject the agent to punishment for selling liquor without having paid tax, etc., in the county wherein Z. lies.—People v. De Groot, 111 Mich. 245.

¶ 256. Section 5379, Comp. Laws 1897, as amended by Act No. 62, Pub. Acts 1903, required the payment of a tax upon the business of selling liquors, and defined retail dealers in liquors as all persons who sell any liquors by the drink. Defendant, a carpenter working about a hotel, in the absence of the hotel owner, sold the prosecutor a single bottle of liquor and was indicted under the statute. Held, that defendant came within the terms of the statute so as to be subject to the tax, and the penalties of the statute.—People v. Wilcox, 152 Mich. 39.

¶ 257. Laws 1887, Act No. 313, making it unlawful to engage in the business of selling spirituous and intoxicating liquors without having paid the tax required therein does not cover sales made upon public waters outside of shore line of adjoining township, and to which its boundaries, according to government survey, extend.—People v. Bouchard, 82 Mich. 156.

¶ 258. Comp. Laws 1897, § 5379, as amended by Act No. 291, Pub. Acts of 1909, relating to the sale of liquor, makes it unlawful for a corporation "to solicit or do business" in Michigan without the license provided by statute. Held, that a.. agent of a foreign corporation who solicits orders from wholesalers without such license is guilty under said statutes, although he is authorized only to solicit orders to be accepted at the home office of the corporation.—People v. Swenson, 162 Mich. 397.

¶ 259. If a wife, as administratrix of her husband's estate, can continue to carry on the business of liquor selling in which he was engaged at the time of his death, she cannot do so without first paying the tax and giving the bond required by the statute; and if she does so she is criminally liable.—People v. Sykes, 96 Mich. 452.

¶ 260. Under How. St. § 2283d (Comp. L. § 5385), making it a misdemeanor for any person to engage in the liquor business without having given the bond required by the act, a saloonkeeper whose bond is insufficient because one of his bondsmen is disqualified is not relieved from liability by the fact he gave it in good faith believing the bond to be good, and that the officers charged with the duty of determining as to the sufficiency of the bond have accepted and approved the same.—Wolcott v. Superior Court Judge, 112 Mich. 311.

¶ 261. In a prosecution for an alleged violation of Act 291, Pub. Acts 1909, providing

that only one saloon for every 500 inhabitants may be established in villages, etc., in counties which adopt local option and return to the license system, the unlawful conduct of a village council in attempting to license a second saloon in a town of 308 inhabitants in such a county is no protection to respondent who secured the second license though he complied with the law in obtaining it.—People v. Edwards, 174 Mich. 445.

§ 51. Sales by druggists or physicians.

Sales by clerks, see also ante § 48.
Averring the crime, see post § 62.
Evidence as to offense, see post §§ 68, 69.

¶ 262. In a local option county a druggist who sells liquor without filing bond, or who, having filed bond, sells in violation of restrictions, should be prosecuted under the local option law, not under the general statute.—People v. Murphy, 93 Mich. 41; Bishopp v. Hillsdale Circuit Judge, 94 Mich. 461.

¶ 263. A druggist who has complied with the general law by filing a bond entitling him to sell liquors for medicinal purposes but has made a single unlawful sale, cannot be convicted of "keeping a place for the sale of liquors" in violation of the local option law (How. St. § 2283a). The prosecution in such case should be for the illegal sale.—Maynard v. Eaton Circuit Judge, 108 Mich. 201.

¶ 264. A druggist, acting in good faith in the sale of liquors, has a right to rely upon the statement made by the purchaser as to the purpose for which the liquor is to be applied, unless circumstances or facts known to him show such statement to be false, and are sufficient to satisfy such druggist, acting in good faith and in an honest endeavor to obey the law, that the purpose is not such as stated by the purchaser; the law does not require him to enter into an extended investigation, or to refuse to sell to a stranger without investigation and proof of the truth of his assertion of such purpose.—People v. Hinchman, 75 Mich. 587.

¶ 265. The information charged defendant with selling at retail intoxicating liquor, without any license or authority, he not having paid any tax, and not having a receipt and notice. Held, the fact that he was engaged in the business of selling drugs would not constitute a defense.—Stewart v. Calhoun Circuit Judge, 156 Mich. 642.

¶ 266. One who keeps a drug store, giving a bond as a druggist, may not keep a saloon or habitually sell liquor as a beverage without being liable under the local option act or the general liquor law for keeping a place where intoxicating liquor is sold as a beverage unlawfully.—People v. Congdon, 137 Mich. 133.—Writ of error dismissed in 200 U. S. 612, 50 L. ed. 619, 26 Sup. Ct. Rep. 753.

¶ 267. A violation of Pub. Acts 1899, No. 183, § 25, requiring a report of a druggist in local option territory to the prosecuting attorney of liquor sales made, subjects the offender to punishment but does not of itself render a sale theretofore legal unlawful.—People v. Thompson, 147 Mich. 444.

¶ 268. Comp. L. 1897, §§ 5381, 5391, forbid, and were intended to forbid, sales of liquor by druggists to certain persons, even for medicinal purposes.—People v. Sharrar, 164 Mich. 267.

¶ 269. Comp. L. 1897, §§ 5381, 5391, make it unlawful for any one to sell liquor to an intoxicated person. Druggists by the terms of the act are permitted to sell liquor for medicinal purposes, but are required to do so in strict compliance with the law, and are forbidden to sell to persons in the habit of becoming intoxicated. The Local Option Act (Act No. 207, Pub. Acts 1889) provides that said act shall not apply to druggists, but states that druggists shall be under the restrictions imposed by the general laws of the state. Defendant druggist sold a mixture of whisky and quinine to a person in the habit of becoming intoxicated. He made the sale on a physician's prescription, in good faith and without knowledge that said person had said habit. Held, defendant was criminally liable despite his good faith, since by the terms of the statute he must act at his peril.—People v. Sharrar, 164 Mich. 267.

¶ 270. Where a statute expressly forbids the sale of liquor to one in the habit of becoming intoxicated, it is immaterial that a respondent sells the liquor in good faith, on a physician's prescription and without knowledge of said habit.—People v. Sharrar, 164 Mich. 267.

¶ 271. How. St. § 2283c6 absolutely prohibits the sale of spirituous liquor by a druggist to a person who is in the habit of getting intoxicated, whether to be used as a beverage or not; and the words "to be used as a beverage" do not apply to portions of the statute prohibiting sales to persons in the habit of getting intoxicated.—People v. Hamilton, 101 Mich. 87.

¶ 272. Where a druggist mixes ten grains of quinine with eight ounces of whisky and sells it, the sale is as a matter of law a sale of intoxicating liquor, and not a sale of medicine.—People v. Sharrar, 164 Mich. 267.

¶ 273. How. St. § 2282, regulating the sale by druggists of "spirituous, malt, brewed, fermented or vinous" liquors, includes the sale of fermented or "hard" cider, and the sale thereof as a beverage without giving a bond as required by the statute is unlawful.—People v. Foster, 64 Mich. 715.

¶ 274. There is nothing that prohibits a druggist from retailing spirits, provided he

complies with the law relating to retailers. —Stewart v. Calhoun Circuit Judge, 156 Mich. 642.

¶ 275. Where a druggist without a license sells liquor to be drunk as a beverage on the premises, such sale cannot possibly be within any of his lawful privileges.—Stewart v. Calhoun Circuit Judge, 159 Mich. 229.

¶ 276. The mere fact that a person is a practicing physician does not prevent his conviction for violation of the local option law, so called, by keeping a place where intoxicating liquors are sold, stored for sale and furnished.—People v. Bell, 170 Mich. 675.

¶ 277. A druggist in a local option county who had given the required bond and who had sold intoxicating liquor in excess of three gallons, in good faith for medicinal purposes, was not limited to selling quantities within the limit prescribed by statute for retailers, and was not subject to prosecution under Comp. L. 1897, § 5380, as a wholesaler. —People v. Longwell, 136 Mich. 302.

¶ 278. Where the act of a druggist in selling liquor upon a physician's prescription is unlawful, the physician cannot be held liable on the theory of an accessory before the fact, aider or abettor, for issuing the prescription in bad faith.—People v. Rice, 161 Mich. 657.

¶ 279. Section 26, Act No. 107, Pub. Acts 1909, provides that druggists may sell liquors upon the bona fide prescription of a physician. Held, that unless there is open or tacit collusion between the druggist and the physician, so that the actual sale is unlawful because, though made upon a certificate proper in form, it is made in bad faith, the conduct of the physician is not unlawful.—People v. Rice, 161 Mich. 657.

¶ 280. Section 26, Act No. 107, Pub. Acts 1909, provides that druggists may sell liquors upon the bona fide prescription of a physician. Held, that under this act a physician cannot be convicted merely for issuing such a prescription in bad faith to a drunkard. —People v. Rice, 161 Mich. 657.

§ 52. Sale to minors.

Sales by clerks or servants, see ante § 48.

¶ 281. Belief in good faith upon inquiry that a person to whom liquor is sold is of lawful age is a good defense for one charged with selling liquor to a minor in violation of the law.—People v. Bronner, 145 Mich. 399.

¶ 282. In a prosecution against a saloon keeper for selling intoxicating liquor to a minor, held, that the defense of good faith under Comp. L. 1897, § 5391, should have been allowed.—People v. Averill, 179 Mich. 224.

¶ 283. In a prosecution of a person engaged in the business of selling intoxicating liquors, for selling to a minor, the question of good faith is involved and Comp. L. 1897, § 5391, applies.—People v. Averill, 179 Mich. 224.

¶ 284. Pub. Acts 1909, Act 160, making it unlawful for any person to sell intoxicating liquors to a minor, does not repeal Comp. L. 1897, § 5391, since such act refers only to persons engaged in the business of selling intoxicating liquors.—People v. Averill, 179 Mich. 224.

¶ 285. Act No. 160, relating to the sale of intoxicating liquors to minors, if inconsistent with the later statute on the subject, Act No. 291, Pub. Acts 1909, must yield to the latter.—People v. Thompson, 161 Mich. 391.

¶ 286. Section 13 of the Law of 1887 forbids the sale of intoxicating liquors to minors for any purpose. Act No. 160, Pub. Acts 1909, makes it an offense to sell them as a beverage. Held, Act No. 160 does not repeal the law of 1887.—People v. Thompson, 161 Mich. 391.

¶ 287. Act No. 291, Pub. Acts 1909, relating to the sale of intoxicating liquors to minors, does not amend section 13 of the law of 1887 so as to increase the penalty for violations previously committed.—People v. Thompson, 161 Mich. 391.

¶ 288. A single sale constitutes engaging in the business of selling intoxicating liquors within the meaning of the statute forbidding sales to minors.—People v. Thompson, 161 Mich. 391.

¶ 289. Proprietors of a saloon who, at the time a minor was in such a saloon, were absent therefrom, the saloon being in charge of their clerk, and who had no knowledge of the minor's presence, cannot be convicted of violating Laws of 1887, Act No. 313, § 15 (How. St. § 2283d8), providing that it shall be unlawful for any person to allow a minor to visit or remain in any room where liquors are sold, unless accompanied by his father or guardian.—People v. Hughes, 86 Mich. 180.

¶ 290. The offense, under Laws 1875, Act No. 231, of selling liquors to a minor was not committed where the dealer sold to one whom he had reason to believe and did believe to be of age.—Faulks v. People, 39 Mich. 200.

¶ 291. In a prosecution for selling liquor to a minor contrary to Pub. Acts 1887, No. 313, § 13 (How. St. § 2283d6), which declares that a sale of liquor to any minor shall be "prima facie evidence of intent" to violate the law, proof that respondent made the sale in good faith, relying on the minor's appearance and his statements that he was of full age, precludes conviction. Criminal intent is material.—People v. Welch, 71 Mich. 548.

¶ 292. Comp. L. 1897, § 5391, making it unlawful for any person except a druggist to furnish or give intoxicants to a minor as construed with the title of the act "An act to provide for the taxation and regulation of the business of manufacturing and selling," etc., does not apply to the giving of intoxicants to a guest in a private home. —People v. Bird, 138 Mich. 31.

¶ 293. Comp. L. 1897, § 5381, forbidding the sale of liquor to a minor imposes upon the seller the duty of ascertaining the age of the minor at his peril.—People v. Curtis, 129 Mich. 1.

¶ 294. A child cannot be made an agent to purchase or get liquor, and a statute forbidding the sale of liquors to a minor is violated though the liquor is delivered to the minor for an adult's use.—People v. Garrett, 68 Mich. 487.

¶ 295. A saloonkeeper who permits an adult to buy intoxicating liquor and give it to a minor to drink in his saloon is guilty of "furnishing" such liquor to minors within the meaning of Act 313 of Laws of 1887, prohibiting the furnishing of liquor to minors.— People v. Neumann, 85 Mich. 98.

¶ 296. One who owns and occupies a building used as a club house, and customarily, for a stated service charge, furnishes beer to members which has been bought directly from wholesalers by members or through such proprietor, is guilty of furnishing beer to a minor under Pub. Acts 1909, No. 160, § 2, regardless of his intent, where he furnishes beer to a party, one of whom was conceded to be a minor, at the request of a member of a club who was a member of the party.—People v. Lumley, 189 Mich. 613.

§ 53. Sale to students.

¶ 297. Section 5392, Comp. L. 1897, How. St., 2nd Ed., § 5068, prohibiting the sale of intoxicating liquor to students attending any public or private institution of learning does not unconstitutionally deprive adult students during the school year of privileges enjoyed by them in vacation.—People v. Damm, 183 Mich. 554.

¶ 298. Since intent is not made an ingredient of the offense described by § 5392, Comp. L. 1897, How. St., 2nd Ed., § 5068, the owner of a saloon is criminally liable for the sale in his absence and without his knowledge by his agents of intoxicating liquor to a student of the University of Michigan.—People v. Damm, 183 Mich. 554.

§ 54. Sale to Indians.

¶ 299. Section 5391, Comp. L. 1897, prohibiting the sale of intoxicating liquors to "any Indian or person of Indian descent," applies to all persons with Indian blood in their veins.—People v. Gebhard, 151 Mich. 192.

§ 55. "Giving" or "furnishing" liquor.

¶ 300. The act of an individual in serving liquor to private citizens at his home without an intention to violate or evade the Local Option Law (Pub. Acts 1889, No. 207), is not a criminal violation of such law.— People v. Peterson, 156 Mich. 235.

¶ 301. It is not a violation of the local option act for a person in his home to extend hospitality to his guests in furnishing liquor to them, so long as there is no intent to traffic in liquors.—People v. Slater, 164 Mich. 156.

¶ 302. One who at his own house as an act of hospitality, without charging or receiving money therefor, gives a guest one or two drinks of intoxicating liquor, is not guilty of a violation of the Local Option Law. —People v. Hancock, 166 Mich. 654.

¶ 303. One going to a farmhouse to secure milk, and while there partaking of intoxicating liquor at the invitation of the farmer, cannot be held as a matter of law not to have been a guest.—People v. Hancock, 166 Mich. 654.

¶ 304. A clerk living in a hotel who furnishes beer to a servant girl in her room in the hotel is furnishing liquor in the girl's, and not in his own home.—People v. Myers, 161 Mich. 40.

¶ 305. A clerk living in a hotel who furnishes beer to a servant girl in her room in the hotel is liable to conviction under Comp. L. 1897, § 5412, prohibiting the giving away of liquor.—People v. Myers, 161 Mich. 40.

¶ 306. Defendant in the office of a livery stable belonging to another person gave one Vipond a drink from his bottle of whisky. Held, such act was a violation of the local option statute, in force in the county in question.—People v. McCall, 161 Mich. 674.

¶ 307. Respondent and one Davis, together with others, were playing billiards together. Davis gave respondent some money to purchase liquor, and the latter went out and got a bottle of whisky which he passed around to the others. Held, he was guilty under Act No. 207, Pub. Acts 1889, as amended, of furnishing liquor.—People v. Lapham, 162 Mich. 394.

¶ 308. Respondents, located in a local option county, took orders signed by customers for beer and they were forwarded to the brewery in another county. Respondents received the price in cash and the freight money. They sent said cash, less the freight money, to the brewery with the orders. The brewery shipped the beer, each case or package being marked to the customer as consignee. The money paid for freight was put into a receptacle to be paid later to the transportation companies. The brewery sent re-

spondents a notification sheet which they checked up with the beer received at the station. One of respondents, the son of the other, transferred the beer over to his father's place. Respondents received their compensation in the form of payment for the return of empty bottles. The beer was distributed to customers without attention as to whether each customer got the particular case consigned to him. Held, respondents were guilty of violation of the Local Option Law under a charge of keeping a place where intoxicating liquors were sold, stored for sale and furnished.—People v. Adler, 169 Mich. 322.

¶ 309. Respondent and one Mathews were working together on a farm in a local option county. Mathews gave respondent a dollar and requested him to purchase a bottle of whisky in a county where the same might be legally sold. Respondent went to said county, purchased the whisky, and turned it over untouched to Mathews. Respondent did what he did merely as an accommodation to Mathews. Held, he was not guilty of violating the Local Option Law, Comp. L. 1897, § 5412.—People v. Tart, 169 Mich. 586.

§ 56. Selling at prohibited times and days.

Sunday closing, see post § 57.
Sale after legal hours, see post § 58.

¶ 310. The statute prohibiting the keeping open of saloons, during certain hours and on holidays, imposes upon the keeper of a saloon the affirmative duty to see that it is closed during the prohibited time, and the neglect of such duty is an offense.—People v. Lundell, 136 Mich. 303.

¶ 311. Laws 1879, Act No. 267, closing all "saloons" on "legal holidays" is meant to prevent the sale of liquors on holidays in any place of resort for refreshments.—People v. Hobson, 48 Mich. 27.

¶ 312. In a prosecution for having a saloon open on the 4th of July, it cannot be said that respondent must be convicted if the saloon was open for any purpose whatever.—People v. Minter, 59 Mich. 557.

¶ 313. Christmas is a "legal holiday" within the meaning of a statute directing saloons to be closed on legal holidays, Sundays and election days.—Reithmiller v. People, 44 Mich. 280.

¶ 314. The term "all legal holidays" as used in the Liquor Law of 1887, § 17, includes all days set apart by the governor or by the president of the United States as days for fasting and prayer, or of thanksgiving; e. g., April 30, 1889, known as "centennial day."—People v. Ackerman, 80 Mich. 588.

¶ 315. Pub. Acts 1875, No. 163, in force in 1887 (How. St. § 1591), concerning legal holidays, enacted that in case any of the holidays should fall upon Sunday, then the Monday following should be considered as said holiday; and the amending act (Pub. Acts 1893, No. 185) provided that whenever certain specified holidays (including July 4) should fall upon Sunday, the Monday following should be deemed a public holiday "for any or all of the purposes aforesaid." Held, that one who kept his saloon open on Monday, July 5, 1897, violated How. St. § 2283e (being Pub. Acts 1887, No. 313, § 17), requiring saloons to be closed on all "legal holidays."—People v. Thielman, 115 Mich. 66.

¶ 316. A conviction in 1903, under Comp. L. 1897, § 5395, requiring saloons to remain closed on legal holidays, was sustained, although said section became law in 1887, and Labor day, the holiday in question, was not made a holiday until 1893.—People v. Kriesel, 136 Mich. 80.

¶ 317. Defendant saloonkeeper was prosecuted under section 5395, Comp. L. 1897, and section 51, Act No. 4, Ex. Sess. 1907, for keeping open on election day. The election was one for the making of nominations under a newly enacted direct primary law, under which elections had been held for two years. Held, a conviction was not invalid from the fact that the People were unable to prove that all the statutory requirements had been fulfilled in adopting the system.—People v. Doyle, 160 Mich. 423.

¶ 318. Liquor dealers or other business men will not be permitted to excuse noncompliance with or violation of the statutes relating to legal holidays by pleading ignorance that a particular day has been set apart by proclamation of the governor or president as a day of "fasting and prayer or thanksgiving."—People v. Ackerman, 80 Mich. 588.

§ 57. ——Sunday closing.

Sales by servants, see ante § 48.

¶ 319. In a prosecution under a statute requiring places where liquor is sold to be closed on Sundays a proprietor's intent or purpose in allowing his saloon to be kept open is immaterial.—People v. Waldvogel, 49 Mich. 337.

¶ 320. In a prosecution for keeping a saloon open on Sunday the proprietor's intent or purpose in keeping it open is immaterial; and this is so though the opening was the act of respondent's bartender and without his knowledge or express authority.—People v. Blake, 52 Mich. 566; People v. Roby, 52 Mich. 577.

¶ 321. A statute requiring saloons, etc., to be "closed" on Sundays and after certain hours at night means that all sales shall be entirely stopped, and the traffic shut off effectually, so that drinking and the conveniences for drinking shall be no longer accessible, and those who frequent such places

for that purpose shall be dispersed.—Kurtz v. People, 33 Mich. 279; and see Lynch v. People, 16 Mich. 472.

¶ 322. Under § 5395, Comp. L. 1897, § 5074, How. St., 2nd Ed., it is the duty of the proprietor of a saloon to keep it closed at his peril on Sunday.—People v. Damskey, 180 Mich. 664.

¶ 323. Sections 7 and 17 of Act No. 313, Pub. Acts 1887, are not repealed by Act No. 291, Pub. Acts 1909, passed without a saving clause, and the provisions of the said Act of 1887, relating to the closing of saloons on Sunday, are in force so as to support a conviction had after the passage of the Act of 1909 for an offense committed before its passage.—People v. Schoenberg, 161 Mich. 88.

¶ 324. A saloon is not "closed," within the meaning of How. St. § 2274, requiring such places to be closed at certain times, so long as it is possible for persons desiring liquor to get in peacefully, whether by the outside entrance or any other, or so long as any customer who is inside at the time for closing remains inside. And it is not important that there is no one attending the bar, if the liquor is accessible, nor is it important that none is sold; since it is not alone the intent or purpose for which the saloon is kept open that is offensive to the law, but also the opportunity furnished persons to obtain liquors at the hours and on the days prohibited by the statute.—People v. Cummerford, 58 Mich. 328.

¶ 325. Where the keeper of a garden used as a pleasure resort maintains therein a bar at which intoxicating liquors are sold on week days, he must, in order to comply with the statute, close access to the bar completely on Sunday, either by closing the bar itself or the garden.—People v. Beller, 73 Mich. 640.

¶ 326. Where a door leading from a saloon into a hallway that does not connect with any room but the saloon is left open, and where persons are allowed to enter the hallway the saloon is open within the meaning of the statute requiring it to be closed on Sunday.—People v. Schotley, 116 Mich. 1.

¶ 327. Where the owner of a saloon permits occupants of the building to go in and out through the bar room on Sunday, he is liable for violation of Sunday closing law.—People v. Norman, 158 Mich. 37.

¶ 328. Under Comp. L. 1898, § 5395, requiring saloons to be kept closed on Sundays, a saloonkeeper who enters his saloon on a Sunday to fix the fires, empty the pans under the refrigerators, light the lights, and prepare his meals in an adjoining kitchen, is guilty, although he may have no other place to prepare his meals and no liquors are ever served in the kitchen and no other person enters on Sunday.—People v. Henze, 149 Mich. 130.

¶ 329. Comp. Laws 1897, § 5395, requiring saloons to be closed on the first day of the week, is not complied with by surrounding the bar of the saloon with a temporary fence on that day, the room itself being open for the conduct of a restaurant business.—People v. Gordon, 156 Mich. 237.

¶ 330. Where a saloonkeeper lived with his family in rooms over his saloon, which were reached by means of a stairway and a room communicating with the wine rooms, the presence of persons in one of these wine rooms on Sunday constituted a violation of the law requiring saloons to be closed on Sundays.—People v. Boyd, 151 Mich. 577.

¶ 331. A saloonkeeper occupied three rooms for that business, and lived over them. The rooms opened into one another from front to rear, and the rear room had an outer door. The bar was in the front room; the other two were used for card-playing and drinking. Between the front and back rooms there was a hole in the wall. Held, that the saloon included the three rooms; and if any outsider had access to the rear rooms on Sunday, no matter for what purpose, the statute requiring the saloon to be kept closed on that day was violated.—People v. Higgins, 56 Mich. 159.

¶ 332. The rooms, in which a saloonkeeper and his family live, constitute part of the saloon, if he sometimes uses them to serve or dispense liquors in as part of his saloon business, and to open them or not keep them closed on Sunday to persons not members of his family is a violation of the law against opening saloons on Sunday.—People v. Cox, 70 Mich. 247.

¶ 333. L., a saloonkeeper, was properly convicted of violating Pub. L. 1881, p. 350, How. St. § 2274, whose clerk, without his knowledge or consent, but while he was on the premises, opened the saloon on Sunday morning to have it cleaned, and meanwhile sold a drink to a casual customer who insisted on having it.—People v. Roby, 52 Mich. 577.

¶ 334. A room connected with a saloon, where sales of liquor can be made on Sundays and after hours, and where liquors are served from the saloon on week days, is a part of the saloon, and failure to keep it closed on Sunday is criminal.—People v. Ringsted, 90 Mich. 371.

¶ 335. A front room having on its door the signs "Lager Beer" and "Wines and Liquors," and connected by double doors with a room having a bar where liquors are stored, though nominally an eating room, is such a part of the saloon, where liquors are served indiscriminately in it or in the rear

room during week days, as to warrant a conviction for keeping it open on Sundays.—People v. Koob, 109 Mich. 358.

¶ 336. A saloonkeeper who serves liquor upon Sunday in a room adjoining and connected with his saloon is guilty of a violation of the law against keeping saloons open on Sunday, even though he receives no pay for the liquor so furnished.—People v. Bowkus, 109 Mich. 360.

¶ 337. Laws 1881, Act No. 259, How. St. § 2274, requiring saloons to be kept closed on Sunday, is violated if a saloon is allowed to be open whether for the sale of liquor, for cleaning up, or for any other business purpose; and the question of the proprietor's intent is immaterial.—People v. Waldvogel, 49 Mich. 337.

¶ 338. Where a saloonkeeper is prosecuted for keeping his saloon open on Sunday, the respondent's intent in allowing his saloon to be open is immaterial, even if the opening was the act of his bartender and without his knowledge or express authority.—People v. Blake, 52 Mich. 566.

¶ 339. A saloonkeeper charged with opening his saloon on Sunday cannot justify on the ground of overruling necessity, in that his father was taken suddenly ill in the vicinity of the saloon, and had to be immediately cared for, where it appears that there were drug stores equally convenient of access and that a number of customers were admitted to the saloon while so open.—People v. Taylor, 110 Mich. 491.

¶ 340. The fact that a saloonkeeper relied upon the advice or permission of a police officer to keep the doors of the saloon open on Sunday, with the bar merely screened off from the balance of the room, is no defense to a prosecution for keeping the saloon open in violation of law.—People v. Gordon, 156 Mich. 237.

¶ 341. The fact that other saloons are kept open on Sunday in violation of law is no defense to a prosecution of a saloonkeeper for violating such law.—People v. Gordon, 156 Mich. 237.

¶ 342. A saloonkeeper charged with failing to keep his saloon closed on Sunday cannot base a successful defense on the fact that the bar was closed and separated by damask curtains and other barricades from other rooms, and that he received his friends in these rooms on that day.—People v. Hughes, 90 Mich. 368.

¶ 343. It is no defense to a prosecution for keeping a saloon open on Sunday that the owner lived over the saloon and the only entrance to his home was through a room connected with the saloon by means of swinging doors.—People v. Talbot, 120 Mich. 486.

§ 58. ——Unlawful hours.

¶ 344. A saloon keeper acts at his peril if he conducts any business in his saloon that requires its doors to be open or permits people to enter at unlawful hours.—People v. Minter, 59 Mich. 557.

¶ 345. One was properly convicted of keeping open his saloon after eleven o'clock at night, where, on his trial, he testified that on the night in question he closed the saloon at eleven o'clock; that his bartender and a third person remained in the saloon with him for the purpose of "cleaning up the place,—scrubbing the floor, cleaning the glasses, and fixing the things up all right for Monday morning"; that when they got through they went out at the back door, and locked it; that no one was admitted to the saloon during the time they remained there; that no liquor was sold there; but that the parties took one drink when they went away.—People v. James, 100 Mich. 522.

¶ 346. Interconnecting billiard and lunch rooms, the lunch room connecting with a saloon in front of it, all being arranged for use together and for the accommodation of customers, must all be closed to the public during unseasonable hours.—People v. Hughes, 97 Mich. 543.

¶ 347. A barkeeper who permitted the keeper of a boarding house in a portion of the building in which the saloon in question was located to remain in the saloon during prohibited hours longer than the time required to clean out a water pipe, was in effect having or keeping the saloon open contrary to law, the entry having been made to clean out such pipe.—People v. Lundell, 136 Mich. 303.

¶ 348. In a prosecution for keeping a saloon open after hours, a resolution by a township board extending the hour, as provided by Pub. Acts 1909, Act 291, as amended by Pub. Acts 1911, Act 170, How. 2nd Ed., § 5056, giving the right if the township had a population of 1,000, is no defense where it is not shown that the question of population was presented to the board.—People v. Worges, 176 Mich. 685.

¶ 349. In a prosecution for keeping a saloon open after hours, it is no defense that defendant in good faith believed he had the right to keep the saloon open.—People v. Worges, 176 Mich. 685.

B. INFORMATION AND COMPLAINT, PROSECUTION, TRIAL, EVIDENCE AND PUNISHMENT.

Prosecutions for drunkenness, see post § 92.
Nature of proceedings under municipal ordinances, see Municipal Corporations, XVI, B.

§ 59. Complaints and warrants.

Charging or substantive averments, see post §§ 60-62.

General law of complaints and arrests for crime, see Arrest.
General law of complaints serving as accusations on which to prosecute, see Indictment, XVIII.
General law of indictments and informations, see Indictment, I.
Searches and seizures and procedure for search, see Searches and Seizures.

¶ 350. A complaint under Comp. L. 1857, § 1667, which does not set forth any facts or circumstances, but merely states the belief of the complainant that the person complained of has, between certain specified days, sold liquors in violation of the act, is not sufficient to confer jurisdiction upon the justice to whom it is made to issue subpoenas and compel the attendance of witnesses to testify concerning supposed violations.—In re Morton, 10 Mich. 208; In re Hall, 10 Mich. 210.

§ 60. Charging and describing offense.

¶ 351. An indictment for a violation of the statute against the presuming to be "a seller of wine, brandy, rum or other spirituous liquors," etc., without being licensed as an innholder (R. S. 1846, p. 184, § 1), charged the defendant with presuming to be a seller of whisky, alleging it to be spirituous liquor, without license. Held sufficient.—People v. Webster, 2 D. 92.

¶ 352. An information for selling whisky without payment of a tax is not defective for not stating whether respondent was engaged in a business requiring the payment of a $300 or $500 tax provided for in the statute, or which tax it was respondent failed to pay.—People v. Aldrich, 104 Mich. 455.

¶ 353. It is not necessary in an information in a prosecution for engaging in liquor business without having paid tax, etc., to describe the building in which the business was carried on.—People v. Aldrich, 104 Mich. 455.

¶ 354. An allegation of sale "without having the receipt and notice for such tax posted up," etc., sufficiently charges that the receipt and notice were not posted where the liquors were kept for sale.—People v. Aldrich, 104 Mich. 455.

¶ 355. A complaint which merely charges that on a particular day the defendant sold liquor without having given a bond will not support a conviction under Sess. L. 1881, p. 350 (How. St. § 2270), if it does not allege a sale to any person or persons or identify some act or acts as illegal.—People v. Minnock, 52 Mich. 628.

¶ 356. A complaint and warrant for selling liquor without giving bond, contrary to How. St. § 2270, must allege some specific act of selling to some person.—People v. Heffron, 53 Mich. 527.

¶ 357. A complaint under How. St. § 1286 for doing business as a liquor seller without having first paid the annual tax and posted notice need not allege any specific act of selling, etc., to some person, as is required in a complaint under section 2270.—People v. Breidenstein, 65 Mich. 65.

¶ 358. A warrant alleging that respondent unlawfully sold to a minor "a large quantity of, to wit, spirituous liquors," etc., is not rendered void by the use of the words "to wit."—People v. Kahler, 93 Mich. 625.

¶ 359. Under Comp. L. 1897, § 11924, How. 2nd Ed., § 15095, an information charging the illegal sale of intoxicating liquor to a person in the habit of getting intoxicated following the language of the statute is sufficient.—People v. Smith, 177 Mich. 358.

¶ 360. An indictment under the Local Option Law (Pub. Acts 1899, No. 183) for keeping a place where intoxicating liquors are sold, etc., need not charge specific instances of sales, the charge being for the continuing act of keeping a place for such purpose.—Anderson v. Van Buren Circuit Judge, 130 Mich. 697.

¶ 361. An information charging violation of the local option law need not designate the building wherein is situated the room in which liquors are alleged to have been sold unlawfully, nor need it describe the room.—People v. Whitney, 105 Mich. 622.

¶ 362. An information alleging that respondent sold fermented cider contrary to the provisions of a resolution adopted by the board of supervisors in pursuance of the local option law sufficiently sets forth that said law has been made and is operative in the county.—People v. Adams, 95 Mich. 541.

¶ 363. The objection that an information for violating the local option law did not sufficiently allege the various steps in the adoption of said law was without force.—People v. Keefer, 97 Mich. 15.

¶ 364. In a prosecution for violation of Act 313, P. A. 1887 as amended by Act 291, P. A. 1909, § 39, providing that in counties which adopt local option and return to the license system, saloons may be established in villages, etc., therein not to exceed one to every 500 inhabitants, where it is alleged that respondent conducted a saloon in violation thereof, the information must set forth with certainty that the county adopted local option and returned to the license system before it can be proved at the trial.—People v. Edwards, 174 Mich. 445.

¶ 365. An information under the local option law which alleges that respondents on a certain day unlawfully kept a saloon where intoxicating liquors were sold, stored for sale and furnished as a beverage, is not open

to the objection that it does not charge that intoxicating liquors were either sold, stored for sale, or furnished as a beverage at the time respondents were charged with keeping a saloon; nor is such information open to the objection that it does not charge that respondents, or either of them, sold, stored for sale, or furnished any of the liquors prohibited by the statute.—People v. Whitney, 105 Mich. 622.

¶ 366. Where an information charging violation of the local option law alleges that respondents on a certain day did unlawfully keep a saloon where intoxicating, etc., liquors were sold, etc., they not selling, etc., such liquors as a druggist or registered pharmacist, under and in compliance with the restrictions and requirements imposed upon druggists and registered pharmacists by the general laws of the state, is not open to the objection that it does not charge that either of the respondents was not selling, etc., as a druggist or registered pharmacist, under and in compliance with, etc.—People v. Whitney, 105 Mich. 622.

¶ 367. An information averring that defendant did "by means of certain curtains * * * obstruct the view from the sidewalk and street in front of said bar" does not state that the view "of the bar" was obstructed as forbidden in Comp. L. 1897, § 5409.—People v. Schimmel, 141 Mich. 310.

¶ 368. An information charging the violation of Comp. L. 1897, § 5409, by the failure to remove the screens and other obstructions to view, of defendants' saloon on Sunday (Pub. Acts 1887, No. 313) is sufficient for conviction, even though such information is in the language of the statute, and charges every offense enumerated in the section, and contains no specific allegations of the kind and nature of the obstructions complained of.—People v. Smith, 145 Mich. 530.

¶ 369. In a prosecution for a violation of How. St. § 2283f4, which provides that, during the time when places where liquor is sold or kept for sale must be closed, all curtains, screens, partitions, and other things that obstruct the view, from the sidewalk, street, alley, or road in front of or at the side or end of said building, of the bar or place in said room where said liquors are sold or kept for sale, shall be removed, an information which charges that the respondent, on a specified day, being an election day, was proprietor of and kept a saloon, in a specified village and county, where intoxicating liquors were sold at retail (designating the room and building in which the saloon was kept); that on said day the curtains, screens, partitions and other things that obstructed the view, from the sidewalk and street and alley in front of and at the side of the building in which said saloon was, of the bar and place in said room where said liquors were sold and kept for sale, were not removed, but, on the contrary thereof, said respondent did then and there, as aforesaid, obstruct the view from said sidewalk, street and alley in front of and at the side of the building in which said saloon and room were, by not removing said curtains, screens, partitions, and other things then and there obstructed the view as aforesaid—suffices, "said" curtains, screens, etc., being those of which it had been alleged in the previous part of the information that they obstructed the view of the bar and place in said room where liquors were sold and kept for sale.—People v. Kennedy, 105 Mich. 75.

¶ 370. A complaint under Sess. L. 1881, Act No. 259 (How. St. § 2274), for not closing a saloon "at the hour of 9 o'clock" on a specified day, and for keeping it open "until twenty minutes past 11 o'clock in the afternoon of said day," is not bad for failing to show that 9 o'clock at night was meant and for using the word "afternoon."—People v. Husted, 52 Mich. 624.

¶ 371. A complaint for a violation of the statute which requires saloons to be kept closed on legal holidays (Laws 1879, Act No. 267) is sufficiently precise if it avers that respondent kept a saloon; that he kept it open on the holiday named, and that he then and there sold spirituous and intoxicating or malt liquors.—People v. Hobson, 48 Mich. 27.

¶ 372. A complaint charging that respondent was the proprietor of a place where spirituous and intoxicating liquors were by her kept to be sold, said place not being a drug store, and that on a stated day, "that being the first day of the week, commonly called 'Sunday,' she kept the said place open, and did not keep it closed," is sufficient under How. St. § 2283e, being substantially in the words of the statute.—People v. Wheeler, 96 Mich. 1.

¶ 373. A count for keeping a saloon open on Sunday is not open to the objection that it does not state that liquors were kept for sale "either at wholesale or retail" since the statute applies to either and the offense and punishment are the same.—People v. Talbot, 120 Mich. 486.

¶ 374. An information in a prosecution for keeping a saloon open on Sunday which is in the language of the statute is sufficient.—People v. Possing, 137 Mich. 303.

¶ 375. Under section 1, Act No. 107, Pub. Acts 1909, forbidding the keeping of any place where liquors are given away or furnished, an information is sufficient which alleges specific instances of violation of the statute, and it is not necessary to allege the carrying on of a continuing business or the intent to do so.—People v. Lewis, 166 Mich. 513.

¶ 376. Under section 5391, Comp. L. 1897, an information charging the sale of liquors to a minor is sufficient if it employs the language of the statute, and it is unnecessary to allege that the defendant was engaged in the business of selling intoxicating liquors. —People v. Thompson, 161 Mich. 391.

§ 61. ——Negativing exceptions.

In informations against druggists, see also post § 62.

General rule as to negative averments, see Indictment § 32.

¶ 377. The information charged defendant with selling at retail intoxicating liquor, without any license or authority, he not having paid any tax, and not having a receipt and notice posted. Held, the information was valid under Comp. L. 1897, §§ 5380, 5385, 5386.—Stewart v. Calhoun Circuit Judge, 156 Mich. 642.

¶ 378. A complaint for keeping a saloon open at night need not negative the existence of an ordinance allowing such opening (How. St. § 2274).—People v. Richmond, 59 Mich. 570.

¶ 379. A complaint and warrant for selling liquor on a legal holiday were held sufficient where they set forth that on the date specified the respondent, "being then and there a keeper of a saloon in said village, and the same being a place where spirituous and malt liquors are sold at retail, and the said 4th of July, A. D. 1882, being a legal holiday, did not keep the said saloon closed, and did then and there on the said 4th day of July, A. D. 1882, a legal holiday, keep the said saloon open for the purpose of selling spirituous and malt liquors at retail therein, the said (respondent) not being then and there a druggist nor a person whose business consists in whole or in part of the sale of drugs and medicines," etc.—People v. Baumann, 52 Mich. 584.

¶ 380. A complaint for selling liquor without having the liquor tax receipt posted in view is sufficiently specific in identifying respondent as a dealer if it describes him as "a person then and there engaged in the business of selling and offering and keeping for sale spirituous and intoxicating liquors"; it need not set forth the specific acts for the purpose of showing him to to be a dealer. But as druggists are not required to keep such receipt posted, it must aver that he is not a druggist selling for chemical, scientific, medicinal or sacramental purposes only; and if he does not so aver it is fatally defective (How. St. §§ 1281, 1285, 1286).—People v. Telford, 56 Mich. 541.

¶ 381. A complaint, How. St., chap. 71, § 5, against a person for keeping open "saloon" on week days after 9 o'clock need not state that such a person is not a druggist. The word saloon in such case distinguishes the place.—People v. Robbins, 70 Mich. 130.

¶ 382. Under the Law of 1887 relating to the selling of liquors and keeping them for sale (How. St. § 2283c6), which provides that the penal provisions of the act "shall not apply to druggists who sell liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with the law," an information alleging that respondent, "not being then and there a druggist," unlawfully sold liquor, does not sufficiently negative the exception in the statute.—People v. Haas, 79 Mich. 449.

¶ 383. In a prosecution for selling liquors without having paid tax, the exception in Laws 1887, Act No. 313 (How. St. § 2283c6), must be negatived, and an information which alleges that respondent was not "a druggist nor a person whose business was at that time to sell drugs and medicines" does not sufficiently exclude respondent from such exception.—People v. Decarie, 80 Mich. 578.

¶ 384. An information for keeping a saloon open contrary to the statute need not state that the place kept open is not a drug store, and that respondent is not a druggist.—People v. Sullivan, 83 Mich. 355.

¶ 385. An information for keeping a saloon open on Sunday, in violation of How. St. § 2283e, providing that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned" in the act are sold, shall be closed on that day, is not required to state that the saloon was not a drug store.—People v. Taylor, 110 Mich. 491.

¶ 386. "Not being then and there a druggist, and said liquor not being then and there sold for chemical, scientific, mechanical, medicinal, or sacramental purposes," sufficiently negatives the fact that the liquors were sold by respondent as a druggist "in strict compliance with law."—People v. Aldrich, 104 Mich. 455.

¶ 387. In a prosecution for engaging in the sale of intoxicating liquors without having paid the required tax, respondent is sufficiently shown not to come within the provision which excepts from the penal provisions of the statute druggists who sell liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, "and in strict compliance with law," by an averment in the information that he is not a druggist who sells liquors for any of said purposes, naming them, but omitting the quoted words. —People v. Gault, 104 Mich. 575.

¶ 388. A warrant and information in a prosecution for violating the local option law were not invalid because they failed to show that the acts of the defendant were

not within the exceptions contained in Pub. Acts 1899, Act No. 183, § 15, as to selling for sacramental purposes, and rendering it inapplicable to druggists or registered pharmacists in selling under and in compliance with law.—People v. Rall, 135 Mich. 510.

§ 62. ——Sales by druggists.

Duplicity in averments as charging general violation as well as unlawful druggist's sale, see post § 63.

¶ 389. An information which charges respondent with being engaged in a business consisting in part of the sale of drugs and medicines, which negatives his right to sell spirituous liquors as a beverage, and which alleges sale by him of such liquors as a beverage to a designated person, charges an offense under How. St. § 2282, punishing unlawful sales by druggists.—People v. Quinn, 74 Mich. 632.

¶ 390. An information charging a druggist with the sale of liquor "as a beverage" is equivalent to charging that the liquor was sold "to be used as a beverage," and is sufficient.—People v. Hinchman, 75 Mich. 587.

¶ 391. An averment that a druggist sold whisky to be used as a beverage is tantamount to stating that he was engaged in a business that required payment of the special tax required of retail liquor dealers; a druggist must pay such tax if he desires to sell liquors to be so used.—Luton v. Newaygo Circuit Judge, 69 Mich. 610.

¶ 392. An information against a druggist for selling whisky as a beverage contrary to Laws 1887, Act No. 313, § 3, need not allege that respondent did or did not keep a record of lawful sales as required by statute, nor the quantity sold, nor whether the sale was at retail or by wholesale.—Luton v. Newaygo Circuit Judge, 69 Mich. 610.

¶ 393. A conviction for the sale of liquor by a druggist without a bond is not sustained by an information charging the defendant with selling liquor without the bond prescribed for druggists under Comp. L. 1897, § 5381, where it does not state that he has not given the retailer's bond prescribed in section 5386; the law does not prohibit a druggist from selling under the general retailer's bond.—People v. Utley, 129 Mich. 628.

¶ 394. An information against a druggist for violation of the Local Option Law (Pub. Acts 1899, No. 183) which charges "that the sale was not made under and in compliance with the general laws of the State of Michigan" is insufficient since it fails to describe definitely the violation charged.—Anderson v. Van Buren Circuit Judge, 130 Mich. 695.

¶ 395. Where an information is brought against a druggist for violating the provisions of the bond prescribed by section 5381, Comp. L. 1897, to enable druggists to retail intoxicating liquors, it must allege that the defendant gave such a bond.—Stewart v. Calhoun Circuit Judge, 156 Mich. 642.

¶ 396. If an information charges that the defendant, being a druggist, did sell a quantity of spirituous liquor, called "brandy," to one S., to be used as a beverage, which liquor was drunk upon the premises by S. and others, it is sufficient under How. St. § 2283c6, and need not show negatively that the defendant was not licensed to keep a saloon under other sections of the statute.—People v. Curtis, 95 Mich. 212.

¶ 397. Druggists are not exempted from the provisions of the Local Option Law (Pub. Acts 1899, No. 183) since the exemption is expressly limited to druggists selling in compliance with the general laws and with section 25 of the act, and hence an indictment against a druggist for keeping such place is sufficient if it negatives the exception in the words of the statute.—Anderson v. Van Buren Circuit Judge, 130 Mich. 697.

¶ 398. An information charging the violation of Pub. Acts 1899, Act No. 183, by the illegal sale of liquor by a druggist, was not defective in failing to negative section 15 of the act permitting the sale of wine for sacramental purposes and of pure alcohol for medicinal, etc., purposes.—People v. Shuler, 136 Mich. 161.

¶ 399. An information against a druggist for selling liquor without a license which recites that the liquor was not sold for medicinal, chemical, scientific, mechanical or sacramental purposes, but was sold to be used as a beverage, and drunk on the premises, adequately negatives the idea of any possible sale within the lawful privileges of a druggist.—Stewart v. Calhoun Circuit Judge, 159 Mich. 229.

§ 63. ——Duplicity.

Duplicity, what constitutes, see generally Indictment § 76.

¶ 400. An information alleging that a person engaged in the business of a druggist sold whisky to be used as a beverage, and without having paid the special retail tax required of dealers by the statute, is not bad for duplicity.—Luton v. Newaygo Circuit Judge, 69 Mich. 610; People v. Scott, 90 Mich. 376.

¶ 401. Each sale of spirituous liquor to a person in the habit of getting intoxicated is, under our statute, a separate offense, and an information which charges respondent in the same count with making such a sale on a certain day, and on divers days and times between that day and a later day, is bad for duplicity.—People v. Hamilton, 101 Mich. 87.

¶ 402. The information in a prosecution for engaging in liquor business without having paid tax, etc., charged that, on a certain day and at a specified township, respondent was unlawfully engaged in the business of selling and offering for sale intoxicating liquors at retail as a beverage, and did then and there sell two drinks of whisky to certain persons, naming them, without having first paid in full the tax required by Laws of 1887, Act No. 313, and without having the receipt and notice for such tax posted up in the place where such liquors were kept for sale, as required by said act, said respondent not being then and there a druggist, and said liquor not being then and there sold for chemical, scientific, mechanical, medicinal, or sacramental purposes. Held, not bad for duplicity, as only one offense is alleged, viz., for unlawfully engaging in the business of selling and offering for sale at retail intoxicating liquors as a beverage, without having first paid the tax, and without having the receipt and notice posted, as required by law. —People v. Aldrich, 104 Mich. 455.

¶ 403. An information charging a person with engaging in the business of selling and offering for sale spirituous and intoxicating liquors, without having paid to the county treasurer the annual tax, and without having the receipt and notice for such tax posted up in the place where such liquors were sold, he not then and there being a druggist who sells liquor for chemical, scientific, medicinal, or sacramental purposes only, sufficiently charges an offense under Laws 1887, Act No. 313, § 7, and charges but a single offense.—People v. Paquin, 74 Mich. 34.

¶ 404. The information charged defendant with selling at retail intoxicating liquor, without any license or authority, he not having paid any tax and not having a receipt and notice. Held, the fact that it added that he was "engaged in the business consisting in part of the sale of drugs and medicines" did not make the information bad on the ground that it indicates defendant had intended to furnish a druggist's bond as permitted by section 5381, Comp. L. 1897.—Stewart v. Calhoun Circuit Judge, 156 Mich. 642.

§ 64. Issues and variance.

In penal actions, see post § 74.
General rules as to material issues and variances, see Indictment, I, E.
Election between counts, see Indictment § 46.

¶ 405. In a prosecution for keeping open saloon on Sunday the prosecution is not required to state, before testimony is taken, the particular location of the saloon; the charge in the information that the saloon is situated in a certain city and county is sufficient.—People v. Ringsted, 90 Mich. 371.

¶ 406. Under information for selling without license the jury is not called upon to try the question of sales to the persons named therein, it not being averred that such sales were unlawful, except because of nonpayment of tax and failure to post receipt and notice as required by law. The allegation as to specific sales may be treated as surplusage. —People v. Aldrich, 104 Mich. 455.

¶ 407. There is no variance between an information charging that defendant did not keep his saloon closed on Sunday but on the contrary kept it open, and proof that it was kept open by his barkeeper, since the statute imposes upon the saloonkeeper the positive duty of keeping it closed.—People v. Possing, 137 Mich. 303.

¶ 408. In a criminal prosecution for violating the liquor law in having failed to pay the tax required to be paid the prosecution is not limited to the precise date laid in the information.—People v. Dieterich, 142 Mich. 527.

¶ 409. Where an information is framed on the theory that a defendant physician is guilty of crime for merely issuing in bad faith to a drunkard a prescription for intoxicating liquors, a conviction cannot be sustained, even though the evidence shows a collusion between the defendant and a druggist to make illegal sales.—People v. Rice, 161 Mich. 657.

§ 65. Presumptions and burden of proof.

Sales to minors, see also ante ¶ 291.
General law of presumptions and burden in criminal cases, see Indictment, VIII, A.

¶ 410. The court could not presume that intoxicating liquors were sold in the barroom of a licensed tavern, when by the law as it then stood every license to keep a tavern did not authorize the sale of such liquors.—Savier v. Chipman, 1 Mich. 116.

¶ 411. In a prosecution for engaging in business of selling liquors without having paid tax, the burden of showing beyond a reasonable doubt such engagement and nonpayment is upon the people.—People v. Drennan, 86 Mich. 445.

¶ 412. In a prosecution under How. St., § 2283e for not closing saloon on Sunday, it is not necessary to prove that any liquor was sold.—People v. Cox, 70 Mich. 247.

¶ 413. Upon a trial for not removing curtains, etc., which obstructed the view of a bar from a street or alley, it is not incumbent upon the prosecution to show the dedication of the street or alley, but it is sufficient if the fact appear that said street or alley was at the time open to the use of the general public.—People v. Kennedy, 105 Mich. 75.

¶ 414. Where, on the trial of a saloonkeeper for failing to keep his saloon closed on Sunday, it appears that an adjoining room,

containing a temporary bar, and where liquors were served on week days, was open, it is not necessary to show that such liquors were paid for in said room.—People v. Ringsted, 90 Mich. 371.

¶ 415. In a prosecution for violation of the local option law in selling liquors, proof that the defendant sold beer is sufficient, it being incumbent on defendant to show that the beer was not intoxicating if he wishes to rely on such a defense.—People v. Anderson, 159 Mich. 185.

¶ 416. Where a defendant in a prosecution for selling liquor without a license in violation of Pub. Acts of 1909, No. 291, as amended by Pub. Acts 1912 (Second Extra Session), No. 1, How. 2nd Ed., § 5055 et seq., claims that he is within an exception not contained in the enacting clause of the statute providing that no tax shall be required from any person for the manufacture or sale of wine or cider used for domestic purposes, such claim must be made a matter of defense, and the burden of proof is on the defendant to show that the sales came within the exception.—People v. Palasz, 191 Mich. 556.

§ 66. Admissibility of evidence.

Of adoption of local option law, see ante § 28.
Of evidence of other sales or acts, see post § 67.
In prosecutions of druggists, see post § 68.
General law of criminal evidence, see Indictment, VIII, B.
Competency of evidence of purchase of liquor made to secure means of conviction, see Indictment ¶ 700.

¶ 417. On a prosecution for keeping a place where liquors were illegally sold, evidence that persons were seen to enter such place sober, and afterwards come out intoxicated, is admissible.—People v. Berry, 107 Mich. 256.

¶ 418. In a prosecution for keeping a place where intoxicating liquors are sold in violation of the local option law (§ 5412, Comp. L. 1897), testimony of respondent's intoxication is inadmissible.—People v. Converse, 157 Mich. 29.

¶ 419. In a criminal trial for keeping a place for the sale of intoxicating liquor contrary to the local option act, there was evidence that respondent had directed the freight agent of the railroad company to deliver his freight to one Mosher, a drayman; that Mosher had receipted for liquor consigned to respondent; and that Mosher's son had delivered the same to respondent. Held, the shipping bills were admissible in evidence.—People v. Aldorfer, 164 Mich. 676.

¶ 420. Defendant was indicted for violating the local option law by furnishing liquor to one Foster. He had a tent in a berry swamp, and employed pickers. Foster, a picker, came to defendant's tent and got some whisky. Defendant contended that Foster helped himself to the liquor without defendant's consent or knowledge. A witness testified that one Holmes, in defendant's employ, had given his wife some liquor out of a bottle in his possession. Nothing appeared to involve defendant in this transaction. Held, the admission of such testimony to prove the guilty intent of defendant in supplying Foster with liquor was error.—People v. Giddings, 159 Mich. 523.

¶ 421. As the local option law prohibits the sale of fermented cider, inquiry as to the stage of fermentation, and as to whether fermented cider is intoxicating, is excluded.—People v. Adams, 95 Mich. 541.

¶ 422. In a criminal trial for keeping a place for the sale of intoxicating liquor contrary to the local option act, evidence of the chemical analysis of the liquor seized is admissible irrespective of whether the officer seizing same acted with the authority of the court issuing the search warrant.—People v. Aldorfer, 164 Mich. 676.

¶ 423. Where, in a criminal prosecution for carrying on a retail liquor business without having paid the tax required, one of the issues is whether respondent was the person conducting whatever business was carried on at the particular place, it is competent as bearing on this question for the prosecution to prove that goods billed as mineral water were shipped over a railroad line to respondent, and delivered at the particular place of business, and the admission of such evidence is not prejudicial on the ground that the jury were permitted to infer that the packages really contained intoxicating liquors.—People v. Moore, 155 Mich. 107.

¶ 424. In a criminal prosecution for selling intoxicating liquor without having paid the tax required, it is competent to prove that respondent stated to the sheriff when the warrant was read to him that he had paid the tax, and that he then exhibited a federal license, as tending to prove that respondent was engaged in the business of selling liquor.—People v. Moore, 155 Mich. 107.

¶ 425. For the purpose of identifying the proprietor of a saloon, it is proper for a witness to testify as to a license card posted up in the saloon, and its contents.—People v. Davis, 171 Mich. 241.

¶ 426. In a prosecution for selling and keeping for sale intoxicating liquors without first obtaining a license it is competent for a witness to testify that he saw barrels, bottles, etc., in the defendant's place of business, as showing that he had all the means and facilities for carrying on the business on the day in question.—People v. Hicks, 79 Mich. 457.

¶ 427. In a criminal trial for keeping a place for the sale of intoxicating liquors contrary to the local option act, the liquors, implements and furniture, and the testimony of the officer as to where he found the same, may be introduced in evidence irrespective of whether the provisions of said act relating to search and seizure were regularly followed.—People v. Aldorfer, 164 Mich. 676.

¶ 428. In a prosecution of a druggist for selling liquor as a beverage in violation of the local option law, it was proper to show that there was a room adjoining respondent's store, maintained by him, in which purchasers of liquor from him sometimes drank their liquor.—People v. Van Alstyne, 157 Mich. 366.

¶ 429. In prosecution for selling liquor to a minor under How. St., § 2283d6, respondent may show all that transpired between him and the minor at the time the liquor was sold as a part of the res gestæ and as bearing upon the criminal intent.—People v. Welch, 71 Mich. 548.

¶ 430. Where, on the trial of a respondent for selling liquors in violation of the local option law, it appears that the sales were made in the evening from a buggy, and one of the purchasers, after testifying that he was within three feet of the person in the buggy when he purchased the liquor, testifies that he thought at the time that the man in the buggy who sold the liquor was respondent, for he heard his name spoken, the fair inference is that the witness refers to the time when he made the purchase, and this testimony is admissible as a part of the res gestæ.—People v. Stanley, 101 Mich. 93.

¶ 431. Certain witnesses testified that they were within three or four feet of the man in the buggy when he sold them liquor. Held, that it was competent for them to testify further that it was their impression, from what they saw of the occupant of the buggy, that it was respondent.—People v. Stanley, 101 Mich. 93.

¶ 432. On the trial of a druggist for selling liquor to be drunk on the premises it cannot be shown that a liveryman sued the prosecuting attorney to recover for driving a detective to a neighboring town, where he entrapped the defendant into selling liquor in violation of law, as tending to prove that the prosecuting attorney had a part in the employment of the detective.—People v. Curtis, 95 Mich. 212.

§ 67. ——Other sales or gifts or acts to show knowledge, intent or system.

Other acts and offenses as evidence in prosecutions generally, see Indictment, VIII, B, 1.

Other offenses as evidence of intent, see also Indictment § 166.

Other sales as discrediting testimony that transaction was not a sale but a gift, see Witnesses, VI, D.

¶ 433. When offense consists of selling, etc., a person to whom liquor was sold or given must be named or identified in the information, and proof of a sale to "divers other persons" is not admissible except to support charge that respondent kept a saloon where liquors were sold, etc.—People v. Keefer, 97 Mich. 15.

¶ 434. Upon a prosecution for keeping a place for the sale of intoxicating liquors, in violation of the local option law, evidence of sales made prior to the date alleged in the information, extending over a period of three months, is admissible, as bearing upon the character of the place kept by respondent at the time charged.—People v. Caldwell, 107 Mich. 374.

¶ 435. In a prosecution for the violation of the local option law, where the defense is that the liquor was furnished as an act of hospitality, evidence of prior similar acts may be admitted as bearing upon the intent that such liquor was furnished upon the day charged in the information.—People v. Hancock, 166 Mich. 654.

¶ 436. Defendant was indicted for violating the local option law by furnishing liquor to one Foster. Defendant had a tent in a berry swamp, and employed pickers who likewise lived in tents. Foster, a picker, came to defendant's tent and got some whisky. Defendant contended that Foster helped himself to the liquor without defendant's consent or knowledge. Held, evidence that defendant supplied liquor to other berry pickers was admissible to show that defendant did not act innocently or from mistake.—People v. Giddings, 159 Mich. 523.

¶ 437. Under Laws 1887, Act No. 313, § 17, there can be but a single offense of opening a saloon on any particular Sunday, howsoever many times the saloon is open on the same day; therefore proof of several acts of opening is admissible after one has been shown, the others not constituting distinct offenses. Section 7, providing that each violation of the act on the same day shall be a different offense, refers to sales of liquor —People v. Cox, 70 Mich. 247.

¶ 438. In a criminal prosecution for keeping, storing and possessing intoxicating liquor in other than his own residence, where it appeared that defendant was professedly engaged in the sale of nonintoxicating liquors in a room of a building, the remainder of which was his mother's residence, but had at one time been engaged in the sale of intoxicating liquors in such room, and liquor was found under the floor of his mother's room, which defendant claimed belonged to his mother, and defendant claimed that he

handled only nonintoxicating liquor, held that evidence that certain persons were seen drinking beer in certain others rooms of the building was competent.—People v. Calliari, 196 Mich. 475.

¶ 439. Respondent, who had been engaged in selling liquor ostensibly, discontinued his business when the local option law went into effect, but kept his stock on hand awaiting the decision of the supreme court as to the validity of said law. He took out a government license, and sold soft drinks and wild cherry bitters over his counter, behind which he kept a bottle of liquor, which was replenished from said stock, and also received cases of beer weekly, which liquor and beer he claimed were kept for his own use. After the law was declared unconstitutional, and on May 19, 1888, he was advised that he had a right to go on with his business, and invited certain parties from the street to come in and "take something," to whom he gave cigars and "soft stuff," and liquor from the aforesaid bottle. He was prosecuted for engaging in the liquor business on May 19, 1888, without paying the state tax, etc. Held, that while the people were confined to the day laid in the information as the date of respondent's carrying on the business in violation of law, yet they had the right to show that a few days prior to May 19, and after May 1, in answer to a wife who forbade his selling to her husband, respondent answered that he was selling him no more than other saloon men; also to show by the wife that her husband was a constant visitor at respondent's place of business during the week preceding May 19, and was intoxicated almost every day, and at times brought home whisky in a bottle—as tending to prove what respondent's place of business was used for, and its surroundings, as well as the manner in which respondent had conducted his business immediately preceding May 19.—People v. Hicks, 79 Mich. 457.

§ 68. ——Sales by druggists.

Requiring filing of reports and use as evidence as compulsory self-crimination, see Indictment ¶ 694.

¶ 440. In a prosecution for the illegal sale of liquor by a druggist, testimony that the vendee was seen on the same day and after such sale with a bottle containing whisky, which he said he obtained of the respondent, is irrelevant.—People v. Hinchman, 75 Mich. 587.

¶ 441. In a prosecution for illegal sale of liquor by a druggist, testimony that the alleged vendee was seen on the same day and after such sale with a bottle containing whisky which he said he obtained of respondent is irrelevant.—People v. Hinchman, 75 Mich. 587.

¶ 442. Where a druggist sells a mixture of ten grains of quinine with eight ounces of whisky, and is prosecuted for unlawfully selling intoxicating liquor, he is not entitled to introduce evidence to show that reasonable persons would not use the mixture as a beverage.—People v. Sharrar, 164 Mich. 267.

¶ 443. In a prosecution against a druggist for the illegal sale of intoxicating liquors, it was held proper to show on cross-examination that the purchaser went home drunk on the day he bought the intoxicant.—People v. Frost, 179 Mich. 180.

¶ 444. In a prosecution for keeping a drug store for the unlawful sale of liquors in violation of the local option law evidence of purchasers of whisky and beer as to the use made thereof after leaving respondent's premises, without the knowledge of such use on his part is inadmissible where the witnesses had purchased the liquor upon the representation that it was to be used for medicinal purposes.—People v. Thompson, 147 Mich. 444.

¶ 445. In a prosecution of a druggist for violation of the local option law, his reports to the prosecuting attorney of the sales of intoxicating liquors made in his business, showing a large number of sales and large quantities sold, are admissible in connection with other evidence to prove the illegal nature of the business, although none of such sales was proved to be unlawful.—People v. Van Alstyne, 157 Mich. 366.

§ 69. Weight and sufficiency of evidence.

Of adoption of local option law, see ante § 28.
In penal actions, see post § 74.
Matters necessary to be proved under the issues, see ante § 64.
General rules as to sufficiency of criminal evidence, see Indictment, VIII, C.

¶ 446. The testimony of an eyewitness that a man at the bar of a saloon was furnished with a glass containing liquor that looked like beer and that he paid for it, and was presently thereafter very much intoxicated, is evidence tending to show that intoxicating liquor had been sold to him.—Wilson v. Booth, 57 Mich. 249.

¶ 447. The admission of a respondent on trial for failing to keep his saloon closed on Sunday, that he was the keeper of a liquor saloon located in a front room on the first floor of a designated building, is not prima facie evidence that he was the keeper of a like saloon located in a rear room in the second story of the same building, and only connected with the other saloon by an outside stairway from an alley at the side of the building.—People v. Kridler, 80 Mich. 592.

¶ 448. On the testimony of a bartender that he went into the saloon on Sunday, that the defendant was there and no one else, that later in the day he went into the saloon

and no one was there, that he got a cigar and a drink of beer, and went away, the defendant may be convicted for failing to keep his saloon closed on Sunday.—People v. Crowley, 90 Mich. 366.

¶ 449. In a prosecution for keeping a saloon open on a legal holiday, evidence that, upon the day in question, respondent, during the absence of his copartner, sold liquors in rooms occupied by the latter as living apartments, situated above the saloon proper, and accessible only by an outside stairway, is sufficient to justify a conviction.—People v. Whipple, 108 Mich. 587.

¶ 450. Evidence which shows that the paraphernalia of a saloon was in a certain place, and that in this place bottles labeled with the name of a certain brewing company and containing lager beer were sold, is enough to indicate that the parties conducting these sales were engaged in selling intoxicating liquor at retail.—People v. Boos, 155 Mich. 407.

¶ 451. A conviction, based upon competent evidence and following proper instructions, of keeping a saloon and of selling intoxicating liquors without having paid tax or given bond, was affirmed.—People v. Harrington, 113 Mich. 523.

¶ 452. On a prosecution under Pub. Acts 1909, No. 291, How. 2nd Ed., § 5055 et seq., as amended, for selling intoxicating liquor without a license, evidence held sufficient to sustain a conviction.—People v. Palasz, 191 Mich. 556.

¶ 453. In a prosecution for violation of the local option law promulgation of adoption of preamble and resolution of board of supervisors need not be proved since Pub. Acts 1889, No. 207, § 17 (Local Option Law) makes a certified transcript of the record evidence. —People v. Adams, 95 Mich. 541.

¶ 454. The evidence held to show the keeping for sixty days within a local option county, of a place where spirituous and intoxicating liquors were stored, sold and kept for sale in violation of law.—People v. Wheeler, 186 Mich. 489.

¶ 455. Where a respondent charged with violation of the local option law is proved to have kept liquor on ice in his quarters, and to have permitted persons to go and come to and from the room and help themselves to the liquor, the evidence is sufficient to sustain a conviction.—People v. Bedell, 162 Mich. 230.

¶ 456. Under Act No. 107, Pub. Acts 1909, forbidding the keeping of a place where liquors are given away or furnished, evidence of a violation of the statute is sufficient which shows that respondent mixed and left on a table in his room an intoxicating beverage, of which various persons partook in his presence without invitation being extended on his part.—People v. Lewis, 166 Mich. 513.

¶ 457. In a prosecution for keeping a place for the sale of intoxicating liquors in violation of the local option law (section 5412, Comp. L. 1897), there was testimony that two cases of beer had been shipped to respondent as agent for an express company; that the consignee carried away one case immediately; that subsequently he took the rest away, a few bottles at a time, and without the knowledge of respondent, and that he paid for all the beer at the time of ordering it. Held, that such testimony did not warrant an instruction that if the jury believed it to be true defendant would be guilty. —People v. Converse, 157 Mich. 29.

¶ 458. Upon a prosecution for keeping open a saloon on a legal holiday (How. St. § 2274), testimony that the saloon was open on a certain day, and identifying respondent as keeper of the saloon, and as keeping liquor and being about the building, though the bartender was in charge, is enough to go to the jury upon the main charge.—People v. Baumann, 52 Mich. 584.

¶ 459. Where the chief dispute was as to the intoxicating quality of the drinks sold on Sunday at respondent's bar, it not being disputed that intoxicating liquors were sold there during week days, a conviction for keeping open on Sunday a bar where intoxicants are sold, was proper.—People v. Beller, 73 Mich. 640.

¶ 460. In a prosecution under Comp. L. 1897, § 5395, requiring the closing of saloons on Sunday where the evidence showed that two employees of the respondent were engaged in cleaning the saloon, one having been admitted by the other, after which the doors were locked and kept locked and no other person admitted but the sheriff, who demanded admittance as an officer, and no person took a drink it was not error for the court to refuse to direct a verdict of not guilty, and the commission of the acts narrated is sufficient to constitute the offense of keeping a saloon open on Sunday.—People v. Tolman, 148 Mich. 305.

¶ 461. In a prosecution for keeping a saloon open on Sunday in violation of Comp. L. 1897, § 5395, How. St., 2nd Ed., § 5074, a conviction was sustained where it appeared that the defendant's son, having a key, entered the barroom on Sunday and that such act did not constitute a trespass.—People v. Damskey, 180 Mich. 664.

¶ 462. Under Comp. L. 1897, § 5409, requiring the removal of all curtains, screens, partitions, and other things obstructing the view from the sidewalk, street, alley or road in front of, at the side or end of the building in which a saloon is conducted, a convic-

tion is sustained by evidence that the saloon was conducted in a hotel in a place not open to view from any street, sidewalk, etc.—People v. White, 127 Mich. 428.

¶ 463. A conviction of keeping a place and saloon where intoxicating liquors were sold as a beverage, in violation of the local option law is sustained by evidence of the selling, and that the premises occupied by the accused contained the fixtures, surroundings, and furniture usually found in an ordinary saloon, and never in a drug store, although no evidence was offered that he was not a registered pharmacist.—People v. Knopf, 109 Mich. 145.

¶ 464. Where a person, not a druggist, has been complained against for having sold liquor at retail without having paid tax, posted notice, or given bond, and the evidence has showed that he was a druggist, but has failed to show that he had not filed a bond, the conviction should be set aside.—People v. Beach, 93 Mich. 25.

¶ 465. A failure to comply with Pub. Acts 1899, No. 183, § 25, requiring reports of liquor sales made by druggists in local option territory to the prosecuting attorney is not conclusive as to the illegality of such sale, but may in connection with other circumstances be some evidence.—People v. Thompson, 147 Mich. 444.

§ 70. Trial practice; questions of law and fact.

General trial practice in criminal cases, see Indictment, IX.

Juror's views on liquor question or laws as ground of disqualification, see Jury § 31.

Tasting liquor in evidence as erroneous conduct by jury, see also Indictment § 461.

¶ 466. Although in a prosecution for violating the local option law the existence of the law is a fact to be proved, the question of the sufficiency of the proof is for the court and not for the jury.—People v. Keefer, 97 Mich. 15.

¶ 467. Under a prosecution for violating the local option law, evidence was introduced by the state tending to prove that respondent, who had previously been a saloonkeeper at the store in question was keeping and selling cider at his place of business, which cider "had commenced to work"; that a barrel of beer, not opened, a case of beer sealed and not opened, both of them apparently consigned to some other person than respondent, a quart bottle of beer on ice behind the counter, and a quantity of cider, were found by officers. Respondent was conducting a restaurant. There was no proof of sales of liquor and none that the cider was intoxicating. Held, the court erred in refusing to direct a verdict for defendant.—People v. Hickman, 164 Mich. 672.

¶ 468. On a prosecution for selling liquor without a license where the evidence showed that the respondent kept a restaurant and there was a saloon next door with no door or connections between the restaurant and saloon, and the respondent had no proprietary interest in the saloon, but with money given her by customers for that purpose she purchased beer for the patrons which was served at her tables, and made no profit out of the transactions, there being no secrecy in the transactions, the question as to whether she acted as a mere intermediary of the buyer or as a seller was one to be determined by the jury from the evidence, and such evidence as related did not warrant the court in directing a verdict.—People v. Journeau, 147 Mich. 520.

¶ 469. In a prosecution for keeping open saloon on Sunday it appeared that defendant used three rooms in connection with each other—one a card room, the second for the sale of tobacco, the third for the sale of liquors. Held, that it was properly left to the jury to say what room constituted the saloon.—People v. Scranton, 61 Mich. 244.

¶ 470. In a prosecution for keeping a saloon open on Sunday, a showing that defendant's barkeeper opened the saloon without authority and contrary to instructions, does not require a directed verdict in favor of defendant.—People v. Possing, 137 Mich. 303.

¶ 471. In a prosecution for keeping a saloon open on Sunday in violation of Comp. L. 1897, § 5395, where the undisputed evidence demonstrated the respondent's guilt, it was not error for the court to charge that it was the duty of the jury to find the respondent guilty.—People v. Gordon, 156 Mich. 237.

¶ 472. Whether a particular mixture containing alcohol is a medicinal compound, a medicine, and unfit for use except in medicinal doses, is generally a question of fact.—People v. Sharrar, 164 Mich. 267.

§ 71. Instructions and requests.

Criminal instructions in general, see Indictment, IX, E.

Instructions on credibility of informers, policemen and detectives, see Indictment § 438.

¶ 473. In a prosecution for engaging in the business of selling liquors without having paid tax, the burden of proof is upon people to show beyond a reasonable doubt that respondent was engaged in the business and had not paid his tax, and a refusal so to instruct the jury is error.—People v. Drennan, 86 Mich. 445.

¶ 474. In a prosecution for violating a local option law by selling fermented cider, a charge conveying the idea to the jury that they might convict if they found the cider in any stage of fermentation, though it

might not then be intoxicating, is not erroneous.—People v. Kinney, 124 Mich. 486.

¶ 475. In a prosecution for the unlawful sale of fermented cider, a charge that if the cider was fermented, defendant was guilty, without going into the degree of fermentation necessary to cause intoxication, approved.—People v. Emmons, 178 Mich. 126.

¶ 476. In a prosecution for violating the local option law, where respondent claimed the drinks sold were nonintoxicating, it was proper to refuse his request for an instruction that if the jury found the drinks sold contained some alcohol, but not enough to cause intoxication, there should be an acquittal.—People v. Ingraham, 100 Mich. 530.

¶ 477. Where one charged with violating the local option law has testified that he was assured by those from whom he bought the drink sold by him that it was nonalcoholic and nonintoxicating, his request for an instruction that he should be acquitted should the jury find he purchased and sold the drink in good faith, believing it to be nonalcoholic and nonintoxicating, is properly refused; and it is proper to charge that respondent's ignorance that the liquors were intoxicating would not excuse him unless he took such reasonable means as an ordinarily careful and prudent man, desirous of obeying the law, would take to ascertain whether the liquors were such as were prohibited.—People v. Ingraham, 100 Mich. 530.

¶ 478. In a prosecution for violating the local option law two witnesses for the people testified that they drank beer in respondent's place, and one of them further testified that the beer was intoxicating. Another of the people's witnesses testified on cross-examination that he drank with one of said witnesses, and from the same bottle; that what he drank was "hop-pop"; that he could not swear whether or not "hop-pop" is intoxicating, but that he was not affected by drinking it. A witness for respondents testified that he was present, and that what the witnesses first mentioned drank was not lager beer. Respondents testified that they did not keep lager beer for sale at the time charged, and did not sell to said witnesses any such beer; that they had tested "hop-pop," and it was not intoxicating. Held, that the court should have instructed the jury, as requested by respondents, that, in order to convict, it must believe from the evidence introduced, beyond a reasonable doubt, that respondents, on the day charged, sold lager beer, as alleged in the information, and that, if it should believe they only sold "hop-pop" they should acquit; but that it would have been proper to add to this instruction a caution that, if what was sold was in fact lager beer, responsibility for the sale could not be avoided by giving it the name of "hop-pop."—People v. Rice, 103 Mich. 350.

¶ 479. An instruction was properly refused in a prosecution under Comp. L. 1897, § 5381, for illegal sale of liquor to be drunk upon the premises, which stated that if nothing was said or done after the purchase to indicate that it was the purchaser's intention to take the beer into the back yard and there drink it, then respondent would not be guilty of the sale of such beer to be drunk on the premises; as the purpose might be proved by what was said or done before or at the time of the sale.—People v. Shuler, 136 Mich. 161.

¶ 480. In a trial for the sale of intoxicating liquors to a minor, a charge of the court that the fact of the sale raises a presumption of a felonious intent is not prejudicial error on the ground that it intimates the offense is a felony.—People v. Thompson, 161 Mich. 391.

¶ 481. In a prosecution for selling intoxicating liquor without a license, an instruction that respondent is guilty if there was an unlawful business being carried on in the place in question, and respondent was engaged in helping to carry it on, and that it is not necessary to show what interest he had in it, whether he was a clerk or partner, or how he was interested, is proper.—People v. Boos, 155 Mich. 407.

¶ 482. In a prosecution for violation of the local option law, a request stating that proof of any number of single illegal sales, or even a series of such sales, covering the time alleged, would not establish the keeping of a place, etc., was properly refused.—People v. Robinson, 135 Mich. 511.

¶ 483. Under Comp. L. 1897, § 5429, providing that proof of a single sale of any one or more of the liquors or beverages mentioned in the act should be presumptive evidence of keeping a place where such liquors are kept for sale, it was error, in a prosecution for violation of the local option law, to refuse a request stating that a druggist who had complied with the general law by filing a bond entitling him to sell liquor for medicinal purposes cannot, on proof of a single unlawful sale, be convicted of keeping a place for the sale of liquor.—People v. Remus, 135 Mich. 629, additional opinion, reaffirming Maynard v. Eaton Circuit Judge, 108 Mich. 201.

¶ 484. In a prosecution under the Local Option Law for keeping a place where intoxicating liquors are sold, stored for sale and furnished, where defendant does not claim that the information fails to charge an offense under said statute, it is not error for the court to refuse a requested instruction that the state must prove that the liquor in question, claimed to have been sold, stored for sale and furnished at said place, was intoxicating liquor.—People v. Adler, 169 Mich. 322.

¶ 485. A respondent charged with violating the local option law requested an instruction that if the jury believed the drinks sold contained only one per cent of alcohol, and if it was not convinced beyond a reasonable doubt that they were intoxicating, it should acquit. The court charged that the statute prohibited the keeping of a place where intoxicating liquors, or liquors some part of which was spirituous or intoxicating were sold, that if respondent was not keeping such a place he could not be convicted, and that it was for the jury to say, under all the evidence, whether he kept such a place. Held, that respondent could not complain. —People v. Ingraham, 100 Mich. 530.

¶ 486. Defendant was indicted for violating the local option law by furnishing liquor to one Foster. Defendant lived in a tent pitched in a berry swamp, and employed pickers, who likewise lived in tents. Foster, a picker, came to defendant's tent and got some liquor. Defendant contended that Foster helped himself without defendant's knowledge or consent. Held, the court properly refused a requested instruction that if defendant supplied the liquor at all the jury was to say whether or not he did so to Foster as a guest.—People v. Giddings, 159 Mich. 523.

¶ 487. On the trial of one charged with selling and keeping for sale at retail intoxicating liquors without first obtaining the required license; an instruction by the court "that a man has a right to treat his friends, if he does it for that purpose alone, and in good faith, and without intending to evade the laws; but he had no right to open his saloon, and treat different individuals, as a means of introducing the business he is about to engage in; neither for the purpose of advertising the business he is engaged in," is sufficiently favorable to the defendant.—People v. Hicks, 79 Mich. 457.

¶ 488. Where a respondent charged with violating the local option law is shown to have kept in his shop liquor which he furnished to persons who came there to drink, and some of whom became intoxicated, an instruction that proof of a single sale of liquor or the posting of a United States revenue receipt would be presumptive evidence, etc., is not error, although there is no direct proof of such a sale or posting, the instructions given at respondent's request preventing all possibility of the jury's being misled into a belief that such proof was not needed.—People v. Bacon, 117 Mich. 187.

¶ 489. In a prosecution for selling liquor in violation of the local option law, where the claim of the prosecution was that respondent's store was divided into several rooms, one of them being his general store, and the other rooms where liquor was drunk by purchasers, an instruction that respondent was chargeable with notice of what occurred in the back rooms if purchasers went there and drank liquor bought from him, although he was in the front of the store and could not see them, was proper.—People v. Van Alstyne, 157 Mich. 366.

¶ 490. In a prosecution for violation of the local option act, there was evidence that respondent and one Keyes were engaged in conversation in front of the building where respondent roomed; that respondent said he had to write some letters and went up to his room; that Keyes followed him; that a bottle of liquor was in the room and both of them drank thereof; and that respondent did not expressly ask Keyes to drink. Held, it was error for the court to instruct the jury to find respondent guilty, as the question of his intent to violate the act was one for the jury.—People v. Slater, 164 Mich. 156.

¶ 491. Upon the trial of a druggist for selling liquor contrary to law it is proper to refuse an instruction that the defendant cannot be convicted if he was entrapped by a detective into making the sale; the public authorities being in no way concerned in setting the trap.—People v. Curtis, 95 Mich. 212.

¶ 492. In a prosecution for violation of the local option law, it was not error in response to a question by a juror as to whether, if defendant were told the liquor was wanted for medicine, he could take the purchaser's word for it, for the court to charge that defendant could only rely on such statement if he sold the liquor in good faith, without any surrounding circumstances to tell him different.—People v. Robinson, 135 Mich. 511.

¶ 493. An instruction in a prosecution for keeping a saloon open on Sunday, that "if a saloon is kept open on one of the forbidden days, for any purpose, or for any business, or for any length of time, no matter how short, it will be a violation of the statute," is not prejudicial to respondent, where he admits having served liquor upon the day in question in a room alleged to constitute a part of his saloon.—People v. Bowkus, 109 Mich. 360.

¶ 494. In a prosecution for keeping a saloon open on Sunday, it was proper to instruct the jury to the effect that respondent had no right to let persons into his saloon on that day, and that, if he did so, he was guilty of the offense charged, whether he sold them liquor or not.—People v. Bowkus, 109 Mich. 360.

¶ 495. In a prosecution under Comp. L. 1897, § 5395, requiring the closing of saloons on Sunday, where the evidence showed that two employees of the respondent were engaged in cleaning the saloon, one having been admitted by the other, after which the doors were locked and kept locked except to admit

the sheriff who demanded admission as an officer, and that no person took a drink, it was not error for the court to instruct the jury "Now the court instructs you that if you believe the testimony that these two men were in there on that day, your verdict will be guilty, otherwise your verdict will be not guilty. The fact that no liquor was sold has nothing to do with this case at all. The law provides that these saloons shall be closed, and when the people are in there they are not closed. They have to open them to go in and open them to come out; therefore a saloon is open. * * * "—People v. Tolman, 148 Mich. 305.

¶ 496. Where, in a prosecution for sale of liquor on Sunday, it was shown that defendant occupied living rooms which were over the saloon, and connected therewith, an instruction that defendant had no right to open rooms upon Sunday in which it was customary or his practice to serve from the barroom is not open to the objection that if wine or beer had ever been served in defendant's living rooms, such rooms would be included.—People v. Boyd, 151 Mich. 577.

¶ 497. In a prosecution for a violation of Comp. L. 1897, § 5409, providing that during the time that places where liquors are sold are required to be closed, screens, curtains, etc., obstructing the rear of the bar or place where liquors are sold, shall be removed, a charge stating among other things that a person had a right to observe from the sidewalk or street what was going on and would not have to go into the doorway or crowd against the glass or stand on his tip toes, to ascertain whether persons were inside, or that business was being carried on, is not erroneous.—People v. Locy, 124 Mich. 180.

§ 72. Verdicts, judgments and punishments.

Sentence as ipso facto revoking license, see post § 73.

Requisites and sufficiency of verdicts and sentences, see generally Indictment, IX, G; XI.

General law of punishments, see Crimes, I, E.

Place for imprisonment for crimes, see Crimes §§ 28, 29.

Attorneys' fees for prosecutions, see Indictment § 508.

Discretion as to fine or imprisonment for violation, see also Indictment § 484.

Review by writ of error, exceptions or otherwise, see Indictment, XIV-XVII.

¶ 498. Under Act No. 183, Pub. Acts 1899, providing a penalty for the unlawful sale of intoxicating liquor, the court must impose a penalty of both fine and imprisonment, and can exercise his discretion only as to the maximum and minimum.—People v. Sharrar, 164 Mich. 267.

¶ 499. It is discretionary with a trial judge whether, in sentencing a person convicted of keeping his saloon open at unlawful times, he imposes either fine or imprisonment alone or both together (How. St., § 9603).—People v. Minter, 59 Mich. 557.

¶ 500. Laws 1887, Act No. 313, § 8, prohibits, among other things, the selling of liquor in any other place than that specified in the dealer's bond, without giving notice and filing another bond, and provides that any sale made in violation of said section shall be a misdemeanor punishable as provided in section 6 of said act. Said section 6 does not provide any penalty or punishment whatever, but section 7 of the same act provides that any person engaging in business without paying tax, executing bond, etc., shall be deemed guilty of a misdemeanor. Held, that the reference in section 8 to section 6 may be regarded as surplusage, and that for a violation of section 8 the offender may be punished under section 7.—People v. Brown, 85 Mich. 119.

¶ 501. The fact that the general liquor law (Pub. Acts 1887, No. 313, § 7) prescribes a penalty for the violation of any of the provisions of the act for which no specific penalty is provided, does not preclude inflicting the penalty so prescribed upon one guilty of keeping open his saloon on Sunday in violation of section 17 of the statute, after the penal clause of said section 17 has been held unconstitutional and void, it being provided by section 18 that a person convicted of violating any of the provisions of the five preceding sections shall be punished as provided in section 7.—People v. Rohrer, 111 Mich. 31.

C. FORFEITURE OF LICENSE AND ACTIONS FOR PENALTIES.

§ 73. Forfeiture or revocation of license.

Mandamus to compel revocation of unlawful license, see Mandamus, III.

¶ 502. On May 1, 1910, defendant received a retail liquor license and paid the fee for same. On January 26, 1910, and again on May 10, 1910, defendant was convicted in a court of record of violating act No. 291, Pub. Acts of 1909. Held, said convictions operated ipso facto to forfeit defendant's license under section 36 of said act so as to render defendant liable to conviction for selling liquor without a license on sales made after May 10, 1910.—People v. Schafran, 168 Mich. 324.

¶ 503. An ordinance regulating the licensing of saloons provided that a saloonkeeper's license should be revoked if he should be convicted within one year of a violation of the ordinance and of "the state law." Held, that "the state law" referred to was the one controlling the sale of liquors, and a violation of some other law did not come within the meaning of the ordinance.—Cox v. Jackson Common Council, 152 Mich. 630.

§ 74. Actions for penalties.

General law of penal actions, see Penalties and Forfeitures.
General law of pleading, see Pleading.
Mode of pleading statutes, see Pleading, I.
Prosecutions for violations of municipal ordinances, see generally Municipal Corporations, XVI, B.

¶ 504. The action of debt provided for by the prohibitory liquor law of 1855, § 8 (Comp. L. 1871, § 2141), was to be treated as taking the character and incidents of a civil suit, not those of a criminal prosecution.—People ex rel. Strickland v. Bartow, 27 Mich. 68; In re Buddington, 29 Mich. 472; In re Sorenson, 29 Mich. 475; and see also People v. Hoffman, 3 Mich. 248.

¶ 505. Prosecution for penalty under R. S. 1846, ch. 41, for selling spirituous liquor without license was properly brought in the name of the village.—Smith v. Village of Adrian, 1 Mich. 495.

¶ 506. In the case of the village of Romeo, an action for a penalty under the liquor law should have been brought in the name of the village instead of in the name of the president and trustees of the village.—Village of Romeo v. Chapman, 2 Mich. 179.

¶ 507. A declaration that is not good at common law, nor sufficient either under the general statute for the recovery of penalties or under the specific provisions of the prohibitory liquor law, cannot be sustained in a suit to recover a penalty for the violation of the liquor law.—Benalleck v. People, 31 Mich. 200.

¶ 508. A declaration under Comp. L. 1871, § 2143, to recover a penalty for a violation of the prohibitory liquor law, is fatally defective if it lacks the signature of the prosecuting or any other attorney.—Benalleck v. People, 31 Mich. 200.

¶ 509. To recover the penalty given by R. S. 1846, ch. 41, § 1, it was not necessary to show that defendant assumed to act as tavernkeeper or common victualler.—Smith v. Village of Adrian, 1 Mich. 495.

¶ 510. In an action to recover the penalty given by Rev. St., 1846, ch. 41, § 1, it was not necessary for the prosecution to prove that defendant had no license, or that the question of license or no license was submitted to the people in pursuance of said chapter.—Smith v. Village of Adrian, 1 Mich. 495.

¶ 511. Where, in suing for such penalty, the plaintiff declared in the form given by the statute, it was held that he could not, on the trial, be compelled to elect the penalty or penalties he would seek to recover.—Smith v. Village of Adrian, 1 Mich. 495.

¶ 512. Where two persons as partners were keeping a recess where liquors were sold without license, it was held that the sale by one was the act of both, and might be given in evidence against the other in an action against him alone for the penalty.—Smith v. Village of Adrian, 1 Mich. 495.

VII. CIVIL LIABILITY FOR INJURIES FROM SALE.

Right to recover money paid for liquors as illegal payment, see Payment, VI.

§ 75. In general; nature of liability and right of action.

Necessity that sale be wrongful and productive of injury, see post § 76.
Defenses to the action, see post § 77.
Persons entitled to sue, see post § 78.
Persons liable, see post §§ 79, 80.
Form of the action and practice in actions, see post § 81 et seq.
Evidence in the action, see post §§ 85-89.
Actions of debt for penalties, see ante § 74.
Release of one as releasing other wrongdoers, see Releases, III.

¶ 513. Comp. L. 1897, § 5398, known as the Civil Damage Act is in the nature of a police regulation, and is in part penal and in part remedial, and was designed to furnish absolute protection to the parents of minors.—Bailey v. Briggs, 143 Mich. 303.

¶ 514. Laws recognizing the liquor traffic by taxing it and imposing damages for selling to certain classes of persons are not inconsistent as legalizing it for one purpose and penalizing it for another.—Kehrig v. Peters, 41 Mich. 475.

¶ 515. A recovery by any one of the persons entitled by the Civil Damage Law to sue for recovery of money paid out for liquor would bar an action by any other; but where injuries arising from the sale are several, there may be several actions for damages, and a recovery in one would not bar another.—Friend v. Dunks, 37 Mich. 25.

¶ 516. Claimant sued defendant saloonkeeper for damages for the death of her brothers due to intoxication induced by the sale of liquor to them by defendant. Held, claimant was not barred from recovery by the fact that the mother of these men had previously recovered damages for the same injury.—In re Miller's Estate, 160 Mich. 309; In re Claim of Bennett, Id.

¶ 517. The statute gives a separate right of action to the wife and to the children against saloonkeepers for unlawfully selling liquors to a drunken husband and father and the action of the wife must therefore proceed upon the theory that for only her own injuries can she be awarded damages.—Rauhala v. Maki, 172 Mich. 112.

§ 76. Wrongfulness of sale, injury, and proximate cause.

¶ 518. There can be no recovery under the statute for injuries caused by the sale or furnishing of liquor to another, unless such sale or furnishing is in violation of law.—Peacock v. Oaks, 85 Mich. 578; Bell v. Zelmer, 75 Mich. 66.

¶ 519. In a wife's suit for damages to her means of support occasioned by the killing of her husband by a person intoxicated with liquor obtained from the defendant, it is not for plaintiff to produce proof, or for the jury to speculate upon the probabilities as to whether the intoxication of the person who killed the husband was the natural cause of the killing; the act itself fixes defendant's liability if the sale of the liquor was wrongful.—Doty v. Postal, 87 Mich. 143.

¶ 520. It is not essential to the liability of a saloonkeeper for injuries sustained by a wife by reason of the sale of intoxicating liquors to her husband, whereby he became a habitual drunkard (Pub. Acts 1887, No. 313), that such sales should have been made when the husband was intoxicated, or after he had formed the habit of getting intoxicated.—Wood v. Lentz, 116 Mich. 275.

¶ 521. Under the Civil Damage Act the wife's right of recovery against those who caused or contributed to her husband's intoxication does not depend upon knowledge on their part that he was in the habit of becoming intoxicated.—McMahon v. Dumas, 96 Mich. 467.

¶ 522. Where there has been a series of successive transfers of liquor by sale or gift before it reaches the one whose intoxication is caused thereby, the first one in that series is not liable for the consequences of the subsequent sales or gifts he was not a party to, of which he had no knowledge, and to a party he has never even seen.—West v. E. P. Leiphart & Co., 169 Mich. 354.

¶ 523. Defendant saloonkeeper illegally sold intoxicating liquors to two persons, one a minor and the other a habitual drunkard. Said persons took said liquor to the residence of plaintiff and together with plaintiff's minor son consumed same. Said son became intoxicated and while crossing the street in said condition attempted to board a moving freight train and was killed. Held, defendant saloonkeeper was not liable for damages to plaintiff under Comp. L. 1897, § 5398.—West v. E. P. Leiphart & Co., 169 Mich. 354.

¶ 524. A wife suing a saloonkeeper for selling liquor to her husband against her protest, knowing him to be a habitual drunkard, may recover damages for an assault committed upon her by her husband while drunken with such liquor.—Wilson v. Booth, 57 Mich. 249.

¶ 525. The right of action conferred by How. St., § 2283e3, is limited to cases where the injuries are the direct result of acts done while intoxicated, or where they indirectly result by reason of the intoxication and does not cover loss of support due to imprisonment for burglary while drunk.—Dennison v. Van Wormer, 107 Mich. 461.

¶ 526. A recovery under the statute may be had against a liquor seller although the death or hurt resulting in injury to plaintiff's means of support was not the natural or proximate result of the intoxication caused by his sales.—Brockway v. Patterson, 72 Mich. 122; Thomas v. Dansby, 74 Mich. 398; Doty v. Postal, 87 Mich. 143; Eddy v. Courtwright, 91 Mich. 264.

¶ 527. In an action under the Civil Damage Law, if the jury do not find that defendant's act in supplying liquor was so closely connected with the injury for which the action was brought as to have been effective in causing it, they cannot find for plaintiff.—Steele v. Thompson, 42 Mich. 594.

¶ 528. Under the Civil Damage Act giving a right of action against a liquor seller for injury occasioned by an intoxicated person, the fact that the person causing the injury was intoxicated at the time is sufficient.—Brockway v. Patterson, 72 Mich. 122.

¶ 529. In an action for injuries received from an intoxicated person, it need not be shown that the intoxication was the proximate cause of the injury. The fact of intoxication and the unlawful sale is sufficient upon which to base the action.—Heikkala v. Isaacson, 178 Mich. 176.

¶ 530. Under Laws 1887, No. 313, § 20, it is not necessary to show, in order to recover damages for injury to one's means of support by the death of an intoxicated person, that the death was a probable consequence of the intoxication; so held where a drunken man was drowned while attempting to cross a lake.—Eddy v. Courtright, 91 Mich. 264.

¶ 531. A wife has a right of action where her husband and a third person become intoxicated, and the husband's leg was broken in a scuffle between them, causing an injury to the wife's means of support; and the question whether the sale of liquor was a remote or indirect cause of the loss is not involved.—Thomas v. Dansby, 74 Mich. 398.

¶ 532. The intoxication of a person who is incarcerated in a jail and meets his death two hours after confinement as a result of a fire started by him while intoxicated, and not the failure to take him forthwith to a justice of the peace, is the proximate cause of his death.—Taylor v. Davarn, 191 Mich. 243.

¶ 533. Where a husband has no means of providing for his family except his wages, an injury which cuts these off is an injury to the wife's means of support within the meaning of the Civil Damage Act of 1883.—Thomas v. Dansby, 74 Mich. 398.

§ 77. Defenses.

¶ 534. A saloonkeeper is not authorized to sell liquor for medicinal use any more than for other purposes, and he cannot excuse a sale made to a man known by him to be in the habit of becoming intoxicated by the plea that he relied upon the statement of the purchaser that he wanted the liquor for medicine.—McDonald v. Casey, 84 Mich. 505.

¶ 535. A wife is not precluded from recovering against a saloonkeeper for furnishing liquors to her husband, thereby enabling the latter to continue the habit of drunkenness, which he has already formed, by reason of the addiction of the husband to drink at a time prior to the period involved in the suit.—Johnson v. Grondin, 170 Mich. 447.

¶ 536. A sale to a minor in violation of Comp. L. 1897, § 5398, cannot be excused in a prosecution under the strictly penal provision of the act by showing a good faith belief that the minor was of age. The fact that the minor stated to the druggist that he was more than 21 years of age affords no defense.—Bailey v. Briggs, 143 Mich. 303.

¶ 537. The question whether the saloonkeeper received pay for the liquor shown to have been furnished in his saloon is immaterial, in an action under the Civil Damage Law (Comp. L. 1897, § 5398), against a saloonkeeper and his bondsmen, and such saloonkeeper would be liable.—Hilliker v. Farr, 149 Mich. 444.

¶ 538. A wife who has encouraged or requested sales of liquor to her husband cannot claim for herself damages for injuries sustained by defendant's furnishing liquor to him.—Rosecrants v. Shoemaker, 60 Mich. 4.

¶ 539. A written order to let her husband have liquor, given by a woman to a liquor seller will not prevent her recovering under the Civil Damage Act of 1883, where such order was procured from her by the husband by threatening to leave her and by refusing to let her have money, which facts were known to the defendant.—Thomas v. Dansby, 74 Mich. 398.

¶ 540. The fact that a wife has authorized the sale of liquor to her husband will not prevent her recovering damages resulting from injuries received by the husband at the hands of an intoxicated person to whom the dealer receiving such permission has furnished liquors.—Thomas v. Dansby, 74 Mich. 398.

¶ 541. In an action to recover damages for the sale of liquor to her husband evidence that plaintiff on one occasion drank beer at home with her husband does not deprive her of the right to recover, though there are doubtless cases where the wife's consent or participation in the purchase and use of liquor may preclude recovery or lessen damages.—Radley v. Seider, 99 Mich. 431.

¶ 542. A wife suing solely in her own behalf cannot recover damages for injuries sustained by defendant's having furnished her husband liquor if she herself encouraged or requested sales to her husband.—Rosecrants v. Shoemaker, 60 Mich. 4.

¶ 543. In an action under the Civil Damage Act (Comp. L. 1897, § 5398) against a druggist for selling intoxicating liquor to plaintiff's son, a minor, it is no defense that the sale was made on an order purporting to be signed by the plaintiff, but which was in fact a forgery; the false order is but a false statement of the boy reduced to writing.—Bailey v. Briggs, 143 Mich. 303.

¶ 544. One who sells liquor to an emancipated minor, or who sells to a minor with consent of the latter's father, is nevertheless liable under Laws 1883, Act No. 191, § 16, giving to any one injured by an intoxicated person a right of action against the person who sold the liquor to such person.—Flower v. Witkovsky, 69 Mich. 371.

¶ 545. A husband's contributory negligence does not affect his wife's right to recover under the statute (Laws 1887, Act No. 313) damages for being thrown,—by reason of negligence of intoxicated persons to whom defendant sold liquor,—from a carriage in which she was riding with her husband.—Wright v. Treat, 83 Mich. 110.

¶ 546. In an action under Comp. L. 1897, § 5398, How. 2nd Ed., § 5074, against a saloonkeeper for injuries caused by intoxication, where the plaintiff's eye was put out by a blow from an intoxicated man, it was held no defense that plaintiff himself was intoxicated.—Heikkala v. Isaacson, 178 Mich. 176.

¶ 547. In a suit for damages, under section 5398, Comp. L. 1897, for the death of plaintiff's husband from drowning, caused by intoxication induced by the sale of liquors to him by defendant saloonkeeper, the plaintiff is not deprived of her remedy by the fact that the husband at the time he met his death was fishing in a river in violation of law.—Weatherbee v. Byam, 160 Mich. 600.

§ 78. Who may sue.

Separateness of wife's and children's causes of action, see also ante § 75.

¶ 548. Laws 1881, Act No. 259, § 2 (How. St., § 2271) as amended by Laws 1883, Act No. 191, § 16, providing that "every wife, child, parent, guardian, husband or other person" who may be injured thereby shall

have a right of action against persons selling intoxicating liquor, does not limit the right of action to persons holding the special relationship mentioned, but covers all persons injured by the intoxication.—Flower v. Witkovsky, 69 Mich. 371.

¶ 549. The daughter of one who dies from the excessive use of liquor has no cause of action under Comp. L. 1897, § 5398, providing that plaintiff has a cause of action when she has been "injured in person or property or means of support, or otherwise," against a saloonkeeper, who furnished liquors to decedent which did not contribute to the intoxication which caused his death, nor to any damage sustained by her.—Johnson v. Johnson, 145 Mich. 586.

¶ 550. Where an adult, in company with a minor, frequents saloons, and they each buy liquor for themselves and for each other and become drunk, and they take an automobile belonging to a third person, and the adult is injured while the car is being driven by the minor, he cannot recover in an action under the civil damage statute, Comp. L. 1897, How. St., 2nd Ed., § 5074, against the saloonkeeper furnishing the liquor, as he is not an "other person" such as is contemplated by the statute, he being guilty himself of furnishing liquor to an intoxicated minor.—Morton v. Roth, 189 Mich. 198.

¶ 551. Laws 1877, Act No. 193, giving "every wife, child, parent, guardian, husband or other person" a right of action against a liquor seller for injury done the plaintiff by reason of the intoxication of any person, does not give the intoxicated person himself a right of action against the dealer for money stolen from him while drunk.—Brooks v. Cook, 44 Mich. 617.

¶ 552. Under Laws 1851, Act No. 178, a married woman could sue in her own name for breach of the bond provided for in the statute, conditioned to pay all damages sustained by reason of the obligor's traffic in intoxicating liquors.—Langley v. Ergensinger, 3 Mich. 314.

§ 79. Persons liable or responsible.

¶ 553. A liquor dealer is liable under the Civil Damage Law for sales made by his employees within the scope of their authority. —Kehrig v. Peters, 41 Mich. 475.

¶ 553a. A dealer in intoxicating drinks is responsible, under Laws 1871, Act No. 196, for the acts of his servants in that business, even though in a particular transaction they disobey his instructions.—Kreiter v. Nichols, 28 Mich. 496.

¶ 554. Where injuries were sustained in consequence of the sale of liquor by defendant's bartender to plaintiff's intoxicated husband in defendant's saloon on Sunday, it was no defense that defendant had instructed his bartender not to open the saloon on the day in question.—Gullickson v. Gjorud, 82 Mich. 503.

¶ 555. In an action by a widow under Comp. L. 1897, § 5398, against a saloonkeeper for injury due to the intoxication of her husband, the defendant is liable for drinks sold by an agent not a regular attendant at the bar, although defendant had instructed his regular barkeeper not to sell to the husband.—Dice v. Sherberneau, 152 Mich. 601.

¶ 556. Laws of 1887, Act No. 313, § 24 (How. St. § 2283e7), making persons engaged in liquor selling, whether as owner or as clerk, agent, servant, or employee, equally liable as principal for any violation of the provisions of the Act, and making any principal liable for the acts of his clerks, agents, servants, or employees amounting to such violation, was intended to enlarge the liability of proprietors of saloons so as to extend to it the acts of those mentioned in civil but not in criminal actions.—People v. Hughes, 86 Mich. 180.

¶ 557. Any one who justifiably possesses intoxicating drink which another appropriates without his consent may demand payment for it without being either legally or morally responsible for the injuries resulting from its use by the trespasser. The trespass being against his will, the wrong to him cannot be converted into a public wrong and a breach of the Civil Damage Law by his compelling the trespasser to make such redress as the law may compel if appealed to.—Kreiter v. Nichols, 128 Mich. 496.

§ 80. Liabilities of sureties.

Construction and obligation of bond and time when same takes effect, see ante § 15.
Necessity and purpose and sufficiency of bonds, see ante §§ 10, 11.
Joinder with principal in one action, see post § 82.

¶ 558. In an action under the Civil Damage Act (section 5398, Comp. L. 1897), against the surety on a liquor dealer's bond, recovery may be had for damages sustained by wrongful sales of intoxicating liquors during the period covered by defendant's bond, although the injury to which such sales contributed occurred after the termination of the suretyship.—Scahill v. Aetna Indemnity Co., 157 Mich. 310.

¶ 559. Under section 5398, Comp. L. 1897, making the principal and surety on a liquor dealer's bond jointly and severally liable for wrongful sale of intoxicating liquors, such liability is enforceable against the surety alone.—Scahill v. Aetna Indemnity Co., 157 Mich. 310.

¶ 560. Under Comp. L. 1897, § 5398, giving a right of action to a wife injured in person, property, or means of support by reason of

the sale of intoxicants to any person, a local dealer and the sureties on his bonds for successive years, are responsible in damages to a wife for the total disability of her husband brought about by unlawful sales by such dealer during those years, and the liability of such sureties is not restricted to the damages occurring during the periods of their respective suretyships.—Merrinane v. Miller, 157 Mich. 279.

¶ 561. A saloonkeeper's bondsmen are liable for an unlawful sale of liquor in a saloon by a person ostensibly the purchaser of such saloon, but in reality the bona fide agent of the owner thereof, where the sale of such business to the agent was a mere pretense to relieve the owner's bondsmen from responsibility.—Hilliker v. Farr, 149 Mich. 444.

¶ 562. A saloonkeeper's bondsmen are not liable under the Civil Damage Act for unlawful sales made by a person to whom such saloonkeeper sold his saloon and to whom he gave a power of attorney authorizing him to conduct the saloon business as the seller's agent, where such authority is a mere pretense to enable the buyer to carry on the business unlawfully under the seller's license.—Hilliker v. Farr, 149 Mich. 444.

¶ 563. Upon a liquor bond executed under How. St. § 2278, a wife injured by a sale contrary to its conditions has an immediate right of action against the principal and his sureties jointly without first obtaining judgment against the principal; since the condition of the bond is not only to pay any judgment but also to keep all the covenants of the bond.—Anthony v. Krey, 70 Mich. 629.

¶ 564. The right to recover damages for breach of a liquor dealer's bond is not made dependent upon the fact that the dealer is legally engaged in the business.—Brockway v. Petted, 79 Mich. 620.

¶ 565. The sureties on a liquor dealer's bond are estopped to deny its recital that their principal was carrying on the business at the time it was executed.—Brockway v. Petted, 79 Mich. 620.

¶ 566. Where a liquor dealer gives a bond differing from that prescribed by Comp. L. 1897, § 5386, but intended by him to be the bond required by statute, and by reason of the bond is permitted to carry on his saloon business, he and the sureties are estopped to question the bond in a suit by a wife for an injury under the Civil Damage Act.—Kirkpatrick v. Phillips, 162 Mich. 251.

¶ 567. In a suit against the sureties upon a liquor dealer's bond to recover the amount of a judgment for damages recovered against the principal, the sureties cannot retry the original suit upon the merits.—People for use of Clinton v. Laning, 73 Mich. 284.

§ 81. Form of action.

Joinder of principal and sureties, see post § 82.
Pleadings, see post § 83.
Impropriety of joinder of action in assumpsit for recovery of money paid with action for damages, see Pleading, II.
General trial practice, see Trial.

¶ 568. As the statute prohibiting sales of liquor to husbands, children, etc., in certain cases provides no form of remedy, a common-law declaration by the person injured is good.—Friend v. Dunks, 37 Mich. 25; Kehrig v. Peters, 41 Mich. 475.

¶ 569. Case is the proper action for damages from unlawful sales of liquor to plaintiff's husband, etc.—Friend v. Dunks, 37 Mich. 25; Friend v. Dunks, 39 Mich. 733.

¶ 570. Assumpsit, not case, is the proper form of action under the statute to recover back moneys paid to defendant for intoxicating liquors; while case is the proper action for recovery of damages resulting from the sale of such liquors by defendant.—Friend v. Dunks, 37 Mich. 25; Friend v. Dunks, 39 Mich. 733; and see Schafer v. Boyce, 41 Mich. 256.

§ 82. Joining sureties and principal in single action.

Action against surety alone, see also ante § 80.
Right of principal to intervene in action against sureties alone, see Parties.

¶ 571. Under How. St. § 2283e3, giving to one injured by reason of the intoxication of another a right of action against any person or persons who by furnishing any liquors shall have contributed to the injury, and further providing that the principal and sureties to the bond mentioned in the act shall be liable severally and jointly with the person or persons so furnishing any such liquors, the principals and sureties upon the bonds of several liquor dealers may be joined in a single action.—Franklin v. Frey, 106 Mich. 76.

§ 83. Pleading.

Issues under the pleadings and variances therefrom, see post § 84.
General law of pleading, see Pleading.
Pleading damages, see Damages § 272.
Sufficiency of allegation that selling was cause of death, see Death by Wrongful Act § 14.

¶ 572. A common-law declaration is good under the Civil Damage Law.—Kehrig v. Peters, 41 Mich. 475.

¶ 573. A declaration by a wife for injuries sustained by defendant's selling liquor to her husband whereby he became a habitual drunkard (Pub. Acts 1887, No. 313), may

allege the cause of action as continuing.—Wood v. Lentz, 116 Mich. 275.

¶ 574. A declaration in an action under the liquor law (Laws 1887, Act No. 313), should allege that the person to whom the liquor was sold was intoxicated at the time or was known to be in the habit of getting intoxicated, and may be demurred to for failure to so allege, but where no demurrer was interposed and the objection was not raised until all the evidence had been submitted, the declaration may be treated as having been amended and in support of the verdict and judgment, where there was in fact evidence to sustain such facts as were omitted from the declaration.—Wright v. Treat, 83 Mich. 110.

¶ 575. In an action by a wife under Laws 1887, Act No. 313, where sale to a person intoxicated is counted on, vendor's knowledge of the intoxication is presumed from the circumstances of the case, and need not be alleged.—Fletcher v. Forler, 83 Mich. 52.

¶ 576. Declaration in an action against a liquor dealer and his bondsmen for illegal sales to a married man, held sufficient.—Schnell v. Michigan Bonding & Surety Co., 183 Mich. 340.

¶ 577. Allegations that illegal sales of liquor from and after a certain day, to and after the time the plaintiff's husband had become a habitual drunkard, are too indefinite and uncertain to sustain an action under the Civil Damage Act.—Schnell v. Michigan Bonding & Surety Co., 183 Mich. 340.

¶ 578. Where, in a suit against a saloonkeeper for unlawfully selling liquor to plaintiff's husband, it is alleged that defendant duly executed the statutory bonds in compliance with the law, that the surety company became surety, and that the same were duly approved by the township board and filed with the county treasurer, the declaration is sufficient, in the absence of a demurrer, although it does not allege that defendant paid the tax and received the receipt from the county treasurer and posted up the notice required by the statute.—Johnson v. Grondin, 170 Mich. 447.

¶ 579. Where a declaration, in a suit against a saloonkeeper for unlawfully selling intoxicating liquors to plaintiff's husband, alleges that the husband was in the habit of becoming intoxicated, that defendant was advised thereof and notified to cease from furnishing liquor to him, and defendant continued to sell him liquor in large quantities, that he spent a large portion of his salary in defendant's saloon for liquors, thereby depriving plaintiff of her usual means of support, and that the husband became drunk and intoxicated therefrom and mistreated plaintiff, and where it appears that the bonds given by defendant were in statutory form, the declaration sufficiently alleges a breach of the bonds.—Johnson v. Grondin, 170 Mich. 447.

¶ 580. Claimant sued defendant saloonkeeper for the death of her brothers, alleged to be due to intoxication induced by liquor sold to them by defendant. Claimant alleged in her declaration that her brothers had agreed to support her during her natural life. Defendant filed no demurrer, and examined the claimant extensively on this point at the trial. Held, the contract counted on was not bad for uncertainty.—In re Miller's Estate, 160 Mich. 309; In re Claim of Bennett, Id.

¶ 581. Allegations in a declaration in an action for unlawful sales of liquor to the plaintiff's husband, of sales to a person while intoxicated, to a person in the habit of becoming intoxicated, and sales making that person a habitual drunkard, when referring to the same person, do not render the declaration double, where such sales are alleged to have contributed to making that individual a common drunkard.—Schnell v. Michigan Bonding & Surety Co., 183 Mich. 340.

§ 84. Issues, proof and variance.

General rules as to issues and variance, see Pleading, IX, X.

¶ 582. Comp. L. 1897, § 5398, allows damages in favor of any person injured in means of support by an intoxicated person, against any one selling liquor so as to contribute to such intoxication. In an action by a widow against a saloonkeeper, where the intoxicated husband committed suicide, it is not necessary to show that the intoxication was the cause of the suicide.—Dice v. Sherberneau, 152 Mich. 601.

¶ 583. In an action under the Civil Damage Act to recover for the death of plaintiff's husband by reason of intoxication to which defendant contributed, it is not material and need not be shown that defendant knew that deceased was in the habit of becoming intoxicated.—McMahon v. Dumas, 96 Mich. 467.

¶ 584. Where the evidence shows that the husband is, and was during the period in which such sales were made, a habitual drunkard, it is unnecessary to show that defendant had knowledge of that fact.—Radley v. Selder, 99 Mich. 431.

¶ 585. Claimant sued defendant saloonkeeper for damages under the Civil Damage Statute for the death of her brothers, due to intoxication induced by the sale of liquor to them by defendant. Held, that under this statute it was not necessary to prove that the defendant knew that the brothers were in the habit of getting intoxicated.—In re Miller's Estate, 160 Mich. 309; In re Claim of Bennett, Id.

¶ 586. In a suit for damages under the Civil Damage Act for the sale of intoxicating liquor to plaintiff's son, it is not necessary to prove that defendant sold the liquor to the son, but only that he furnished it to him. —Liebler v. Carrel, 155 Mich. 196.

¶ 587. In an action for injuries caused by one intoxicated by liquor sold to him by defendant, the averment in the declaration that a particular kind of liquor was sold does not confine the proof to that kind of intoxicant. —Flower v. Witkovski, 69 Mich. 371.

¶ 588. Where, in a suit against a saloonkeeper for unlawfully selling liquor to plaintiff's husband, the declaration charges not only the sale of liquor after the serving of the notice, but also at days and hours prohibited by law, it is proper to admit testimony showing the sale of liquors by defendant after the hours of closing prescribed by law. —Johnson v. Grondin, 170 Mich. 447.

§ 85. Presumptions and burden of proof.

¶ 589. Sale of intoxicating liquors in a tavern will not be presumed where by law there might be a license to keep tavern without authority to sell such liquors.—Savier v. Chipman, 1 Mich. 116.

¶ 590. In an action under the Civil Damage Act to recover damages for selling liquor to plaintiff's minor son, testimony that plaintiff's husband rented a building for saloon purposes, and was surety upon a liquor dealer's bond, is immaterial, especially in the absence of proof that plaintiff assented to these dealings or was in sympathy with the business of selling intoxicating liquors; and it will not be presumed that plaintiff is insensible to the effects of liquor upon her children because her husband supports the business of selling liquors.—Liebler v. Carrel, 155 Mich. 196.

§ 86. Admissibility of evidence.

Habits of person made drunk as evidence, see post § 87.
Other sales or intoxications as evidence, see post § 88.
General law of evidence, see Evidence.
Evidence admissible on damages, see Damages, XI.
Evidence as to damages and dependents in action for death, see Death by Wrongful Act §§ 20-26.
Conviction for drunkenness as evidence in civil suit, see Former Adjudication ¶ 68.
Offers and introduction of proofs and order of proofs, see Trial, V.

¶ 591. Where, in a suit by a wife to recover damages for injuries sustained by reason of the sale of liquor to her husband, it appears that defendant sold out his saloon business at a certain date, and that the saloon was thereafter occupied by the vendee, it is error to permit the plaintiff to show the intoxication of her husband after that date, and that he frequented said saloon, unless it is further shown that defendant contributed to such intoxication by selling or furnishing him liquor.—Peacock v. Oaks, 85 Mich. 578.

¶ 592. In an action under the Civil Damage Act, where the ostensible saloonkeeper was claimed to have been a purchaser of the saloon from a former keeper, whose bondsmen were also made defendants, and where it is claimed on the other side that he was a mere agent holding a power of attorney from the former one, which would have made the bondsmen liable, it is admissible to show whether the transaction was in fact a sale or an agency.—Hilliker v. Farr, 149 Mich. 444.

¶ 593. In a suit for civil damages under Act No. 313, Pub. Acts 1887, for the death of plaintiff's deceased from intoxication induced by liquors sold by defendant saloonkeepers, evidence is admissible to show the deceased was intoxicated on the day of his death.—Sisson v. Lampert, 159 Mich. 509.

¶ 594. Claimant sued defendant saloonkeeper for damages arising from the death of claimant's brothers, who were killed by a railroad train shortly after an alleged intoxication induced by the alleged sale of liquor to them by defendant. Defendant admitted the death, but denied the intoxication. Held, claimant might introduce evidence of the mutilated condition of the bodies after the accident, the presence of whisky bottles, and the odor of liquor, and other circumstances tending to show intoxication. —In re Miller's Estate, 160 Mich. 309; In re Claim of Bennett, Id.

¶ 595. In an action against a saloonkeeper and his surety for an assault on a minor daughter by her father while intoxicated, the defendant may show that on the morning of the alleged assault the father did not have money with which to purchase liquor.—Yonkus v. McKay, 186 Mich. 203.

¶ 596. The notice served by a wife upon a dealer forbidding him to sell liquors to her husband need not be in writing, and, even if written, may be proved by parol.—Loranger v. Jardine, 56 Mich. 518.

¶ 597. As bearing upon defendant's wilful disregard of plaintiff's rights, and as justifying exemplary damages, evidence that plaintiff had requested defendant not to sell liquor to her husband is admissible, although at the time of the request defendant had no license to sell.—Larzelere v. Kirchgessner, 73 Mich. 276.

¶ 598. In an action under the Civil Damage Act to recover damages against saloonkeeper and his bondsmen brought by a wife for illegal sales of liquor to her husband the fact that the sales were made on prohibited

days or during prohibited hours could be considered by the jury only to enable them to understand the way the defendant was dealing with plaintiff's husband, that is to determine if there was wantonness, recklessness, or carelessness and for no other purpose.—Merrinane v. Miller, 148 Mich. 412.

¶ 599. In an action under the Civil Damage Act against a druggist for unlawfully selling intoxicating liquor to plaintiff's husband, where the defense relied on is that the sales were made in good faith, and for medicinal purposes, it is competent to show as rebutting this defense that defendant kept a refrigerator in the store in which beer was kept, and that he sold beer.—Lockard v. Van Alstyne, 155 Mich. 507.

¶ 600. In a suit for selling liquor to her husband, plaintiff may show the reason for her permission to another saloonkeeper to sell her husband liquor on Saturday nights.—Montross v. Alexander, 152 Mich. 513.

¶ 601. Circumstances which would justify the jury in finding that the conviction of plainfiff's husband for drunkenness was collusive, and that she should not be permitted to recover under the Civil Damage Act against the saloonist for mental suffering incident thereto, do not render evidence of the conviction inadmissible.—Lucker v. Liske, 111 Mich. 683.

¶ 602. If, in an action under the Civil Damage Act against a saloonkeeper for damages for furnishing intoxicating liquors to plaintiff's son, defendant wishes to rely on the defense that the whole animus of the plaintiff's case is to injure defendant's business, and thereby benefit that of plaintiff's husband, who owned a saloon near by, he should in some way connect plaintiff with the matter, and testimony to the effect that there had been trouble about granting a license to the saloon owned by plaintiff's husband is not relevant, especially where no evidence is offered to show that defendant was in any way responsible for the trouble over obtaining the license.—Liebler v. Carrel, 155 Mich. 196.

¶ 603. In an action against a druggist and his bondsmen for the unlawful sale of liquor to plaintiff's husband as a result of which he was killed it was prejudicial as against the bondsmen to permit a witness to testify that there was great excitement over the shooting in which the husband had been killed, and that the druggist who had sold the liquor was greatly condemned by the whole community, and he was criticized for selling liquor illegally.—Martin v. Fisher, 143 Mich. 462.

¶ 604. In a suit by a wife to recover damages to her means of support by the sale of intoxicating liquors to her husband, testimony as to the number of his or her children is inadmissible.—Larzelere v. Kirchgessner, 73 Mich. 276; Johnson v. Schultz, 74 Mich. 75; Montross v. Alexander, 152 Mich. 513.

¶ 605. In a suit against a saloonkeeper for unlawfully selling liquor to plaintiff's husband, it is not error to permit reference in the testimony to a twelve-year-old child of plaintiff for the purpose of showing what the child had to do in conjunction with the plaintiff in serving notice upon defendant to desist from selling liquors to the husband, the purpose of the evidence being solely to prove the facts of the service by showing that the boy was present and witnessed the same.—Johnson v. Grondin, 170 Mich. 447.

¶ 606. In an action for damages from the sale of liquor, it is inadmissible to show the amount of money spent at defendant's saloon.—Friend v. Dunks, 39 Mich. 733.

¶ 607. Plaintiff in an action for selling intoxicating liquor to her son may show her situation and condition, her dependence on him, the amount earned and possessed by him before he became addicted to the use of liquor, his failure to obtain employment afterwards, if traceable to his drinking habit, and that he has been seen upon the street in a state of intoxication during the time defendant is claimed to have sold him liquor.—Weiser v. Welch, 112 Mich. 134.

¶ 608. Proof that the husband of a mother suing under the Civil Damage Law for the death of her son paid the doctor's bills and funeral expenses of decedent occasioned by his injury, was inadmissible, since it had no bearing on any issue in the case.—Hilliker v. Farr, 149 Mich. 444.

¶ 609. In a suit by a wife against a liquor dealer for selling liquor to her husband, evidence that plaintiff had recently sold a lot formerly purchased to build a home on, is of doubtful materiality.—Montross v. Alexander, 152 Mich. 513.

¶ 610. Where action is brought for damages for alleged illegal sales of intoxicating liquor to plaintiff's husband, it is error to admit testimony as to sales of property by the husband to support his family after he was injured while intoxicated.—Spencer v. Johnson, 176 Mich. 278.

¶ 611. In a suit against a saloonkeeper for unlawfully selling liquors to plaintiff's husband, plaintiff's twelve-year-old boy was permitted to testify as to the preparation and service of the notice to the saloonkeeper; was allowed to state he was the son of the plaintiff and to recite the circumstances surrounding the serving of the notice; and to testify to acts which he witnessed on the part of his father in pursuing his mother when the father was intoxicated. The trial court in his charge referred to the fact that, in the presence of the boy, the husband, when intoxicated, had called her vile names.

Held, no error was committed in showing the relationship of the boy to the plaintiff.—Johnson v. Grondin, 170 Mich. 447.

¶ 612. The husband's previous pecuniary condition may be proved only as tending to show damage.—Friend v. Dunks, 37 Mich. 25.

¶ 613. In an action by a wife to recover moneys paid by her husband to defendant for intoxicating liquors, it is held not error for the plaintiff to ask the husband, who, as a witness for her, has testified to having spent money in the defendant's saloon and in other saloons, "what was your practice in visiting defendant's saloon and other saloons, —what proportion?" the object being to find what proportion of the money he had sworn to having expended for liquor had been paid to the defendant.—Hemmens v. Bentley, 32 Mich. 89.

¶ 614. In a suit against a liquor dealer for selling liquor to her husband, it is proper to show that the plaintiff suffered a stroke of paralysis, and to admit the testimony of experts as to its connection with her troubles.—Montross v. Alexander, 152 Mich. 513.

§ 87. ——Habits of person made drunk or of his family.

¶ 615. In a wife's suit for damages to her means of support, occasioned by the killing of her husband by a person intoxicated with liquor obtained from defendant, evidence that such person was in the habit of getting intoxicated is admissible for the purpose of showing that the sale of the liquor was unlawful.—Doty v. Postal, 87 Mich. 143.

¶ 616. Evidence is admissible in an action under the Civil Damage Law that before the origin of the suit the drunkard had promised to let liquor alone, as it would tend to show his habits at the time.—Friend v. Dunks, 39 Mich. 733.

¶ 617. In a wife's action for injuries to herself from sales to her husband, no facts antecedent to the unlawful acts complained of should, as a rule, be allowed, except to show the husband's habits and circumstances. —Friend v. Dunks, 37 Mich. 25.

¶ 618. In an action against a saloonkeeper and the sureties on his bond for damages by the sale of intoxicating liquor to plaintiff's husband, whereby he became a habitual drunkard, it was not error to permit plaintiff to prove frequent intoxications of her husband, without proving that they were occasioned by liquor sold by defendant.—Bowden v. Voorheis, 135 Mich. 648.

¶ 619. In an action by a widow against a liquor seller for damages resulting from the death of her husband caused by an intoxicated person, evidence of the husband's habits as a drinking man is admissible as bearing on the question of damages; and evidence that the husband was quiet when sober and quarrelsome when drunk is admissible as bearing on the question of his intoxication at the time of the injury, and whether his intoxication contributed to the injury; but the husband's statements on the night of the injury as to how it was received are inadmissible.—Brockway v. Patterson, 72 Mich. 122.

¶ 620. In a suit against a saloonkeeper by a wife for unlawfully selling liquors to her husband, it is error to exclude the testimony of the wife as to the conduct of her husband when intoxicated from the effects of liquor unlawfully sold to him by defendant.—Fleming v. Gemein, 168 Mich. 541.

¶ 621. In an action to recover damages under the Civil Damage Act, for furnishing intoxicating liquors to plaintiff's minor son, it is competent for defendant to show that the minor was in the habit of becoming intoxicated prior to the time when it is claimed he furnished him liquor, and under the circumstances such evidence would tend to mitigate damages.—Liebler v. Carrel, 155 Mich. 196.

¶ 622. In an action under the Civil Damage Act, against a druggist for furnishing liquor to plaintiff's husband, the testimony of his employer to the effect that he (plaintiff's husband) drew money almost every day, and immediately went to defendant's drug store and returned with whisky, which he drank in the shop, and became intoxicated, is admissible as bearing upon the habits of plaintiff's husband, and upon the question whether or not defendant furnished liquor to him, and as rebutting the idea that defendant was selling liquor for medicinal purposes.—Lockard v. Van Alstyne, 155 Mich. 507.

¶ 623. In a suit against defendant saloonkeeper for the death of plaintiff's husband from intoxication due to the sale of liquors to him, it is proper to permit witnesses to testify in detail of previous intoxications of the deceased in order to prove a habit in that respect.—Merrill v. Tinkler, 160 Mich. 575.

¶ 624. In a suit for damages under Act No. 313, Pub. Acts 1887, for the death of plaintiff's husband from intoxication induced by liquor sold by defendant saloonkeepers, evidence is admissible as to the drinking habits of the deceased during the year prior to his death, for the purpose of showing he was in the habit of getting intoxicated, and that the sale was therefor illegal, and for the purpose of proving exemplary damages. —Sisson v. Lampert, 159 Mich. 509.

§ 88. ——Other sales or intoxications.

Habits of sobriety or drunkenness, see also ante § 87.

General rule as to admissibility of other distinct matters, see Evidence, III.

¶ 625. In an action for selling liquor to a minor, testimony that the minor had drunk at other places than at defendant's is incompetent, even though plaintiff has already testified, without objection, that the minor had not drunk elsewhere. It is immaterial whether others than defendant made sales to the minor or not.—Theisen v. Johns, 72 Mich. 285.

¶ 626. It was prejudicial error to allow proof by plaintiff in an action against a saloonkeeper and his bondsmen under the Civil Damage Law for an unlawful sale of liquors, of other unlawful sales to other persons on the day in question.—Hilliker v. Farr, 149 Mich. 444.

¶ 627. Although the general rule is that proof of one offense cannot be admitted for the purpose of proving another, there is an exception in cases where it is necessary to prove a scienter or particular intent; therefore in a suit against a druggist under the Civil Damage Act for unlawfully selling whisky as a beverage to plaintiff's husband, it is competent to prove that defendant made sales of whisky as a beverage to third persons, especially where the theory of the defense is that the sales made to plaintiff's husband were lawful ones for medicinal purposes.—Lockard v. Van Alstyne, 155 Mich. 507.

¶ 628. In an action by a mother against a druggist for the unlawful sale of intoxicating liquor to her minor son, under Comp. L. 1897, § 5398, the habits of the father are immaterial.—Bailey v. Briggs, 143 Mich. 303.

¶ 629. In an action against a saloonkeeper under the Civil Damage Act to recover damages for furnishing intoxicating liquors to plaintiff's minor son, testimony to the effect that plaintiff's husband is a drinking man is irrelevant.—Liebler v. Carrel, 155 Mich. 196.

¶ 630. Evidence that a room in which beer was served was a sitting room, connected with a barroom, and that on other occasions beer had been served there, is competent in an action under the Civil Damage Act to show that the room was a part of the saloon.—Moreland v. Durocher, 121 Mich. 398.

¶ 631. That a minor daughter had been previously assaulted by her father while sober may be shown by the defendant in an action by the daughter against a saloonkeeper and his surety for an assault made on her by her father when intoxicated.—Yonkus v. McKay, 186 Mich. 203.

¶ 637. In an action for damages under the Civil Damage Act for furnishing intoxicating liquor to plaintiff's minor son, where plaintiff proves specific acts of intoxication, and defendant denies having made any sales, it is competent to prove that the intoxication was caused by liquor furnished by another; but neither as a defense to the action, nor for the purpose of dividing with another the liability imposed by the statute, may prior or contemporaneous sales by another be considered.—Liebler v. Carrel, 155 Mich. 196.

¶ 633. In a suit by a wife to recover against the defendant, a saloonkeeper, for unlawfully selling liquor to her husband, the court properly refused to admit evidence to show that the husband attempted through others to get liquor from defendant, and also to admit evidence of statements made to aid such attempts, out of the husband's hearing.—McNetton v. Herb, 158 Mich. 525.

§ 89. Weight and sufficiency of evidence.

Issues necessary to be proved, see also ante § 84.

Sufficiency to make jury question, see post § 90.

¶ 634. A court or jury would not be justified in finding a defendant liable for damages for the consequences of a sale of liquor upon a given day solely, on testimony to the effect that the witness thinks he and the decedent did not go into the defendant's saloon on the day named, or get any liquor there, and that he was mistaken in his contrary statement made before the trial, or on a previous trial.—Bell v. Zelmer, 75 Mich. 66.

¶ 635. Testimony that a man at the bar of a saloon was furnished with a glass containing liquor that to the witness looked like beer, and that he paid for it, and was presently thereafter very drunk, tends to show that intoxicating liquor was sold to him.—Wilson v. Booth, 57 Mich. 249.

¶ 636. Testimony of plaintiff and her daughter to conversations had with defendant in relation to the subject of the sales complained of, from which the jury might justly infer that they were made, and of one of plaintiff's attorneys to a conversation with the defendant, in which he tacitly admitted that he was in the habit of selling liquor to plaintiff's husband, and promised to come in again, with a view to a settlement of the case, coupled with the fact that defendant did not choose to deny the charge by being sworn in his own behalf, is proof of the fact of the sales.—Radley v. Selder, 99 Mich. 431.

¶ 637. Where it appeared that the husband of plaintiff, suing under the Civil Damage Act, was addicted to drink, and was in the habit of getting drunk, that he had to go two miles from where he lived to where defendant's saloon was, that on the evening when he was killed he was in that saloon, part of the time when it was open in violation of law, and had spent the evening and part of the night in saloons, and that between 11 and 12 o'clock he had a glass of

beer and one of cider in defendant's saloon, there was evidence that decedent was intoxicated at the time he drank in defendant's saloon.—McMahon v. Dumas, 96 Mich. 467.

¶ 638. In an action on a liquor bond under the Civil Damage Act, Comp. L. 1897, § 5398, How. 2nd Ed., § 5074, evidence held sufficient to show that deceased was intoxicated at the time he set fire to the jail in which he was incarcerated.—Taylor v. Davarn, 191 Mich. 243.

¶ 639. In an action by a wife under the Civil Damage Act, Comp. L. 1897, § 5398, How. 2nd Ed., § 5074, against a saloonkeeper and his sureties to recover damages for injury to her person, property, and means of support evidence held sufficient to sustain the verdict.—Baker v. Mohl, 191 Mich. 516.

§ 90. Questions for jury and instructions.

General law of instructions and requests, see Instructions.

Effect of instructions to cure error in admission of evidence, see Harmless Error, III, B.

¶ 640. In an action by a wife for damages to her means of support occasioned by the killing of her husband by a person intoxicated, where the evidence was conflicting as to which party was the aggressor in the affray the question must be submitted to the jury.—Doty v. Postal, 87 Mich. 143.

¶ 641. Where in an action to recover for the death of plaintiff's husband resulting from intoxication to which defendant contributed, it appeared that decedent, the next morning after drinking in defendant's saloon, was found dead near the railroad track between the town in which he lived and that in which defendant's saloon was, that he was a habitual drunkard and had to go to defendant's town for liquor customarily walking there and back on the railroad track, and where it was evident that he had been struck by a train, it was for the jury to say whether he was intoxicated when he drank in said saloon, and whether his intoxication caused his death.—McMahon v. Dumas, 96 Mich. 467.

¶ 642. In an action against a druggist and his bondsmen for the lawful sale of liquor to the plaintiff's husband, where the question of the ownership of the drug store is one of the material facts in dispute the question is properly submitted to the jury.—Martin v. Fisher, 143 Mich. 462.

¶ 643. In an action against a saloonkeeper and the sureties on his bond to recover damages caused by the sale of intoxicating liquor to plaintiff's husband, the refusal to direct a verdict for defendant on the ground that the testimony relating to damages was too indefinite and uncertain to justify a verdict for plaintiff, was proper, where it was inferable from plaintiff's testimony that the sale of liquor by defendant contributed to make her husband, who occasionally drank, a drunkard, from which it was inferable that plaintiff suffered shame and social disgrace.—Bowden v. Voorheis, 135 Mich. 648.

¶ 644. Plaintiff was assaulted in defendant's saloon and seriously injured by one Kirk. The evidence showed that Kirk was not acquainted with plaintiff, but walked up behind him stealthily and assaulted him while plaintiff was quarreling with Kirk's brother; and also that Kirk drank whisky in the saloon a short time before the assault. In a suit on defendant's bond for selling to a habitual drunkard, held, the evidence was sufficient to go to the jury.—Shepard v. Platt, 158 Mich. 181.

¶ 645. Defendant's saloon ran north and south and was located on the south side of the street. The bar was on the east side of the room. South of the bar a partition separated off a card room, on the west side of which partition there was an opening some six or eight feet wide. One Whiteman bought two glasses of beer, took them to the card room and gave one to Baessler, the plaintiff's husband. There was evidence that the defendant knew that Baessler was drinking with Whiteman in the card room, and that customers standing in front at the north end of the bar could see Baessler and Whiteman sitting at the table. In a suit for damages for the death of plaintiff's husband from intoxication induced by liquor sold to him by defendant, held, the court did not err in submitting to the jury the question whether defendant could see Baessler in the card room and knew he was supplying him with liquor.—Baessler v. Foster, 159 Mich. 513.

¶ 646. In a suit against a saloonkeeper under the Civil Damage Act for unlawfully selling liquor to plaintiff's husband, there was evidence that the husband sent plaintiff's minor son to defendant's saloon to get a bottle of whisky for him and that the son procured and delivered the whisky to the husband at 11 a. m. The son testified that he thought that the husband at that time took a drink from the bottle. There was evidence that the husband was a habitual drunkard and had been drinking for days. Held, the court properly refused to direct a verdict for defendant on the ground that there was no evidence that the husband drank the liquor furnished by defendant.—Ryerson v. Phelps, 163 Mich. 237.

¶ 647. A plaintiff in three counts of her declaration sought to recover damages for the death of her husband from drowning, caused by intoxication induced by the sale of liquors to him by defendant saloonkeepers. A fourth count did not rely on the death, but simply asked damages for selling liquor to her husband during a period of time when

he was in the habit of becoming intoxicated. The fourth count was supported by sufficient evidence. Held, the court ruled properly in letting the fourth count stand and go to the jury along with the other three counts.—Weatherbee v. Byam, 160 Mich. 600.

¶ 648. In an action by a wife against a liquor seller for injury to her means of support, arising from the imprisonment of her husband upon his conviction of burglary committed while intoxicated, an instruction authorizing a recovery if the jury should find that the husband formed the intent to commit the offense by reason of the intoxication, or that he was so intoxicated at the time as to be incapable of forming any intelligent intent, is sufficiently favorable to plaintiff.—Dennison v. Van Wormer, 107 Mich. 461.

¶ 649. An instruction defining an intoxicated person as one whose manner is unusual or abnormal, whose condition is reflected in his walk or conversation, and whose judgment and common sense are disturbed, or whose will power is temporarily suspended, held unobjectionable.—Lafler v. Fisher, 121 Mich. 60.

¶ 650. In a suit against defendant saloonkeeper for the death of plaintiff's husband from intoxication induced by the sale by defendant of liquors to him, the court instructed that defendant was not liable unless the liquor sold contributed to the intoxication of the deceased. Held, the charge was correct, and no error was committed in refusing a requested instruction implying the same thing.—Merrill v. Tinkler, 160 Mich. 575.

¶ 651. Where plaintiff's husband, while at least partially intoxicated, has been furnished liquor in defendant's saloon and was soon after drowned, an instruction that "if deceased became intoxicated by the liquor sold to his companion in the bottle defendant was not liable" was properly refused.—Gullickson v. Gjorud, 82 Mich. 503.

¶ 652. An instruction, in an action under the Civil Damage Act, brought for the death of a husband against two proprietors of saloons, and their bondsmen, stating that the plaintiff was entitled to a verdict if either of the defendants furnished liquor which caused or contributed to the death of the plaintiff's husband, is not erroneous as authorizing a recovery against all the defendants upon proof of sale by one only, where another portion of the instruction states that the action was brought against two separate dealers and their bondsmen, and that a judgment could not be recovered against all of the defendants, unless both dealers served liquor to the plaintiff's husband which contributed to the intoxication that he labored under when he received his injury.—Moreland v. Durocher, 121 Mich. 398.

¶ 653. In a suit under Comp. L. 1897, § 5398, to recover damages for the illegal sale of liquor to plaintiff's husband, it is error for the trial court to instruct the jury that plaintiff had the right to a sober, industrious husband, to his support, and to the comfort of her home, to the ability and extent of that husband to give her same, where there is no evidence that prior to the illegal sales complained of her husband was sober and industrious and supporting her to the best of his ability.—Pearson v. Schoenburg, 167 Mich. 255.

¶ 654. In an action under the Civil Damage Act, against a druggist for unlawfully selling intoxicating liquor to plaintiff's husband, an instruction which sets out the different purposes for which a druggist may lawfully sell liquor, and then charges that if he sells for any other purpose he does so at his peril, is proper.—Lockard v. Van Alstyne, 155 Mich. 507.

¶ 655. On the trial of a suit brought by a wife against a saloonkeeper to recover damages occasioned by reason of the sale of liquor to her husband, the plaintiff denied that she ever consented to such sales during the time covered by her declaration, and defendant denied that plaintiff ever forbade his selling liquor to her husband, as testified by her, and further testified that plaintiff told defendant several times to let her husband have liquor after defendant had refused so to do. Held, that the court was warranted in instructing the jury that the consent of the wife which would justify unlawful sales must cover the sales for which the action was brought.—McDonald v. Casey, 84 Mich. 505.

¶ 656. In an action by a wife against saloonkeepers under the Civil Damage Act, Pub. Acts 1887, No. 313, § 20, How. 2nd Ed., § 5074, to recover for the death of her husband alleged to be due to his falling in a hot pond while intoxicated by liquor purchased from defendants, held that the charge, when considered as a whole, was not misleading as permitting a recovery although deceased was not intoxicated when he fell into the hot pond.—Holtquist v. O'Connell, 196 Mich. 484.

¶ 657. The method of the court in dividing its instruction, held not erroneous in an action against a saloonkeeper and his surety by a child to recover for an assault committed on her by her father while intoxicated.—Yonkus v. McKay, 186 Mich. 203.

§ 91. Damages, verdict and judgment.

Elements, measure, pleading and proof of damages, see Damages.
Pain, suffering, worry, and humiliation as elements of damage, see Damages § 27.
Loss of earnings and expenses incurred as damages, see Damages § 45.
Sales by others as affecting measure of damages, see Damages § 162.

Measure of damages for sale where death results, see Death by Wrongful Act § 33 et seq.
Dependency of mother on adult son as supporting recovery for his death, see also Death by Wrongful Act § 11.
General law of verdicts and findings, see Verdicts and Findings.
General law of judgments, see Judgments.
Effect of judgment as estoppel, see Former Adjudication.
Right to costs as depending on amount recovered, see Costs § 17.

VIII. DRUNKENNESS AS AN OFFENSE OR INCAPACITY.

§ 92. In general.
Capacity and liability of drunkards in matters of contract and property, see Incompetents § 2.
Habits of drunkenness as affecting testamentary capacity, see Wills, II.
Habitual drunkenness as cause for divorce, see Divorce § 14.
Drunkenness as defense of incapacitation for crime, see Crimes §§ 14, 16.
Instructions on intoxication as affecting criminality of act, see Indictment § 409.
Nature and equality of crime committed by drunken person, see Crimes; Assault; Homicide; Rape.
Evidence of character for sobriety and temperance, see Evidence § 352.
Employment of drunken servant as negligence, see Master and Servant, III, IV.
Ground for discharge of servant, see Master and Servant, II.
Statute defining offense of drunkenness, see Comp. L. 1915, § 15530 et seq.

¶ 658. A person may be convicted of being drunk on the public street under Comp. L. 1897, § 11736, where the evidence showed that he was arrested before complaint was made upon private property, and that previous thereto he had become drunk at a saloon on a named street and had passed that street in going to the place where he was arrested.—People v. Camp, 142 Mich. 219.

¶ 659. Under Comp. L. 1897, § 11736, a respondent is properly convicted of drunkenness where the evidence shows that the officer saw him in a drunken condition in a public street and pursued upon a private lot to arrest him.—People v. Lowerie, 163 Mich. 514.

¶ 660. In a prosecution for being drunk on the public street under Comp. L. 1897, § 11736, the defense being that he was on private property, where the testimony justified the jury in finding defendant guilty of being drunk upon the street named, the fact that he was also drunk on adjacent private property where he was afterward arrested is not inconsistent with their conclusion.—People v. Camp, 142 Mich. 219.

¶ 661. In a prosecution for being a disorderly person in that he was a drunkard, it is proper to instruct that the respondent is guilty if intoxication became a habit.—People v. Radley, 127 Mich. 627.

¶ 662. In a prosecution for being a disorderly person in that he was a drunkard, it is not error to refuse to instruct that to constitute a drunkard the habit must be so firmly fixed that the person becomes intoxicated as often as the temptation arises.—People v. Radley, 127 Mich. 627.

¶ 663. Under Comp. L. 1897, § 5923, punishing disorderly conduct, a complaint charging that the respondent was a drunkard without defining the word drunkard, follows the statute and is sufficient; the word drunkard being sufficient to apprise the respondent of his offense.—People v. Radley, 127 Mich. 627.

¶ 664. In a prosecution for being drunk on a public street, the court instructed the jury that drunkenness indicates such condition of a person as is induced from the excessive use of intoxicating liquors, and that the jury should use their common knowledge in determining the fact of drunkenness. Respondent did not ask for a more specific instruction on the point. Held, the charge was sufficient.—People v. Lowerie, 163 Mich. 514.

INTOXICATION to JOINDER; JOINT.

Cross-References.

Intoxication—
As public offense, see Intoxicating Liquors, VIII.
As condition affecting insurance on life or against accident, see Fraternal Associations; Insurance.
As incapacitating fact or condition, see Incompetents § 2.
As factor in negligence of contributory negligence, see Negligence; and see specific topics, such as Carriers § 151; Highways §§ 217, 247 et seq.
Habitual drunkenness as ground for divorce, see Divorce § 14.
Intrusion—
On lands as wrong, see Trespass; Ejectment; Forcible Entry.
Remedy for intrusion into office, see Officers, III; Quo Warranto; Injunctions, II.
Intruding on jury, see Indictment § 459; Trial, VIII.
Inurement of Title by Estoppel—
See Estoppel §§ 18-22.
Invalid; Invalidity—
See generally the topic treating of that which is questioned for validity. It is not feasible to make a complete collation of references under the terms above, since they are mere qualitative words carrying no legal significance apart from the qualified words.

Inveiglement—
As defense to crime, see Crimes § 17.
Into jurisdiction to serve process, see Process, II; Judgment, VII.
Inventions—
See Patents.
Inventories—
Of estate and property of decedent, see Estates of Decedents, V, C.
Under attachment levy, see Attachment, VI, B.
Under execution, see Executions § 47 et seq.
Use of inventory as memorandum to refresh memory, see Examination of Witnesses § 21.
Inverse Order—
Rule for marshalling assets and securities, see Marshalling Assets.
Order for sale of parcels of land alienated by debtor, see Executions § 64 et seq.; Foreclosure §§ 37, 116 et seq.
Order of right to redeem from sale, see Executions § 82 et seq.; Foreclosure § 183 et seq.
Order for application of payments and credits, see Payment, III.
Investments—
Duties of trustees, see Trusts, VI, C; Estates of Decedents, V, E.
Testamentary provisions as to investments, see Wills, VI, F.
Invited Error—
See Harmless Error § 10; Indictment § 537.
Invited Licensees—
See Licenses to Enter; Negligence; Buildings § 4 et seq.; Railroads, VIII, B.
Inviting Bids and Offers—
See Contracts, III; Public Contracts, II.
Involuntary Discontinuance—
See Discontinuance, III.
Involuntary Sales—
See Executions; Judicial Sales; Foreclosure; Partition; Estates of Decedents, VII.
Irrationality—
See Insane Persons, I.
Admissible opinions as to rationality, see Evidence, VI; Indictment, VIII, B, 4, 5.
Irregularities—
See specific topics treating of that which is questioned for regularity, e. g., Judgments, VIII; Executions, VII, F; Foreclosure, V; Estates of Decedents § 248; Taxes.
Errors regarded as harmless or cured, see Harmless Error; Indictment, XV.
In title as affecting marketability, see Vendors and Purchasers, III.
Irrelevancy—
See Evidence, III; Indictment, VIII, B.
Objections for, see Trial, V, C; Indictment, IX, B.
Irreparable Injury—
As ground for injunction, see Injunctions, I.
Irresponsibility—
Of person as ground for rejection or removal as personal representative or trustee, see Estates of Decedents §§ 18 et seq., 40; Receivers, II, A; Trusts, V.
Mental irresponsibility, see Insane Persons.
Irresponsiveness—
Of answers to questions, see Examination of Witnesses § 33.
Ground for striking out, see Trial, V, C; Indictment § 366.
Of judgment to issues and findings, see Judgments, II, B.
Of sentence to accusation and trial, see Indictment § 490.
Irrevocable Licenses—
See Licenses to Enter.
Isolated Facts—
Instructing on single facts instead of whole case, see Instructions, V, C; Indictment, IX, C, §§ 442, 443.
Issuance of Process, Warrants and Writs—
See Attachment § 42; Certiorari § 30; Appeal § 71; Executions § 9; Process, I; Mandamus, V; Civil Arrest; Arrest; Searches and Seizures.
Issuance of Stocks and Bonds—
See Corporations §§ 81, 265 et seq.; Municipal Bonds, II.
Issue—
As word of limitation or description in deeds or wills, see Wills, VI; Deeds, III.
Issues—
In pleadings, see Pleading, IX.
Under indictment or information, see Indictment, I, E.
In particular actions and proceedings, see also specific topics treating of such actions, e. g., Ejectment § 36; Conversion § 26 et seq.; Libel, VII.
Items and Particulars—
In accounts, see Accounts Stated; Accounting Suits; Estates of Decedents § 342; Pleading, V.
Itinerant Vendors—
Interstate regulations, see Commerce §§ 7-10.
Jail Liberties—
See Civil Arrest § 54.
Jails—
See Prisons and Jails; Reformatories.
Jeofails—
See Harmless Error; Indictment, XV.
Amendments to cure errors, see Pleading, VI; Judgments, V; Indictment, I, D.
Jeopardy—
Rule against double jeopardy for crime, see Crimes, I, D.
Jewelry—
Liability of innkeeper for loss of jewels by guest, see Inns § 8.
Joinder—
Of causes at law, see Pleading, II.
Of counts in declaration, see Pleading, II.
In equity, see Equity §§ 63, 73 et seq.

Of parties, see Parties; and see specific topics treating of the particular suits.
Of indictments, informations and counts or of parties thereto, see Indictment, I, C.
Of trials for crime, see Indictment § 326.

Joint—
See generally topics treating of the thing characterized as "joint," e. g., Joint Adventures; Tenants in Common; Contracts § 169; Wills; Appeal § 77.

Joint Contracts—
See generally Contracts §§ 10, 169, 245, 258, 278, 311, 362.

Joint Debtors—
As parties to creditors' bills, see Creditors' Suits § 24.

Joint Demands—
As subjects of garnishment, see Garnishment § 29.

Joint Interests and Parties—
See Tenants in Common; Husband and Wife; Partnership.
Admissions by one binding others, see Evidence §§ 405-408.

Joint Tort Feasors—
See Torts; Assault; Conspiracy; Conversion; Nuisances; Trespass.
Releases and Contribution among, see Releases, III; Indemnity, II, B.

JOINT ADVENTURES.

TREATS of single enterprises by two or more persons joining for profit or sharing of losses without any general business association.

Analysis.

§ 1. In general; nature and existence of adventure.
§ 2. Formation and abandonment or breach of adventure.
§ 3. Services and compensation for services.
§ 4. Contributory rights and liabilities.
§ 5. Property rights and interests and liens.
§ 6. Interests and rights in profits.
§ 7. Sale or transfer of shares.
§ 8. Accounting.

[Note. In many respects the law of partnership is the same as that of single joint adventures. For that reason the topic Partnership should always be consulted as complementary of this. For statutes bearing on the law of partnership, see the Uniform Partnership Act, Pub. Acts 1917, No. 72.]

§ 1. In general; nature and existence of adventure.

How formed, see post § 2.
Termination and breach of agreement, see post § 3.
Services and compensation of parties, see post § 3.
Mutual obligation to share expenses and contribute capital, see post § 4.
Mutual rights in the property, see post § 5.
Interests and rights in profits, see post § 6.
Other joint or common interests and ownerships, see Partnership; Tenants in Common; Joint Stock Companies; Corporations, VI (promotion); Trusts.
Employments for expectant shares in profits or sums measurable thereby, see Agency; Brokers; Master and Servant, I, II.

¶ 1. An agreement whereby one party is to enter lands in another's name who is to advance money to pay his expenses and to deed him part of the land on repayment thereof, is a joint adventure, and does not establish a relation exclusively of agency, master and servant, or vendor and purchaser. —McCreery v. Green, 38 Mich. 172.

¶ 2. Where a contract entered into by plaintiff and defendant makes them jointly interested, though it does not create a partnership, the business may properly be described as a "joint enterprise."—Alderton v. Williams, 139 Mich. 296.

¶ 3. Two firms orally agreed to buy and lumber certain lands, one to furnish cash and the other labor. The former, without the latter's knowledge, took the land contract in their own name, while the latter acted under their oral agreement in the belief that they were parties to the contract. Held, that in a settlement of mutual claims they should be treated as if they were such parties, and that their rights as such would be enforceable in equity.—Edson v. Gates, 44 Mich. 253.

¶ 4. Only to the extent of the interest so to be paid did the relation of debtor and creditor exist between D., who was to erect and conduct a hotel paying interest for the use of money contributed for the erection, and the subscribers; where the terms of the subscriptions were that the amounts contributed were to be "as and for stock" in the

building, and that they were to "take in pay" corresponding interests in the building, and that D. was to have the use of the building as long as he should conduct the hotel and was to pay interest on the amounts of the several subscriptions; and where no stock was ever issued and the business of the hotel was discontinued; and accordingly D. could maintain a bill to determine the interests and wind up the concern. —Murray v. Near, 106 Mich. 59.

¶ 5. When one who has handled and shipped lumber in this state claims that he has acted on the joint account of himself and a person resident in another state and sues such person's son for an accounting, the defendant, if he denies the claim alleged and asserts the arrangement to have been one of service on the plaintiff's part for which his compensation was to be a share of the profits, and that in determining the same the defendant was to receive interest at a named per cent on advances and a specified commission on sales, the interest charge and commissions claimed must depend upon the agreement of the parties at the time the business was begun or during its continuance, and the burden of proof is on the defendant. —Clark v. Pierce, 74 Mich. 638.

¶ 6. Where one of several joint parties to a contract has received the profits of it, he cannot deny his liability to his associates on the ground that the contract was voidable as against the other party to it.—Richardson v. Welch, 47 Mich. 309.

¶ 7. Evidence examined and held insufficient to show that timber land was purchased under an agreement to divide profits with plaintiff, a go-between, where it appeared that as a result of his efforts no unconditional bargain for the land was negotiated, where the land was afterwards purchased by another who took title in his name for himself and defendant, and where the testimony of plaintiff and his witnesses was somewhat open to doubt and the alleged contract with plaintiff was so disadvantageous to defendant as to cast doubt on plaintiff's claims.—Seymour v. Canfield, 122 Mich. 212.

¶ 8. On a bill to obtain specific performance of an alleged contract to share in the profits of a mine if complainant was successful in procuring one for defendants evidence held insufficient to establish a contract for sharing in profits, but to establish a contract to reasonably compensate complainant for his services.—Schook v. Zimmerman, 188 Mich. 617.

¶ 9. It is immaterial to the question whether plaintiff had an agreement that defendant should share profits realized from a sale of lands, which lands plaintiff under an agreement therefor had looked up for defendant, that another agent of defendant, who actually procured a profitable sale of the land, was to work up the timber for the new purchaser and have an interest in it for such work.—Davis v. Gerber, 69 Mich. 246.

§ 2. Formation and abandonment or breach of adventure.

False statements as to prospects as fraud, see Fraud §§ 14-17.

Formation and termination of partnerships, see Partnership.

¶ 10. An agreement to form a joint adventure for buying timber land which was to have 112,000,000 or more feet according to an estimate is not binding if the estimate proves to be of less than that.—Seymour v. Canfield, 122 Mich. 212.

¶ 11. An agreement for a joint adventure in lands to be purchased for $410,000 at which price plaintiff had an option, followed by a failure to close that bargain, and a purchase by a third person at a less sum in which defendant had a half interest, does not leave defendant accountable to plaintiff; since defendant had a legal right to buy it from the owner at a less price than plaintiff insisted on; and the concealment of defendant's relations with the third person was not material.—Seymour v. Canfield, 122 Mich. 212.

¶ 12. In an action by one joint adventurer in a land speculation for recovery of half of advances made and expenses incurred, there being an issue as to whether the venture was abandoned by plaintiff, it was proper to allow defendant to show that thereafter he went to the vendor of the land and sought to have their contract canceled, since it tended to show efforts by defendant to dispose of the property.—Hart v. Firzlaff, 67 Mich. 514.

§ 3. Services and compensation for services.

Services by partners to firm, see Partnership, V.

Rules for implying contracts to pay for services, see Implied Contracts.

Validity of parol promise by one joint adventurer to pay for services, see Frauds, Statute of § 17.

¶ 13. In an accounting between the parties to a joint enterprise, a claim by one against the other for commissions for making collections in the joint business is properly disallowed if there was no express agreement therefor.—Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474.

¶ 14. A., holding an option on timbered land, entered into an agreement with B. that the latter should furnish the capital and buy and sell the land, A. to receive for his expenses incurred prior to the purchase and for his services one-third of the profits, while B. for the use of his capital and for his services was to receive two-thirds, B.'s

advances and the expenses of retaining the property and of sale to be first realized and paid. Held, that B. could not claim compensation for expenses incurred in examining the land prior to the purchase, or for services in connection with the sale of the land, or for interest on advances and balances, or a bonus paid by him to raise the money used in the purchase; nor was he entitled to a rebate upon the purchase price allowed him by reason of the cash payment of a part of such price.—Petrie v. Torrent, 100 Mich. 117.

¶ 15. In an accounting pursuant to an implied promise by defendant to pay part of the cost of litigation with reference to a vessel which plaintiff had contracted to raise for a share of the salvage, defendant is not entitled to charge for his own services unless the testimony justifies an inference of an understanding that he should be so paid.—Murphy v. Northern Steamship Co., 131 Mich. 120.

§ 4. Contributory rights and liabilities.

Duty to serve and right to compensation, see ante § 3.
Rights on accounting, see post § 8.
Contributory rights and liabilities of partners, see Partnership, V.
Measure of damages for failure to furnish money for adventure, see Damages § 51.
Loss and expense as damages for breach of agreement to furnish money for enterprise, see Damages ¶ 168.

¶ 16. One who has contracted to carry on a lumbering operation upon joint account and has agreed to furnish money as needed, the other party to do the work, cannot, without cause of complaint against the latter, refuse to make further advances, and by taking possession and control establish the right as against him to compel him to account on the basis of subsequent operations conducted by someone else in his stead.—McGraw v. Dole, 63 Mich. 1.

¶ 17. In an action for the defendant's contributory portion of advances made and expenses incurred in a land speculation, where there had been an attempt by plaintiff to abandon it because of defendant s failure to pay an award for a claim of expenses, it was error for the court to instruct that a refusal to pay towards the expenses would be a breach of the contract justifying an abandonment, then to qualify it by saying that it would be justified if done "on that account," and then to charge that if notwithstanding the award plaintiff refused to carry out the contract he could not recover, and then to qualify that by saying that he could abandon the award as well as the contract.—Hart v. Firzlaff, 67 Mich. 514.

¶ 18. Where the claim of plaintiff for reimbursement of advances and expenses by defendant, his coadventurer in a land speculation, was that plaintiff was to advance a half on condition that defendant would reimburse one-half of the expenses, it was error for the court in stating to the jury what was plaintiff's version of the agreement to omit to state that condition and simply to state how the contributions to the purchase price were to be made.—Hart v. Firzlaff, 67 Mich. 514.

¶ 19. Under an agreement between an attorney and client for the purchase and sale of tax titles, whereby the attorney was to furnish the necessary services and the client was to advance the necessary money and take title, the proceeds of sales to be divided equally after deducting money advanced and expenses, and lands not sold within a year to be equally held, the attorney was only entitled to his interest upon paying one-half of the purchase price and expenses paid by the client, in a bill for accounting filed by the attorney before the expiration of the year.—Clink v. Carpenter, 122 Mich. 681.

¶ 19a. An agreement between parties to cut and sell timber and to share the expenses equally covers necessary payments of interest on cost of property purchased for camp purposes.—Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474.

§ 5. Property rights and interests and liens.

Interests in capital and property of firm, see Partnership, III, V, VII.
Agreements within statute of frauds, see Frauds, Statute of, II, B.

¶ 20. Where subscriptions in a building enterprise had been paid up, although no stock was actually issued, an equitable lien for interest thereon was allowed upon the completed building; the venture having been terminated and that having been accordant with the nature of the interests.—Near v. Donelly, 80 Mich. 130.

¶ 21. An agreement to take stock in a hotel building to be erected by defendant, to whom the money was to be paid, the subscribers taking in return an interest in the building, according to the amount paid, defendant to have the use of the building so long as he should keep it as a hotel, and he to pay interest to those taking stock so long as they should continue to hold the same, was construed in an action for an accounting as giving such subscribers a lien on the completed building according to the amounts paid, even though the stock was never issued.—Near v. Donelly, 80 Mich. 130.

¶ 22. On a bill to determine the interests of the respective subscribers and of the complainant manager of a hotel built by subscriptions and operated as a commonly owned property until disused for that purpose, where the interests were regarded as "stock" in the building without any issuance of stock, it was proper to order a sale of the property

and a distribution of the proceeds to them ratably.—Murray v. Near, 106 Mich. 59.

¶ 23. A lumberman made contracts with a logger, whereby the two were to undertake a lumbering operation on joint account, but the logger was to do the job. The lumberman was to advance money as needed for outfit or operations, and, as security for his advances, the outfit was to remain his property until the logger should have paid for his share with interest. Held, that this vested in the logger the legal title to his share; but it gave the lumberman no authority in law to take possession of the outfit and sell it to enforce the security; the agreement was one that could only be enforced in equity as an equitable lien.—McGraw v. Dole, 63 Mich. 1.

¶ 24. A bill for an accounting declaring on an oral agreement to buy lands under an option held by complainant, to lumber them, and divide the profits, cannot be construed as founded on a mere profit sharing agreement, and thus avoid the statute of frauds; where it alleged that the lands were taken in the name of a third person who advanced money, that the parties were to become equitable owners of the said lands and timber, and that after payment of the costs and expenses of lumbering they should equally share the profits that arose from the business as well as the money to be received in any way "from the sale of the lands so to be owned by them."—Tuttle v. Bristol, 142 Mich. 148.

¶ 25. One Ruggles made a contract with one Bradley, by which the former was to locate certain lands and the latter was to take the title to the lands and make the necessary payment therefor. By the agreement the lands were to be sold and Ruggles was to have one-half the profits from the sale after Bradley had deducted the money paid by him for the land, plus legal interest. Held, Ruggles had only a personal contract right to receive one-half the profits of sales of the land and had no property interest in the land which he could enforce against the grantees of Bradley taking the lands with knowledge of the agreement.—Ruggles v. Merritt, 166 Mich. 457.

§ 6. Interests and rights in profits.

Profit-sharing rights of partnerships, see Partnership, V et seq.
Common assumpsit for shares, see Assumpsit §§ 30, 31.
Action between brokers for the sharing of commissions, see Brokers § 51.
Evidence of common interest of brokers in profits, see Brokers ¶ 171.

¶ 26. The term "net profits" is what remains as a clear gain in any business venture after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution.—Crawford v. Calkins, 170 Mich. 587.

¶ 27. The losses to be deducted in the process of ascertaining the net profits of the business include bad and uncollectible accounts.—Crawford v. Calkins, 170 Mich. 587.

§ 7. Sale or transfer of shares.

Transfers of shares and interests by partners, see Partnership, IV.

¶ 28. Parties jointly interested with others in the purchase and lumbering of lands sold to the others their joint interest before the undertaking was completed, and the latter agreed to pay them certain sums at fixed times, provided these sums did not exceed the investment made by the vendors in the first purchase, the amount of which was unknown at the time of the sale. Held, in an action by the vendors against the purchasers, that the latter were entitled to retain what they had paid beyond their own proportion, and also what the vendors would have been liable for in the joint dealings of the two with third parties, and the purchasers continued liable for after the dissolution of their relations.—Edson v. Gates, 44 Mich. 253.

§ 8. Accounting.

Right to have accounting, see also ante ¶ 4.
Nonaccountability where agreement of parties was executory, see also ante ¶ 11.
Right to allowance for services, see also ante § 3.
Right to interest, see also ¶ 14.
Failure to advance funds as bar to accounting, see also ante § 4.
Actions for shares and expenses, see also ante § 4.
Rights on premature bill, see also ante ¶ 19.
Ordering sale of common property to effect dissolution, see ante § 5.
Losses to be deducted, see ante § 6.
General law of accounting suits, see Accounting Suits.
Partnership accounting, see Partnership, VII.
Laches in seeking accountings and remedies in general, see Equity, IV.
Submission to jurisdiction of equity for accounting, see Equity ¶ 104.

¶ 29. When a capitalist has at request of a road contractor financed the work and participated in the compensation, it is the duty of the person agreed upon by the parties as their financial agent, and who represents the capitalist's interests, to keep just and accurate accounts of all moneys and supplies furnished for the job and to be able to produce vouchers for moneys or supplies advanced.—Young v. Barras, 74 Mich. 343.

¶ 30. A bill for an accounting will lie wherever there are fiduciary relations between the parties under which the duty to keep and render accounts exists; and one

who files such a bill for an accounting for his share of the proceeds of a business carried on upon joint account is not confined to his remedy at law, whether a partner or not.—Cochrane v. Adams, 50 Mich. 16; Clarke v. Pierce, 52 Mich. 157; Darrah v. Boyce, 62 Mich. 480.

¶ 31. An accounting lies where P., the holder of an option on pine lands, agrees orally with T. to give him the right to purchase, each to pay half the expense incurred in examining the timber, T., if he purchases, to give P. one-third of the profits arising from such purchase, and where T., having purchased and having made large sales of land and timber, refuses to account for the profits.—Petrie v. Torrent, 88 Mich. 43.

¶ 32. In an accounting suit where the defendant denies that the plaintiff was jointly interested in the business with him, and alleges the plaintiff to have been merely his agent under an agreement whereby the compensation for his services was to be a share of the profits, it is inconsistent for the defendant further to allege that he, defendant, was, under the arrangement, to be allowed interest on his capital invested and a commission on sales.—Clarke v. Pierce, 74 Mich. 638.

¶ 33. Complainant and defendant agreed to lumber jointly for a year their separate lands, the timber contributed by each to be taken and sold by a trustee, who was to apply the proceeds to satisfy advances made to complainant, and to pay expenses, the residue to be divided according to the timber contributed by each. The parties operated more than a year under the agreement, departing from it in some particulars related to the keeping of accounts. Disputes then arose and a settlement was refused. Held, that complainant was entitled to an account. —Turnbull v. Monaghan, 94 Mich. 87.

¶ 34. Complainant's intestate contracted with defendants' testator to plat and sell a tract of land owned by the latter, who was to furnish all of the money necessary to the performance of the contract, for which he was to be reimbursed, as also for the purchase price of the land, from the moneys received from the first sales of lots, and the remainder of the moneys realized under said contract were to be equally divided between the parties. Complainant's intestate platted the land, and sold nearly enough lots to reimburse defendants' testator, which money he received, and then revoked the power of attorney he had given complainant's intestate, and sold a portion of the remaining lots, and received the money therefor; and at the time of the death of the respective parties a number of the lots were unsold, and no accounting had been had between them. Complainant thereupon filed a bill for an accounting by defendants for the moneys received by their testator, and for a sale of the remainder of the lots, and an equal division of the net proceeds arising from such sale. Held, that the trust was a continuing one, and that the rights of the parties could not properly be adjusted except in a court of equity.—Fowle v. Barnes, 99 Mich. 8.

¶ 35. Plaintiff contracted to raise a vessel and cargo belonging to defendant for 70 per cent of the salvage. Litigation against a third party claiming certain interest and lien on the vessel was necessary. The jury found an implied agreement by defendant to pay its proportionate cost of the litigation. Held that defendant was entitled to an accounting in which amounts already paid by him on account of such litigation should be considered.—Murphy v. Northern Steamship Co., 131 Mich. 120.

¶ 36. Under a bill for an accounting as to profits of land sold the lower court was directed to make an order allowing complainant full opportunity to examine defendant's books of account.—Petrie v. Muskegon Circuit Judge, 90 Mich. 265.

¶ 37. In an accounting suit where, after the right to an accounting had been determined, defendant harassed complainant by various other suits for the purpose of depriving him of his just share of the fund, and thereby necessitated large expenditures that otherwise were unnecessary, the sum of $3,000.00 was allowed.—Petrie v. Torrent, 107 Mich. 648.

¶ 38. Several persons entered into a contract with D. by which they agreed to contribute certain sums "as and for stock" in a hotel building to be erected by him, and to "take in pay" a corresponding interest in the property. D. was to have the use of the building so long as he should conduct a hotel therein, by paying interest to the others upon the amounts of their several subscriptions. D. constructed the building, and used it for hotel purposes for several years, paying interest as provided by the contract, but no stock was ever issued. Upon discontinuing the business as unprofitable, D. filed a bill to determine the interests of the respective parties, and to wind up the affairs of the concern. Held, that equity had jurisdiction; since there was a property interest and the relation of debtor and creditor existed between the parties only as to the interest which D. was to pay while running the hotel; and a decree was properly entered for a sale of the property, and a division of the proceeds among all of the parties in proportion to the amount furnished by each.—Murray v. Near, 106 Mich. 59.

¶ 39. Defendants represented to complainant that a certain oil lease was for sale for $12,500 and induced the latter and others by such representations to subscribe that sum to purchase it. Defendants themselves subscribed, and defendant Purchase was paid the money as trustee to secure the lease.

He in fact paid only $3,500 for the lease. Held, a bill for an accounting for the balance would lie against defendants, and in such accounting their subscriptions should be charged against them.—Mast v. Purchase, 163 Mich. 35.

¶ 40. One who purchased a half-interest in a mine from another in 1887, with an agreement that the vendor should work the mine and divide the profits with the purchaser, is guilty of laches to such an extent that equity will not aid him in a suit for an accounting where it appears that he never saw the mine, that he wrote defendant concerning it from time to time until 1899, that he continued to write more or less frequently up to the year 1901, but that he never used any diligence to locate defendant until 1904, and that when he did he found him without difficulty.—Dowse v. Gaynor, 155 Mich. 38.

¶ 41. One of the parties to a logging operation that was conducted by the other on joint account stopped the work, took possession of the outfit, and sued the operating party for an accounting. The latter brought trover for the outfit. It was stipulated that both cases should be decided on the chancery record. Held, however, that the question of damages in trover ought rather to be determined by a trial of the case at law; and that after final judgment therein, a further accounting might be had in which such damages, if any, might be allowed as a credit.—McGraw v. Dole, 63 Mich. 1. See also Dole v. McGraw, 71 Mich. 106.

¶ 42. Where complainants and defendant entered into an agreement whereby the former were to advance money to defray the expenses of building a machine, and the latter was to do the work, secure patents, and organize a corporation for the manufacture thereof, and later it was agreed that defendant should dispose of the machine and patents so that complainants could get their money back, and where defendant effected such sale without protecting complainants, receiving for himself a sum far in excess of the amount invested by complainants, upon which the latter filed a bill for an accounting, defendant could not complain of a decree in favor of complainants for the amount invested by them.—Caulkins v. Lavigne, 156 Mich. 89.

¶ 43. In an accounting pursuant to an implied promise by defendant to pay part of the cost of litigation with reference to a vessel which plaintiff had contracted to raise for a share of the salvage, defendant is not entitled to charge against plaintiff any share of loss resulting from a levy upon defendant's boat to collect a judgment rendered in the litigation.—Murphy v. Northern Steamship Co., 131 Mich. 120.

¶ 44. On an accounting between joint adventurers where the business of selling posts and ties was loosely conducted, the court had recourse to the best available data for computing interest on balances, and made its rests somewhat arbitrarily so as to reach a substantially accurate result.—Turnbull v. Monaghan, 94 Mich. 87.

JOINT STOCK COMPANIES.

TREATS of partnership associations, so called, formed under the statutes and having shares transferable without destroying the association, yet not having all of the attributes of corporations. It excludes Partnership and Joint Adventures, both which see.

Analysis.

§ 1. In general; nature and formation.
§ 2. Subscriptions, calls and assessments, and payments.
§ 3. ——Cancellation and withdrawal or forfeiture.
§ 4. Meetings and elections.
§ 5. Resolutions and records.
§ 6. Properties, assets and indebtedness.
§ 7. Recovery of assets.
§ 8. Contracts and transfers of property.
§ 9. Authority and powers of officers.
§ 10. ——Ratification and estoppel.
§ 11. ——Dealings with association or members.
§ 12. Personal obligations and liabilities of officers.
§ 13. Rights and interests of shareholders and members.
§ 14. ——Fraud on members.
§ 15. ——Remedies and procedure to protect interests.
§ 16. ——Liability for association debts.
§ 17. Appraisal of shareholder's interest to retire it.

§ 18. Actions by and against association.
§ 19. Consolidation, reorganization and succession.
§ 20. Dissolution and winding up.

General law of corporations, see Corporations.

§ 1. In general; nature and formation.

Liability of members in illegal or abortive association, see post § 16.
Estoppel to deny existence of association, see post ¶ 20.
Agreements among several to engage in joint adventure, see Joint Adventures.
Applicability of constitutional provisions relating to corporations, see Const. art. XII, § 2.
Statute governing partnership associations, see Comp. L. 1915, chap. 151.
Provisions as to filing articles, see Comp. L. 1915, § 7963.
Provisions as to franchise fees, see Comp. L. 1915, § 7961.
Provisions as to amendment of articles, see Comp. L. 1915, § 7964.
"Limited" as essential part of name, see Comp. L. 1915, § 7952.
Provisions for annual reports to secretary of state, see Comp. L. 1915, § 7962.

¶ 1. There is an essential difference between a joint stock company as it existed at the common law, and a joint stock company having extensive statutory powers conferred upon it by the state within which it is organized.—Lyon v. Denison, 80 Mich. 371.

¶ 2. Partnership associations, limited, organized under How. St., chap. 79, are governed by the law of corporations rather than by the law of limited partnership with respect to paying for stock with notes.—Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251; Goodspeed v. Wayne Circuit Judge, 199 Mich. 273.

¶ 3. An implement company was organized under chapter 160, Comp. L. of 1897. Held, the law governing corporations, rather than the law governing copartnerships, was applicable to such a company.—Armstrong v. Stearns, 156 Mich. 597.

¶ 4. Partnership associations organized under Comp. L. 1897, §§ 6079-6089, How. St., 2nd Ed., §§ 5425-5435, are legal entities, and are quasi corporations, controlled by the law applicable to corporations rather than partnerships.—Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency, 135 Fed. 613.

¶ 5. The fact that Const., art. XV, § 11, is expressly made applicable to associations and joint stock companies having "any of the privileges of corporations," does not imply that the word corporation whenever used in legislation shall include such organizations.—Attorney General ex rel. Potter v. McVichie, 138 Mich. 387.

¶ 5a. A limited partnership association which accepts the provisions of a statute in its incorporation is bound by the provisions of such statute.—Goodspeed v. Wayne Circuit Judge, 199 Mich. 273.

¶ 6. In the statement preliminary to the organization of a limited partnership association, under Comp. L. 1897, chap. 160, the description of property contributed to the capital stock in lieu of cash must be definite enough to allow an inquiring creditor to form an intelligent estimate of the value of the property contributed.—Wood v. Sloman, 150 Mich. 177.

¶ 7. Articles of organization of an association required to be filed with the register of deeds under Comp. L. 1897, § 6079, were properly filed in the office of the person who held the office of both county clerk and register; and the mistake of the county clerk in taking the record of the articles when the offices were separated did not affect the legality of the organization.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 8. The written schedule of property contributed to a limited partnership required to be filed in the office of the register of deeds cannot be varied by a secret parol agreement between the original associates.—Macomber v. Endion Grape Juice Co., 160 Mich. 54.

¶ 9. In describing in the schedule the property contributed by parties as a part of the capital, it is insufficient, under section 6079, chap. 160, Comp. L. 1897, to describe the property in general terms without making the description as specific as the nature of the property will admit of.—Macomber v. Endion Grape Juice Co., 160 Mich. 54.

¶ 10. Where a partnership fails to acquire a valid title to all the property specified in its articles, and the amount of its cash capital is overstated, these irregularities do not affect the validity of its organization.—Andrews v. Brace, 154 Mich. 126.

§ 2. Subscriptions, calls and assessments, and payments.

Withdrawal or cancellation of subscriptions, see post § 3.
Liability of promoters putting out full-paid stock fictitiously paid up, see post § 16.
Difference between real and appraised value of property as an asset in dissolution, see post ¶ 90.

General law of subscriptions to stocks of corporations, see Corporations, VII.
Statutory provisions, see Comp. L. 1915, § 7950 et seq.

¶ 11. The implied promise of one holding moneys for a joint stock association, in which the interests of the members are represented by certificates transferable at will, is to make payment to those who are associates when suit is brought; and where one of the plaintiffs, who is a member at the time of bringing suit holds by assignment from one of the original associates, the declaration need not mention the assignment, but may count as upon an original promise to all the plaintiffs.—Willson v. Owen, 30 Mich. 474.

¶ 12. In an action brought by parties who had united in getting up a horse-fair association, against one who had acted as treasurer, to recover the funds received by him, it was objected that, the defendant being one of the associates, an action at law would not lie against him, but an accounting in equity as between partners was the only appropriate remedy. Held that, the evidence being conflicting upon the question whether defendant was associated with the plaintiffs as a partner in the venture, the verdict of the jury, to whom it was fairly submitted as a question of fact, finding in legal effect that he was not, was a conclusive answer to the objection.—Willson v. Owen, 130 Mich. 474.

¶ 13. Where the articles of a joint stock association made it a condition to an assessment upon shares of stock that the proceeds of the sale of a certain number of shares should first be expended, it was held that a notice given while some of this stock remained unsold of a meeting to be thereafter held for making an assessment was premature, and that no valid meeting for that purpose could be held in pursuance of it, even though in the interval the remaining stock was sold, and the proceeds expended.—Westcott v. Minnesota Min. Co., 23 Mich. 145.

¶ 14. A subscriber to the capital stock of such an association formed as a limited partnership under How. St., chap. 79, may, with the consent of the other subscribers, pay for the stock subscribed for by him by giving his promissory notes therefor, and such payment renders his stock paid up as against creditors of the association; particularly where the notes are at once converted into money, which is applied for the benefit of the association.—Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251.

¶ 15. In changing a company from a corporation to a limited partnership, the property was conveyed by the corporation to defendants Thresher and Johnston, who instantly conveyed the same to the limited partnership. To each of them 2,998 shares of stock in the partnership were issued as fully paid up. These shares they then immediately turned back into the partnership treasury to be sold. No statement of this transaction was filed, as required by statute, with the register of deeds. Plaintiff bought shares of this treasury stock. Held, the treasury stock could not be considered as paid up.—Macomber v. Endion Grape Juice Co., 160 Mich. 54.

¶ 16. Certified checks constitute a contribution in cash in good faith by a special partner as a member of a limited partnership, even if not presented until after the filing of the certificate required by How. St. § 2344 et seq.—Chick v. Robinson, 95 Fed. 619.

¶ 17. Evidence held insufficient to present a question for the jury whether certain of certified checks, which were given by a special partner of a limited partnership in payment for stock, were held and not deposited, under an agreement among the partners, until after the filing of the affidavit of a general partner, under How. St. § 2348 as to the amount in cash contributed by the special partner.—Chick v. Robinson, 95 Fed. 619.

¶ 18. Where payments were made by an individual to a limited partnership association, the absence of proof that such payments were made for the purchase of stock, the only proof being a resolution and entries upon the books, an instruction that the payments made the payor a creditor of the company is justified.—Jacobs v. Morgenthaler, 149 Mich. 1.

§ 3. ——Cancellation and withdrawal or forfeiture.

Liability of other members for amount repayable to defrauded one, see post § 16, ¶ 77.
Rescission and cancellation of agreements in general and grounds for rescission, see Rescission; Fraud; Mistake.
Withdrawal or cancellation of corporate stock subscriptions, see Corporations, VII.

¶ 19. Complainant, on becoming manager of a partnership association, bought shares of stock and made part payment thereon. After acting as manager for several months, he expressed dissatisfaction with his purchase, and a new arrangement was made by which he was given more shares. He now seeks by bill to set aside the sale of stock to him under the new arrangement on the ground of misrepresentation and fraud. Held, the bill could not be sustained, since complainant was familiar with the entire enterprise, and did not rely on the misrepresentations.—Andrews v. Brace, 154 Mich. 126.

¶ 20. In a suit for the cancellation of a certificate of stock it appeared that defendants had attempted to form a limited part-

nership association, but failed to record the articles of association. Plaintiff's subscription was procured by fraud. Held, that plaintiff was not estopped to deny the existence of defendants as a limited partnership association.—Nichols v. Buell, 157 Mich. 609.

¶ 21. One induced by fraudulent representations to subscribe for stock in a partnership association is entitled in equity to have the certificate of stock canceled, and to be repaid its purchase price.—Nichols v. Buell, 157 Mich. 609.

¶ 22. The law court has jurisdiction to entertain the suit of one who bought treasury stock in a limited partnership, rescinded the purchase on the ground of fraud and tendered back the stock, and who sues the original stockholders to recover the purchase money.—Macomber v. Endion Grape Juice Co., 160 Mich. 54.

¶ 23. Stock was put in the treasury of a limited copartnership as being fully paid when it was not. Defendant Spencer bought the same in good faith as fully paid up. In a suit by another innocent purchaser against the stockholders to recover back money paid for treasury stock, held, that defendant Spencer was not liable.—Macomber v. Endion Grape Juice Co., 160 Mich. 54.

¶ 24. The right to forfeit shares in any joint stock undertaking must come from the law, and can only be exercised as therein described. Where the articles of association govern the right of forfeiture, all conditions precedent made by them must be strictly complied with, or the proceeding is void.—Westcott v. Minnesota Min. Co., 23 Mich. 145.

§ 4. Meetings and elections.

Meeting to call assessments, stage when permissible, see ante ¶ 13.

Execution of contracts and authorizing resolutions, see post § 8.

General law as to corporate meetings and voting, see Corporations, IX.

Statutory provisions as to meetings, see Comp. L. 1915, § 7954.

Provisions as to cumulative voting to obtain minority representation, see Comp. L. 1915, § 7966.

¶ 25. Where articles provide that notice of regular meetings shall be given by mail, an oral notice of a meeting to assess stock is not sufficient as to persons who did not appear at said meeting in response thereto.—Westcott v. Minnesota Min. Co., 23 Mich. 145.

¶ 26. The minority representation law, Comp. L. 1897, § 8553, providing for cumulative voting in the election of directors in any corporation, does not apply to the election of managers of limited partnerships where any manager may bind the firm.—Attorney General ex rel. Potter v. McVichie, 138 Mich. 387.

¶ 27. A partnership association, limited, had authority to provide in its by-laws for the service of notice of meetings by mail instead of personally.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 28. Special meetings of managers of a partnership, limited, at which all were not present, were not presumed irregular, and the burden of showing irregularity was upon the complaining member.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 29. A member of an association who was represented by a duly authorized proxy, at meetings held outside the state, was estopped from attacking the validity of mortgages upon the ground that the authority for the execution of such mortgages was given at meetings illegally held outside the state.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 30. A member of an association who was represented at meetings outside the state, by authorized proxy, was estopped from urging the invalidity of the by-laws which authorized him to act by proxy.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 31. A member of a partnership association, limited, was estopped to deny the validity of mortgages and deeds authorized at a meeting of the board of managers outside the state, where he himself at such place signed the articles of association which appointed the managers who all lived at such place, it being presumed that he knew they intended holding the meetings there; and where such member presented a claim at one of such meetings and acted upon authority given to him at another.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

§ 5. Resolutions and records.

Reasonableness of resolution withholding payment of debts to members, see post ¶ 61.

Corporate resolutions, by-laws and records, see Corporations, X, XVIII.

Provisions as to dividends and impairment or reduction of capital, see Comp. L. 1915, § 7955.

Provisions as to loans of credit, see Comp. L. 1915, § 7956.

¶ 32. At the stockholders' meeting of a limited copartnership a resolution was passed directing a committee to sell certain personal property, and apply the proceeds to reducing the general indebtedness of the company. In a suit by one surety of the company who was a member of the committee, against another surety to recover contribution for certain particular debts paid by the former, held, it was inadmissible for the defendant to introduce parol evidence to show that the resolution passed at the meeting was introduced to direct the committee to apply the proceeds to said particu-

lar debts.—Lipsett v. Hassard, 158 Mich. 509.

§ 6. Properties, assets and indebtedness.

Statement and description of property in articles to form association, see ante ¶¶ 6, 9.

Place for filing schedule of property, see ante ¶ 7.

Parol agreement or evidence to vary schedule of property, see ante ¶ 8.

Action to recover property or assets, see post § 7.

Resolution and procedure to purchase property, see post § 8.

Estoppel to attack mortgage as made or authorized at illegal meeting, see ante ¶¶ 29-31.

Division of assets on dissolution, see post § 20.

Indebtedness on contracts of predecessors, see post ¶ 83.

Liability of stockholders for debts, see post § 16.

Conveyance of property to pay debt owing to officer, see post § 11.

Purchase of property by officer at sale on foreclosure, see post § 11.

Indebtedness to members, see also post ¶ 61.

Distinctness of corporate title from stockholders' rights in corporate property, see Corporations, XIII, XXIV, D.

Advances of money and assignment of mortgage as effecting discharge thereof, see Mortgages, VIII.

How real estate is to be held, see Comp. L. 1915, § 7959.

¶ 33. Title to the property owned by a partnership association organized under Comp. L. 1897, chap. 160, is in the company and not in the shareholders, even though such an association is not in the strict sense a corporation.—Starr v. Shepard, 145 Mich. 302.

¶ 34. Application of the proceeds of stock sales to the construction of a water power canal was not a fraudulent misappropriation of the funds of a partnership association formed to deal in lands to which project the power canal was a necessary adjunct.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 35. A resolution at a meeting of a limited copartnership directed a committee to sell certain personal property, and apply the proceeds to reducing the indebtedness of the company. Held, in a suit for contribution, that a surety for certain particular debts of the company was entitled to have the proceeds applied pro rata to these debts.—Lipsett v. Hassard, 158 Mich. 509.

§ 7. Recovery of assets.

See also post ¶ 67.

By trustee of association in bankruptcy, see also post ¶ 90.

Pleading titles or assignments of rights, see also post ¶ 78a.

¶ 36. In an action of trover by the receiver of a limited partnership association against a stockholder to recover certain notes given in part payment for property of the association and distributed to the stockholders the defendant may show the facts concerning the claim of the secretary, who is the principal claimant, and the condition upon which and the funds from which the claim was to be paid.—Jacobs v. Morgenthaler, 149 Mich. 1.

¶ 37. In an action of trover by the receiver of a limited partnership association against a stockholder to recover certain notes given in part payment for property of the association and distributed to the stockholders in payment of their claims, the defendant may show by cross-examination of the receiver and secretary, who is the principal creditor, that no action has been brought against other stockholders who had received notes under similar circumstances. Jacobs v. Morgenthaler, 149 Mich. 1.

§ 8. Contracts and transfers of property.

Effect of omission of word "limited," see post ¶ 71.

Powers of officers and agents to make contracts for association, see post § 9.

Contract as that of officer or that of association, see post ¶ 60.

Ratification of irregular or unauthorized contracts, see post § 10.

Transfers of property to officer in payment of debt, see post §§ 11, 14.

Contracts and liabilities of predecessors, see post ¶ 83.

Estoppel to assert invalidity of oral contract, necessity of detrimental action taken, see Estoppel ¶ 119.

Taker of paper as bona fide holder, see Negotiable Instruments, XIII, A.

Right of bona fide transferree to enforce note for oral purchase of goods above $500 in value, see Negotiable Instruments, XIII, B.

Uncertainty in agreement to adjust salary of manager in future, see Contracts § 3, ¶ 34.

Provisions as to making debts and contracts, see Comp. L. 1915, § 7954.

¶ 38. A contract for the purchase of land was signed in the name of a partnership association dealing in lands, by its chairman, and also signed by the complainant vendor. The chairman then left the city, and some days later the contract was ordered closed and approved at a full meeting of the board of directors, at which time blanks in the contract were filled up. This action of the board was duly spread upon the minutes. One of the material clauses of the contract as prepared by the chairman was ordered stricken out by the board. Held, the act of the chairman in executing the contract in advance of a meeting of the board did not render the contract void under Act 191, Pub. Acts 1877, art. 3.—Howard v. Factory Land Co., 167 Mich. 251.

¶ 39. The secretary and executive officer of a limited partnership association contracted in writing on behalf of said association to purchase certain land. The contract was signed only by the vendor. It was never signed by at least two managers of said association as required by the statute. Defendant made payments under the contract, surveyed, platted, and paid the taxes on the premises. Complainant vendor filed a bill to foreclose the contract. Defendant by cross-bill sought to recover back the payments already made, on the ground that the contract was not lawfully entered into. Held, the contract not being ultra vires, defendant could not recover back what he had paid, the doctrine of estoppel in pais applying to prevent said recovery.—Geel v. Goulden, 168 Mich. 413.

¶ 40. A contract by a limited partnership association to employ plaintiff for two years at a salary of $2,000 per year is void under Comp. L. 1898, § 6083, where not reduced to writing and signed by at least two managers, and therefore not binding upon the partnership.—Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235.

¶ 40a. Where a contract of hiring is made by an officer of defendant limited association, it is not competent in a suit on such contract for the defendant to introduce evidence to show that certain of the terms claimed by plaintiff employee to be included in said agreement were never submitted to defendant's board of managers.—Richards v. Church Balance-Gear Co., 166 Mich. 464.

¶ 40b. Evidence that one of the managers of a partnership association, limited, had expressed his personal intention of readjusting the account of an employee for overdrafts in excess of his salary, held not binding upon the association.—Berry Bros., Ltd. v. Hooper's Estate, 179 Mich. 67.

¶ 40c. Comp. L. 1897, § 6081, does not require the full name of a limited partnership association to be used in a promissory note when it is the payee.—Shaw, Kendall & Co. v. Brown, 128 Mich. 573.

§ 9. Authority and powers of officers.

Contracts of employment, see ante § 8.
Ratification and estoppel, see post § 10.
Dealings between association and members, see post § 11.
Personal liability of officers and representative or personal nature of contracts, see post § 12.
Notice imputed to taker of paper, see Negotiable Instruments, XIII, A.
Authorities and power of corporate officers, see Corporation, XVII.
Mode of exercising authority to contract, see Comp. L. 1915, § 7954.

¶ 41. A delegation of authority to employ plaintiff for a partnership association and fix his salary does not authorize making a contract by which the corporation becomes liable to pay him for services previously rendered for the corporation's predecessor in business.—Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235.

¶ 42. Under section 6083, Comp. L. 1897, it is the law of Michigan that a single manager of a partnership association, limited, has not the authority to make a contract that creates a liability for an amount exceeding five hundred dollars.—Hoyt v. Paw Paw Grape Juice Co., 158 Mich. 619.

¶ 43. Section 6083, Comp. L. 1897, relating to limited partnerships, provides that no obligation in excess of five hundred dollars may be contracted against such a partnership unless the contract be in writing signed by two of the managers. A manager of such a partnership engaged in the publishing business hired plaintiff at a salary of $2,000 a year. Held, the contract was void.—Beach v. Business Man's Pub. Co., 163 Mich. 226.

¶ 44. Under section 6083, Comp. L. 1897, the manager of a limited partnership, even though that partnership be engaged in buying and selling merchandise, cannot without the signature to the contract of two managers make a contract for over five hundred dollars unless the contract so made be a merchandising contract.—Beach v. Business Man's Pub. Co., 163 Mich. 226.

¶ 45. Every one dealing with a limited partnership association is affected with notice of the provisions of How. St. § 2369, providing that no liability for an amount exceeding $500, except against the person incurring the same, shall bind the association, unless reduced to writing and signed by at least two managers.—Dietsinson v. Matheson Motor Car Co., 161 Fed. 874.

¶ 46. The statute governing partnership associations (How. St. § 2369) provides as follows: "No debts shall be contracted nor liability incurred for said association except by one or more of said managers, and no liability for an amount exceeding $500, except against the person incurring it, shall bind the said association, unless reduced to writing, and signed by at least two managers." Held, not to warrant the construction that a contract by one officer only, for an amount exceeding $500, is good for that sum, and void for the excess, but that the invalidity attaches to every such contract in its entirety.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

¶ 47. Complainant vendor's broker negotiated a sale of land with one Moak, the secretary and executive officer of defendant association, who was acting in behalf of said association. The contract was signed by the

vendor only, but was kept in his possession by said Moak. Payments were made by defendant on said contract. The land was surveyed, platted and taxes paid thereon by it. The purchase price was in excess of five hundred dollars. Held, complainant vendor's bill to foreclose said contract would not lie, since under the statute the contract was not signed by at least two managers of defendant association.—Geel v. Goulden, 168 Mich. 413.

¶ 48. Under a provision in the articles of association of a partnership limited, organized for the purpose of buying, selling, etc., and dealing in real and personal property, empowering its elected board of managers to make such rules for the government and management of the business concerns of the association as they might think expedient, and authorizing its chairman and secretary to sign notes, deeds, mortgages, etc.; the inference was that such board had power to authorize the execution of mortgages and deeds, and that they obtained such power from a member who with his associates, signed the articles of association.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 49. Authority to the secretary and treasurer of a corporation to contract to pay for services rendered to another, the predecessor of the corporation, for which the defendant was in no way liable, does not authorize the officers to delegate the authority to another.—Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235.

§ 10. ——Ratification and estoppel.

¶ 50. The articles of a joint stock mercantile association prohibited the officers intrusted with the conduct of its business from making purchases on credit. They, notwithstanding, made a purchase on credit, first giving the seller a copy of the articles. Held, that the association was not liable for the purchase, unless subsequently ratified by it.—Hotchin v. Kent, 8 Mich. 526.

¶ 51. The receipt of the goods by a joint stock mercantile association, or even the sale of them in the course of their business, would not alone amount to a ratification of a purchase on credit, since the members could not be supposed to know that the purchase was made in violation of their articles. —Hotchin v. Kent, 8 Mich. 526.

¶ 52. Section 6083, Comp. L. 1897, provided that the consent of at least two managers in writing should be required to contract debts over five hundred dollars, except in the case of merchandising associations, where a majority in interest might authorize in writing one manager to incur such debts. One of the managers of the merchandising association in question for a period of years, to favor a customer, gave association notes without written authority. The other managers and some stockholders knew of the practice, and acquiesced in it, and the notes were paid from time to time as they came due. Held, that the association was estopped to deny its liability to bona fide holders of the notes.—Armstrong v. Stearns, 156 Mich. 597.

¶ 53. Section 6083, Comp. L. 1897, relating to limited partnerships, provides that no obligation in excess of five hundred dollars may be contracted against such a partnership unless the contract be in writing, signed by two of the managers. The statute excepts associations for the purpose of buying and selling merchandise. The manager of a limited partnership engaged in the publishing business employed plaintiff for a year at a salary of $2,000. The position was filled by him for several years on this basis. Held, the contract was void, and defendant partnership was not liable on any principle of estoppel for breach of the contract in discharging plaintiff.—Beach v. Business Man's Pub. Co., 163 Mich. 226.

¶ 53a. In a bill for an accounting brought by a member of a limited partnership against another member, the complainant cannot set up that sales of lumber by the latter to the partnership were invalid under section 6083, Comp. L. 1897, as being in excess of five hundred dollars, where the lumber was appropriated by the partnership, which was not made a party, and where complainant acquiesced in the sale for seven years and reported same to the secretary of state.—Mack v. Engel, 165 Mich. 540.

§ 11. ——Dealings with association or members.

See also post ¶ 62 et seq.

Lending credit to members, see Comp. L. 1915, § 7956.

¶ 54. A director of a joint stock corporation occupies a fiduciary relation; and his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, are viewed with jealousy and distrust by the courts and may be set aside on slight grounds.—Washburn v. Green, 133 U. S. 30, 33 L. ed. 516, 10 Sup. Ct. Rep. 280.

¶ 55. The validity of a conveyance was not affected by the fact that one of the managers of the association grantor, was a member of the partnership whose indebtedness was paid by the transaction; the rights of the creditor in question being superior to those of the complaining members of the association.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 56. A member of a partnership association and former chairman of its board does not commit fraud on it in buying in its lands on foreclosure, though for less than they are worth, where at the time he has nothing

of the association in his hands and the sale is public and he is personally liable for the debts secured by the mortgages.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 57. Where an assignment was made by a partnership association, limited, to its manager, of a large number of mortgages securing payment of the purchase money of lands sold by it, for the purpose of repaying indebtedness owed to such manager and to avoid the payment of taxes; the latter motive, although not to be approved, did not constitute a fraud upon the members of the association for whose benefit it was done.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 58. Where several pieces of property of a partnership association were purchased before the organization, in the name of one who executed purchase money mortgages and whom the association agreed to indemnify for his personal liability upon such mortgages, and where upon a deficiency resulting at a foreclosure sale, such deficiency was secured by a mortgage upon other property of said association, a subsequent conveyance of the equity of redemption because the association had no other means of paying the mortgage, afforded no evidence of fraud, where there was no such disparity between the value of the property and the indebtedness, as to evidence fraud.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 59. The chairman of a limited association, who was also a stockholder, was not as against one not a creditor, precluded by reason of his relation to the association, from purchasing claims against the association at a discount, after such association had gone into liquidation and trustees had been appointed to manufacture the necessary stock on hand, and had employed such chairman to prosecute such work for the trustees. —Morris v. Imperial Cap Co., 135 Mich. 476.

§ 12. Personal obligations and liabilities of officers.

¶ 60. The treasurer of a limited partnership association does not become liable as vendee on a land contract running to said association as vendee, which was assigned by the vendor but not by said association by reason of the fact that said treasurer at the request of the vendor, who has full knowledge of the fact that said contract is unsigned, assigns said contract to said association.—Geel v. Goulden, 168 Mich. 413.

§ 13. Rights and interests of shareholders and members.

Subscriptions, calls and assessments, withdrawals and cancellations, see ante §§ 2, 3.
Stock regarded as paid up, see also ante ¶¶ 14, 15.
Fraud on members, see post § 14.
Liability of members for debts, see post § 16.
Remedies of stockholders for protection of interests, see post § 15.
Right of dissentient member to have appraisal of interest, see post § 17.
Rights and interests in winding up, see post § 20.
Dealings by officers with association, effect of fiduciary relation to association and members, see ante § 11.
General law of stockholders in corporations, see Corporations, XXIV.
Consent to transfer of stock as consideration for promise to pay share of debts, see Contracts ¶ 510.
Transferability of shares and devolution on death, see Comp. L. 1915, § 7953.

¶ 61. The by-laws of defendant partnership association organized under Act No. 191, Pub. Acts of 1877, provided that all members should be subject to such rules and regulations as should be adopted by the association. Defendant adopted a rule that all money due to members for work and labor should be used in furthering the business of the association and that six per cent interest should be paid on the money thus held back. Held, the regulation was void as being unreasonable, and plaintiff member might recover for work and labor performed. —McCarty v. Caledonia Coal Co., 164 Mich. 692.

¶ 61a. A member of a limited partnership may make a profit on lumber sold to the same where he acts in good faith and charges only the market price.—Mack v. Engel, 165 Mich. 540.

¶ 61b. A member of a partnership association, limited, is in the same position as to interest upon advances made by him as a member of any ordinary partnership.—Mack v. Engel, 165 Mich. 540.

¶ 61c. A partner who makes advances for partnership purposes beyond the amount of his agreed contribution is entitled to collect interest thereon at the customary legal rate, even in the absence of an express agreement therefor with his copartners.—Mack v. Engel, 165 Mich. 540.

¶ 61d. Where a limited partnership sells its plant to a third person, a member actively procuring the sale and securing an interlocutory order confirming the same is estopped to contest the validity of said sale under a bill brought by other members of the partnership for an accounting.—Mack v. Engel, 165 Mich. 540.

¶ 61e. Under a bill for accounting brought by a member of a limited partnership against another member, complainant cannot recover for loss sustained by the partnership in sawing lumber for defendant where he has

acquiesced for a long time in the price charged.—Mack v. Engel, 165 Mich. 540.

§ 14. ——Fraud on members.

Withdrawal and cancellation of subscription or purchase of stock from treasury, see ante § 3.

General law of fraud in fiduciary relations, see Fraud, II; and references there collated.

¶ 62. It was not fraud for a partnership association to make a mortgage to one of its members for a debt for which it was liable to him, and then to convey to him the equity of redemption when it was afterwards unable to pay such debt.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 63. Taking an advance of money to pay mortgages and then in pursuance of the agreement to secure the advancing party assigning to him the mortgages, under which the land passed by subsequent foreclosure, does not amount to the same as paying the mortgages and then transferring them so as to suffer a foreclosure in fraud of the members of the debtor, a partnership association. —Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 64. In a bill to set aside conveyances and for an accounting, brought by a member of a limited partnership enterprise the fact that at foreclosure sales of purchase money mortgages, the land was obtained at less than cost and at less than it was worth, by a defendant who was personally responsible for the debt and had been chairman of the board of managers of the association, and who at the time of the sales had nothing in his hands belonging to the association, afforded no convincing evidence of fraud.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 65. In a bill to set aside conveyances and for an accounting, brought by a member of a limited land partnership enterprise, in which 50 per cent of the stock was placed in trust as treasury stock to be sold to pay off mortgages and indebtedness of the company, fraud was not inferred because the proceeds of the sale of such stock went to the benefit of a water power canal in which complainant and his associates were interested, and where the success of the partnership association depended upon the success of the canal.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 66. The action of all but one of the stockholders of a limited partnership association in transferring certain notes belonging to the association to one of themselves, in payment of an alleged indebtedness, which transfer was made by resolution, is not binding upon a nonparticipating stockholder where in fact there was no indebtedness.—Jacobs v. Morgenthaler, 149 Mich. 1.

¶ 67. In an action of trover by the receiver of a limited partnership association against a stockholder to recover certain notes given in part payment, for the property of the association, and distributed to the stockholders in payment of their claims against it, the defendant may show that a sum sufficient to pay all outstanding debts, except such as were due the consenting stockholders, was set aside, and placed in the hands of the secretary for that purpose. —Jacobs v. Morgenthaler, 149 Mich. 1.

§ 15. ——Remedies and procedure to protect interests.

Remedies to enforce liability for debts, see also post § 16.

Proceeding to appraise dissenter's interests, see post § 17.

General remedies of corporate stockholders to protect themselves and their corporations from misdoing, see Corporations, XXIV, F.

¶ 68. Stockholders in an association organized under Comp. L. 1897, chap. 160, not strictly a corporation, nor yet a partnership, have the right to bring an action in equity, where machinery of the company, claimed by a purchaser at a void tax sale, is about to be moved away and sold, and the officers and directors of the company refuse, or by inertia equivalent to refusal, neglect to act on behalf of the company to protect its rights. —Starr v. Shepard, 145 Mich. 302.

¶ 69. Stockholders of a limited partnership association organized under Comp. L. 1897, chap. 160, have no relief at law, either by actions of replevin or trover, and may therefore have relief in an action in equity, where, such stockholders seek an injunction and a receiver of the company to prevent a purchaser of property of the company at a void tax sale from removing the same.—Starr v. Shepard, 145 Mich. 302.

§ 16. ——Liability for association debts.

Executions against association or its members, see Corporations §§ 197, 287; Executions § 20.

Due process in membership liability proceedings, see Constitutional Law § 166.

Judgment against stockholders upon bond as concluding the question of whether the bond was an individual or an association obligation, see Former Adjudication ¶ 350.

Statutory liability, see Comp. L. 1915, § 7951 et seq.

¶ 70. One who enters into a contract with an association organized under the statute (How. St., chap. 79) relative to partnership associations, limited, relying entirely on an associate liability, does not acquire the right

to maintain an action of assumpsit thereon against the individual stockholders by the discovery of some irregularity or defect in the original organization or subsequent management of the association; especially if the persons whose liability is sought to be enforced were not interested in the association at its organization, and were not aware of any irregularities.—Staver & Abbott Mfg. Co. v. Blake, 111 Mich. 282.

¶ 71. The omission in a single instance of the word "limited" in the use of the associate name does not give a right of action under section 3 of the Act of 1887 (How. St., chap. 79), authorizing the formation of such associations, providing that such omission shall render each member liable for any indebtedness, damage, or liability arising therefrom, where no indebtedness, damage, or liability is shown to have resulted in consequence of the omission in the particular instance.—Staver & Abbott Mfg. Co. v. Blake, 111 Mich. 282.

¶ 72. A creditor of a limited partnership association of which a receiver has been appointed is not thereafter entitled to issue execution on his judgment against subscribers to stock of the association whose subscriptions are not paid up.—Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251.

¶ 73. The good faith of a transaction whereby the stockholders of a limited partnership association, which had become insolvent, gave their promissory notes for the unpaid parts of their subscriptions to the capital stock, and whereby the notes were immediately turned over to the principal creditor, who advanced money to pay certain outstanding indebtedness and arranged to continue the business, is a question for the jury.—Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251.

¶ 74. Where the promoters of a limited partnership association placed a fictitious valuation upon a formula for breakfast food, in order to sell at a nominal price stock represented to be full paid, the transaction falls within the intent of Comp. L. 1897, § 6080, providing that under certain contingencies members of a partnership association may be liable to its creditors to the extent of the portions of their subscriptions in the capital of the association not then paid.—Wood v. Sloman, 150 Mich. 177. (Carpenter and Grant, JJ., dissenting.)

¶ 75. Where defendants attempted to form a limited partnership association, but failed to record the articles of association which were signed by them, they were copartners, and liable for the damages resulting from the fraud of one of them in furtherance of their common enterprise.—Nichols v. Buell, 157 Mich. 609.

¶ 76. In an action on a partnership note against the members of a limited partnership, formed under How. St., § 2342 et seq., in which an individual partner defended on the ground that he was not liable because he was a special partner and had actually contributed the amount of his stock in cash before the filing of an affidavit by one of the general partners as to the amount of money contributed by him, entries in the partnership books, which were open to his inspection under section 2364, were at least prima facie evidence against him of the transactions of the firm, where such entries showed that one payment was credited before the date of filing of the affidavit and two other credits were given after the filing of such affidavit.—Chick v. Robinson, 95 Fed. 619.

¶ 77. Plaintiff bought treasury stock in a limited partnership falsely represented by the original stockholders to be paid up; rescinded the purchase on the ground of fraud, and tendered back the stock; and sued the association at law to recover the purchase money. Held, a judgment in her favor was binding on the defendants, the original stockholders in a proceeding under the statute to enforce their liability.—Macomber v. Endion Grape Juice Co., 160 Mich. 54.

§ 17. Appraisal of shareholder's interest to retire it.

Due process in proceedings to ascertain member's share value, see Constitutional Law § 165.

¶ 78. A circuit court has jurisdiction to act under Comp. L. 1915, § 7953, relating to the appointment of an appraiser to fix the price of stock and interest in a limited partnership association acquired by a transferee who is not elected to the association after such transfer, where due notice is given by the service of a copy of the petition for the appointment of an appraiser with notice of hearing on the association, and it is represented at the hearing when the appointment of an appraiser is determined.—Goodspeed v. Wayne Circuit Judge, 199 Mich. 273.

¶ 78a. Under a by-law of a limited partnership association, providing that any person who is an employee or officer of the association and shall become the owner of one or more shares of stock, shall become a member thereof, provided that in case of a transfer such person shall become a member only when he shall be duly elected and shall become an employee or officer, and when such transfer shall have been made on the books of the association, and when "any stockholder shall cease to be an officer or employee, his stock shall automatically revert to the association, to be paid for at the true cash value thereof, and he shall thereupon cease to be a member thereof," a transferee

of stock is the holder of an interest in the association so as to be authorized to maintain proceedings for the appointment of an appraiser under Comp. L. 1915, § 7953, where the transferor who has ceased to be an officer or employee of the company has not received payment of the true cash value of his stock.—Goodspeed v. Wayne Circuit Judge, 199 Mich. 273.

§ 18. Actions by and against association.

Action on contract of subscription, see also ante § 2.
Actions to recover assets and properties, see also ante § 7.
Remedies and procedure to enforce members' liability, see ante § 16.
Remedies to protect stockholders' interests, see ante § 15.
Dissolution and winding up proceedings, see post § 20.
Presumption as to regularity of meetings, see ante ¶ 28.
Amenability of joint stock company to mandamus as in cases of private corporations, see Mandamus, IV.
Citizenship for purposes of Federal jurisdiction, see Courts ¶ 330.
Nonestoppel of stockholders who appear specially in mandamus to object to jurisdiction, see Former Adjudication § 56.
Statutory provisions as to suing and being sued and as to process and appearances, see Comp. L. 1915, § 7959.

¶ 78a. A declaration by members of a joint stock association, one of whom holds by assignment from one of the original associates, need not mention the assignment in suing one who holds money for the association, but may count as upon an original promise to all the plaintiffs.—Willson v. Owen, 30 Mich. 474.

¶ 79. Defendants in a creditors' suit to set aside fraudulent conveyances, brought by a partnership association, formed in the state, but shown by the signature and jurat to the bill, to be in liquidation in the hands of a trustee, have no interest in objecting that it is not alleged or proved that the complainant is in liquidation, as there is no danger of such defendants being subjected to another suit since in either event the association is complainant.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

¶ 80. The fact that a partnership association, organized under Comp. L. 1897, ch. 160, is in liquidation, sufficiently appears, in a suit by such association, as creditor, to set aside fraudulent conveyances by a debtor, where the bill is signed by a "Trustee in Liquidation," and where the jurat states that the person signing is such a trustee, that he makes oath as trustee, and is authorized to sign the bill, as such description is as effectual in the jurat and signature as elsewhere in the bill, and the statute provides for such trustees without intervention of the courts (Comp. L. 1897, § 6087).—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

¶ 81. A question as to the existence of plaintiff, in a suit to set aside fraudulent conveyances, brought by a partnership association, incorporated in the state, but shown by the signature and jurat, to the bill, to be in liquidation, should be raised by a plea in abatement (Comp. L. 1897, § 10471).—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

¶ 82. The death of a trustee in liquidation who signed and swore to a bill in behalf of the plaintiff, in a suit to set aside fraudulent conveyances, brought by a partnership association, incorporated in the state, but shown by the signature and jurat, to the bill, to be in liquidation, need not be suggested of record and another person appointed in his place since under the statutes such trustee is not a party to the suit, which is brought by the association, and the death of an officer of a party does not affect the status of a suit.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

§ 19. Consolidation, reorganization and succession.

General law of consolidation and succession of corporations, see Corporations, XXII.
Provisions as to reorganization, see Comp. L. 1915, § 7965.

¶ 83. A limited partnership association, which succeeds to the business of a corporation, and carries on business with an agent according to the terms of a contract of agency entered into by such corporation, does not thereby become liable for any transactions between such agent and such predecessor.—Stone v. Fox Machine Co., 145 Mich. 689.

§ 20. Dissolution and winding up.

Effect of appointment of receiver, see also ante ¶ 72.
Suits by association in liquidation, see also ante § 18.
General law of corporate dissolution and winding up, see Corporations, XXIII.
Provisions for dissolution and distribution of property, see Comp. L. 1915, §§ 7957, 7958.

¶ 84. Equity takes jurisdiction of a controversy relating to the distribution among members of an unincorporated joint stock association of the common fund arising from a final disposition of the company's assets.—Butterfield v. Beardsley, 28 Mich. 412.

¶ 85. Where a joint stock company is embarked in a common undertaking for its common profit, and the undertaking is sustained by money advanced by each member, though it have no corporate char-

acter, a court of equity may treat them as partners in order to settle their disputes respecting the distribution of a common fund arising from a final disposition of the entire assets of the company.—Butterfield v. Beardsley, 28 Mich. 412.

¶ 86. Under articles of association providing that the ownership of a certificate should carry with it an undivided interest in all company property, the fact that a subsequent purchaser of a certificate had never subscribed the articles is of no consequence as affecting his right to a ratable share of the proceeds of a sale of the company's property.—Butterfield v. Beardsley, 28 Mich. 412.

¶ 87. Where the entire beneficial interest of a joint stock company is transferred so as to leave nothing which certificates of stock can represent beyond the fund received, in which fund the purchaser is to have no interest, the transaction is not a sale of stock, but a final cession of the ultimate fund or property of the company.—Butterfield v. Beardsley, 28 Mich. 412.

¶ 88. Where the members of an association have each an undivided interest in the whole of its property, belonging in equity to the association, it is of no consequence in a controversy over the distribution of the proceeds of the sale of the property that the legal title stood in a third person.—Butterfield v. Beardsley, 28 Mich. 412.

¶ 89. Where a company's property has been disposed of on the basis of the payment, by or through the holder of a portion of the company's shares, of a certain sum on account of the entire interest of all the other shareholders, in such a manner as to extinguish all claim on his part upon the sum so paid, his former interest in the company will have no bearing on the result in a suit between the rest of the shareholders for an equal distribution of the proceeds of the sale.—Butterfield v. Beardsley, 28 Mich. 412.

¶ 90. The trustee in bankruptcy of a limited partnership association may enforce payment of the difference between the par value of the stock and the sums paid the association for the stock, if this difference is an asset of the association.—Wood v. Sloman, 150 Mich. 177.

¶ 91. Where there are no creditors, a division of the assets of a limited partnership association among the stockholders in proportion to the amounts paid in by them is valid, even though there may have been an understanding that they should take treasury stock for the payments.—Jacobs v. Morgenthaler, 149 Mich. 1.

¶ 92. Comp. L. 1897, § 6087, governing the voluntary winding up of the affairs of a partnership association, is not complied with by calling a meeting and passing a resolution to exchange the partnership assets for stock in a railroad corporation and dividing such stock among the members, and a partner not agreeing thereto is not bound by such arrangement.—Emery v. Kalamazoo & Hastings Construction Co., 132 Mich. 560.

¶ 93. Where a partnership association's term expired September 21st, and a meeting was called July 12th for the settlement of the partnership affairs and the distribution of its assets, it constituted a voluntary winding up rather than a termination of the term and hence such winding up is governed by Comp. L. 1897, § 6087.—Emery v. Kalamazoo & Hastings Construction Co., 132 Mich. 560.

¶ 94. The majority shareholders of a partnership association have no power to wind up the affairs of the partnership by exchanging its assets for stock in a railroad corporation and compelling partners not agreeing to the transaction to become stockholders in the corporation and accept its stock for their interest in the partnership.—Emery v. Kalamazoo & Hastings Construction Co., 132 Mich. 560.

¶ 95. The fact that all the stock of a railroad corporation is owned by a partnership association does not prevent a member of the latter from objecting to an arrangement, made without her consent, by which the partnership assets were exchanged for stock in the corporation, where the partnership and the railroad corporation were separate and distinct organizations.—Emery v. Kalamazoo & Hastings Construction Co., 132 Mich. 560.

¶ 96. A member of a partnership association is not estopped from objecting to an arrangement to which he has not agreed, by which the partnership assets in winding up its affairs were exchanged for stock in a railroad corporation, by the fact that she had accepted payment from the corporation of partnership notes, payment of which the corporation had assumed under an earlier agreement.—Emery v. Kalamazoo & Hastings Construction Co., 132 Mich. 560.

JOINTURE to JOURNALS.

Cross-References.

Jointure—
To bar dower, see Dower § 26.
Marriage settlements, see Husband and Wife § 2.
Journals—
Books of account as documentary evidence, see Evidence, VIII, B; and see Indictment § 296.
Judgment records and dockets, see Judgments, III; Justices of the Peace, IV, F.
Of the legislature, see Statutes, I, V.

JUDGES.

TREATS of the office of judge as distinguished from the court and of the qualifications, disabilities and immunities pertaining to it.

Analysis.

I. The office; election, term and compensation.
§ 1. Eligibility and election and term.
§ 2. Vacancies and vacancy appointments.
§ 3. Compensation.

II. Powers and disabilities; duties and immunities.
§ 4. In general.
§ 5. Matters pertaining to colleagues or to other courts.
§ 6. ——Matters belonging to adjacent county.
§ 7. Cessation of and succession to powers.
§ 8. Disability to practice law.

III. Disqualification to sit in case.
§ 9. In general; effect of disqualification.
§ 10. Interest or bias in general.
§ 11. Relationship.
§ 12. Objections, waiver and cure of disqualification.

IV. Special, assistant and substitute judges.
§ 13. In general.
§ 14. Designation and assumption of office.
§ 15. Objections to substitute or assistant.

I. THE OFFICE; ELECTION, TERM AND COMPENSATION.

General law of public officers, see Officers.
General law of courts and jurisdiction as distinguished from law relative to judges as such, see Courts.
Judicial notice of persons, incumbencies and signatures, see Evidence § 20.

§ 1. Eligibility and election and term.

Times and manner of calling elections, see Elections, I.
Primary elections to nominate candidates, see Elections, IV.
Jurisdiction of contest on election of circuit judge, see Elections § 57.
Constitutional term of judges, see Const. art. XVI, § 1.
Constitutional power to remove judges, see Const. art. IX, § 6.

¶ 1. Residence within the circuit is not a condition to eligibility to, or tenure of, the office of circuit judge, unless a judge actually residing within his circuit removes from it, in which case he vacates his office. People ex rel. Royce v. Goodwin, 22 Mich. 496.

¶ 2. Since a judge of the Recorder's Court of the City of Detroit is a state officer, § 7 of art. V of the Constitution renders a member of the legislature ineligible to such office.—Murtha v. Lindsay, 187 Mich. 79

§ 2. Vacancies and vacancy appointments.

General rules as to vacancies in office, see Officers, II, V.

¶ 3. A judge of probate was re-elected, but died before the commencement of his term, and an appointment was made by the governor to fill the vacancy. January 1st (when the new term would commence) the governor, on the supposition that there was now a new vacancy, made a new appointment. It was held that the second appointment was void, and that under the constitution the person first appointed would hold until a successor was elected and qualified.

—People ex rel. Andrews v. Lord, 9 Mich. 227.

¶ 4. Comp. L. 1857, § 491, How. St. § 667, which provides that, when a vacancy in a county office shall have been filled by appointment of the governor, the appointee shall hold for the unexpired portion of the regular term, cannot constitutionally apply to the office of judge of probate, or be regarded as repealing the statutes providing for special elections to keep that office filled. —People ex rel. Andrews v. Lord, 9 Mich. 227.

¶ 5. Since the Constitution vests it in the governor, sections 35 and 36, Act No. 593, Local Acts 1905, do not permit council to fill vacancy in office of judge of superior court.—Attorney General ex rel. Danhof v. Renihan, 184 Mich. 272.

§ 3. Compensation.

Statutory provisions and prohibitions, see Jud. Act, chap. XLIX, § 8 et seq.; Comp. L. 1915, § 13730 et seq.

Statutory prohibition of taking of fees for services to clients or litigants, see Jud. Act, chap. IV, § 11; Comp. L. 1915, § 12258.

¶ 6. Under Const. art. VI, section 6, providing that circuit judges of Kent and other named counties shall receive in addition to the salary provided by the Constitution, such additional salary as may from time to time be fixed by the board of supervisors, the board has power to take away all additional salary previously voted by it.—Adsit v. Smith, 129 Mich. 4.

¶ 7. Under Const. art. VI, § 6, providing that circuit judges of Kent and other named counties shall receive, in addition to the salary provided by the Constitution, such additional salary as may from time to time be fixed by the board of supervisors, a resolution adopted by the board "that the report of the committee be amended by fixing salaries of county officers as follows * * * for each of the circuit judges a salary of $2,500 as provided by statute instead of $3,500 as heretofore ordered by this board" is adequate to rescind the former action of the board and reduce the salary to $2,500. —Adsit v. Smith, 129 Mich. 4.

¶ 8. The constitutional provision (art. VI, § 6) that the circuit judges may receive such additional salary as may from time to time be fixed and determined by the boards of supervisors, limits the power of the boards to fixing from time to time, if they see fit, an additional salary for the office of circuit judge; the salary must be fixed and determined for the office and not for the particular incumbent.—Beach v. Kent, 142 Mich. 347.

II. POWERS AND DISABILITIES; DUTIES AND IMMUNITIES.

§ 4. In general.

Disability to review or to interfere with colleagues or coequal courts, see post §§ 5, 6.

Cessation of powers and successor's powers, see post § 7.

Practicing law, see post § 8.

Power of judge as court to entertain appeal from order made by himself as judge, see post ¶ 30.

Disqualification pertaining to case, see post III.

Distinctness of judicial functions, and invalidity of encroachments on or by legislative or executive, see Constitutional Law, II.

Jurisdiction of courts as distinguished from that of judges, see Courts, V.

Functions, duties and conduct in trials, see Indictment, IX; Trial (civil trials).

Relative provinces of the court and jury, see Instructions, I; Trial, VI; Indictment, IX, D, E.

Jurisdiction and powers at chambers, see also Courts § 58.

Power to hear petition to dissolve attachment at chambers, see Attachments ¶ 324.

Validity of act conferring powers on judge at chambers, see Constitutional Law § 54.

Power of court or of judge to punish contempts, see Contempt § 19.

Chambers power to issue habeas corpus, see Habeas Corpus § 6.

Function of judge in issuing habeas corpus, see Habeas Corpus § 6.

Collateral attack on acts of judge entering into judgments, see Judgments, VII.

Costs on mandamus against judge, see Costs, II, C.

¶ 9. A judge of probate cannot become interested in a sale made under his order. —Walton v. Torrey, H. 259.

§ 5. Matters pertaining to colleagues or to other courts.

Cessation of powers and powers of successors, see post § 7.

Proper judge to settle and sign bill or case on appeal or error, see Appeal § 112.

Sentence by other than trial judge, see also Indictment ¶ 2319.

Irreviewableness by court of action of judge in proceedings to dissolve attachment, see Attachment § 126.

¶ 10. A circuit judge is not disqualified from rehearing a motion or cause which has been passed upon by another judge sitting in the same court.—Manufacturers' Mutual Fire Ins. Co. v. Gratiot Circuit Judge, 79 Mich. 241.

¶ 11. Where upon a decree of divorce the matter of alimony is left open for future

determination, a later petition asking that alimony be decreed should be brought before the judge who heard the suit.—Mincer v. Wayne Circuit Judge, 163 Mich. 628.

¶ 12. Relator obtained a decree of divorce from her husband, by which the matter of alimony was left for future determination. One year later she filed a petition before respondent circuit judge to have alimony decreed. Respondent dismissed the petition without prejudice, on the ground that the case was heard by one of his colleagues on the circuit and respondent was unfamiliar with the facts. Held, respondent's order was proper, and mandamus would not lie to compel him to vacate it.—Mincer v. Wayne Circuit Judge, 163 Mich. 628.

¶ 13. While the issue in a proceeding as for a criminal contempt for the criticism of a judge is to be tried by the court and not a jury, it does not follow that it must be before the judge who is criticized; and where the offense is committed in the presence of the judge he should deal with the offender, but when committed elsewhere, the better practice is to call in another judge to hear the matter.—In re Dingley, 182 Mich. 44.

¶ 14. A motion to amend the plea by adding an affidavit denying the execution of an instrument sued upon, upon the ground that the question of such execution was fairly raised by the evidence, can properly be heard and decided only by the trial judge to whom the case has been submitted for decision.—Portsmouth Savings Bank v. Hart, 83 Mich. 646.

¶ 14a. None but the judge who tried an appeal from a justice can pass on and award costs.—Steinhauser v. Wayne Circuit Judge, 42 Mich. 463.

§ 6. ——Matters belonging to adjacent county.

Practice of law in other circuits, see post § 8.

¶ 15. As to the right of a circuit judge of an adjoining circuit to take part in the prosecution of a criminal case, quære.—People v. Evans, 72 Mich. 367.

¶ 16. The trial judge may hear and decide the motion to amend a plea after trial to meet proof though when entered the county in which suit was tried has been made a part of another judicial circuit.—Portsmouth Savings Bank v. Hart Circuit Judge, 83 Mich. 646.

¶ 16a. After an order has been made giving plaintiff until the first day of the next term to move for a new trial, if the county is placed in a new circuit, the judge thereof has jurisdiction to grant a new trial.—Manufacturers' Mutual Fire Ins. Co. v. Gratiot Circuit Judge, 79 Mich. 241.

§ 7. Cessation of and succession to powers.

Power after division of county, see also ante ¶ 16.

Settlement of bill or case on appeal by successor, see Appeal § 112.

Provision saving pending proceedings on termination, vacancy and succession, see Jud. Act, chap. IV, § 2; Comp. L. 1915, § 12249.

¶ 17. Application to have a proper judgment entry made which the clerk has failed to do may be entertained by the successor of the judge who rendered the decision and filed the findings and conclusions.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 18. A finding of facts made and filed after the judge who tried the cause has resigned is a nullity.—Ellis v. Rector, 32 Mich. 379.

¶ 19. A judge whose term of office has expired has no authority to make amendments to findings of fact made while in office.—Northern Assur. Co. v. Houghton Circuit Judge, 169 Mich. 238.

§ 8. Disability to practice law.

See also ante ¶ 15.

Disqualification by reason of having been counsel, see post § 10.

Statutory prohibition of practicing or association with partner in practice, see Jud. Act, chap. IV, §§ 9, 10; Comp. L. 1915, §§ 12256, 12257.

¶ 20. Under How. St. § 7247, which provides that no judge can practice as an attorney in the circuit in which he has been elected judge, a judge may practice in another circuit than his own, though he may have presided as judge there.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 21. A circuit judge who has called another judge to take his place and preside at a criminal trial cannot assist in the prosecution, though he has already sent in his resignation as judge to take effect in five days.—Bashford v. People, 24 Mich. 244.

¶ 22. The statute (Comp. L. 1871, § 5679, How. St. §§ 7247, 7248) prohibiting any judge from practicing himself or from having a partner who practices in the court of which he is a judge, is peremptory; and it applies to arbitration proceedings as well as to others.—Gallagher v. Kern, 31 Mich. 138.

III. DISQUALIFICATION TO SIT IN CASE.

§ 9. In general; effect of disqualification.

See also post ¶ 33.

What constitutes disqualifying bias or interest, see post §§ 10, 11.

Calling in substitute judge, see post IV.

Disqualification of judge as matter affecting jurisdiction, see Courts § 39.
Interest or bias of judge affecting validity of indictment, see Indictment ¶¶ 561, 562.
Change of venue, see Venue.

¶ 23. Under Comp. L. 1897, § 1109, no judge in any court can sit as such in any case in which he is a party, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties, and where he does inadvertently sit in a case where he is thus disqualified, the order or decree made is void.—Davis Colliery Co. v. Charlevoix Sugar Co., 155 Mich. 228.

¶ 24. Probate judge named legatee may make orders preliminary to proving will.—McFarlane v. Clark, 39 Mich. 44.

¶ 25. That probate judge when he appointed a trust company guardian of an incompetent person was a stockholder of such company does not render prior proceedings void or destroy jurisdiction of the circuit court on appeal.—In re Leonard's Estate, 95 Mich. 295.

¶ 26. Although the rule as to disqualification of judges must yield to the demand of necessity, such necessity does not exist under the statute (Comp. L. 1897, §§ 264, 276) providing that the settlement of exceptions shall be made by the judge before whom the trial was had, where such statute recognizes the possibility of the absence of the judges, from illness or other causes.—Bliss v. Caille Bros. Co., 149 Mich. 601.

§ 10. Interest or bias in general.

Power of other judge to hear contempt proceedings, see ante ¶ 13.
Effect of disqualification, see ante § 9.
Statutory disqualifications, see Jud. Act, chap. IV, § 7; Comp. L. 1915, § 12254.
Provision disqualifying for having been of counsel in case, see Jud. Act, chap. I, § 76; Comp. L. 1915, § 12081.

¶ 27. The principle that no one can be judge in his own cause applies wherever judicial powers are employed by a body appointed by law.—Stockwell v. White Lake Township Board, 22 Mich. 341.

¶ 28. A judge cannot try a cause in which a corporation of which he is a member is a party; nor can he try a cause in which he has been consulted or employed as counsel.—People ex rel. Whipple v. Saginaw Circuit Judge, 26 Mich. 342.

¶ 29. A judge who, without ever having been employed as counsel for pay in respect to a certain matter, has from time to time advised a party concerned, merely in a friendly way, is disqualified to sit in a cause having reference to that matter.—Curtis v. Wilcox, 74 Mich. 69.

¶ 30. Where an appeal has been taken to the circuit court from an order of the circuit judge made on the hearing of an application to dissolve an attachment, the judge who made the order is not disqualified from passing upon the motion to dismiss the appeal.—Harvey v. Pealer, 63 Mich. 572.

¶ 31. A circuit court judge who had allowed a fraudulent claim by a coroner for an inquest upon the dead body of an alleged stranger, is not disqualified from acting in contempt proceedings against the coroner based on the presentation of the claim.—In re Toepel, 139 Mich. 85.

¶ 32. The interest of a trial judge in a prosecution of some particular offender does not disqualify him from ordering a grand jury for the purpose of inquiring into offenses generally.—People v. Lay, 193 Mich. 476.

¶ 33. Continuances to show cause why an action should not be dismissed, under § 2, chap. XVIII of the Judicature Act, Comp. L. 1915, § 12574, for want of prosecution, granted by a judge who before ascending the bench was plaintiff's attorney, are void.—Sayre v. Detroit, G. H. & M. Ry. Co., 199 Mich. 414.

§ 11. Relationship.

Statutory provisions, see Jud. Act, chap. IV, § 7; Comp. L. 1915, § 12254.

¶ 34. How. St. § 7245, disqualifies a circuit judge, who is by marriage a nephew of one of three complainants and a cousin of the other two, from sitting in the cause or signing a decree therein, and a decree so signed is void.—Horton v. Howard, 79 Mich. 642.

¶ 35. A widow who is beneficially interested in the estate of her husband as a preferred and as a residuary legatee, is not a mere nominal party, but is such a party as would render the rule of disqualification of judges applicable where she is related to the trial judge.—Bliss v. Caille Bros. Co., 149 Mich. 601.

¶ 36. A judge is disqualified to act in a case where one of the parties is a second cousin to his wife, being related to such party by affinity.—Bliss v. Caille Bros. Co., 149 Mich. 601.

¶ 37. The fact that two men, unrelated, marry wives who are second cousins does not establish between them a relation by affinity within the rule that affinity is the

relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, the degrees of affinity being computed in the same way as those of consanguinity or kindred.—Bliss v. Caille Bros. Co., 149 Mich. 601.

¶ 38. A judge who is related to a stockholder in defendant corporation is disqualified from sitting in the case, although the relative holds the stock only as administratrix of her husband's estate, especially where it appears that she will receive one-half of her husband's personal property when the estate is settled.—Davis Colliery Co. v. Charlevoix Sugar Co., 155 Mich. 228.

¶ 39. A judge is not disqualified under the Judicature Act, Pub. Acts 1915, No. 314, chap. IV, § 7, providing that no judge shall sit as a court in any case in which he is related within the third degree of consanguinity to either of the attorneys of either party to the cause, from sitting in a case to pass upon the question of the advisability of granting an order compelling a state's attorney to file with the circuit court clerk papers and documents belonging to the city treasurer's office which the state's attorney had obtained for purposes of a criminal prosecution from auditors examining the books of the city treasurer, by reason of his son and nephew being attorneys of record for the deputy city treasurer in one other case in which he was being prosecuted alone and in another case in which he was being prosecuted jointly with the city treasurer.—Barnard v. Grand Rapids Superior Judge, 191 Mich. 567.

¶ 40. The relationship of one of the justices of the supreme court to an attorney in the case is not a ground for rehearing.—Maclean v. Scripps, 52 Mich. 214.

§ 12. Objections, waiver and cure of disqualification.

Pleas in abatement to indictment for disqualification of judge, see Indictment § 109.
Matter affecting member of supreme court as ground for rehearing, see Appeal § 543.
Waiver of objections to disqualification by going to trial, see Indictment ¶ 590.
Assignment of error that judge was disqualified, see Appeal § 202.

¶ 41. A circuit judge who is a brother-in-law of the plaintiff's counsel is not disqualified from hearing the cause under Comp. L. 1897, § 1109, where an agreement whereby the plaintiff's counsel is to receive a contingent fee and expenses is abrogated upon objection raised and is also originally void as against public policy.—Knickerbocker v. Worthing, 138 Mich. 224.

IV. SPECIAL, ASSISTANT AND SUBSTITUTE JUDGES.

§ 13. In general.

Designation and assumption of office, see post § 14.
Objections to substitute or assistant, see post § 15.
Disability to call in substitute and appear as counsel before him, see ante ¶ 21.
Substitute or special commissioners, see Courts § 4.
Validity of statute empowering circuit judge to sit in recorder's court, see Constitutional Law § 60.
Power of legislature to provide for additional judges, or judges of new courts, see Constitutional Law § 51 et seq.

¶ 42. Article VI, section 11 of the State Constitution provides that "judges of the circuit court may hold court for each other, and shall do so when required by law"; therefore a judge who is disqualified from hearing a case may lawfully secure a judge of some other circuit to sit in his place.—Campbell v. Jackson Circuit Judge, 155 Mich. 326.

§ 14. Designation and assumption of office.

Validity of law for designation of assistant judge by governor, see Constitutional Law § 60.

¶ 43. A simple request by the recorder is all that is necessary to give a judge of the Wayne circuit court authority to act as judge of the recorder's court of the city of Detroit under the statute, and in the absence of a contrary showing the right of a judge so assuming to act will be presumed.—People v. Gallagher, 75 Mich. 512.

¶ 44. No acceptance is necessary where the judge of one circuit is designated by the governor to fill a vacancy in another.—Howerter v. Kelly, 23 Mich. 337.

§ 15. Objections to substitute or assistant.

¶ 45. In the absence of any showing to the contrary, it must be presumed that the necessary facts authorizing a circuit judge to act, under the statute, as probate judge existed; and where objection was made, and the judge acted thereupon by ignoring it, such decision that he had power to act cannot be attacked collaterally.—Landon v. Comet, 62 Mich. 80.

JUDGMENTS AND DECREES.

TREATS of decision and disposal of actions and suits by courts of record, including decrees in chancery in so far as they are subject to principles general to all judgments. It excludes judgments and decrees of probate courts (see Probate Courts, III; Estates of Decedents; Guardianship; Wills, V), municipal courts except as to matters of general law (see Municipal Courts, III), and judgments of justices of the peace (see Justices of the Peace, IV, F). It also excludes matters peculiar to judgments in special and summary statutory proceedings (see Eminent Domain, V, E; Highways, II, B; Forcible Entry; and like topics). Foreign judgments are treated in Foreign Judgments. As to other and further matters excluded see cross-references throughout the body of the topic.

Analysis.

I. General nature, classes and incidents.

§ 1. Definition, nature and purpose.
§ 2. Interlocutory judgments.
§ 3. By default or pro confesso.
§ 4. On demurrer.
§ 5. Nonsuit or dismissal.
§ 6. On confession.
§ 7. Upon stipulation or stipulated facts.
§ 8. Certification or allowance of claim or fee bill as judgment.

II. Requisites, and terms or substance generally.

A. ACTION, PARTIES AND SUBJECT-MATTER BEFORE COURT.

§ 9. Basis for judgment.
§ 10. Jurisdiction requisite to personal judgment.
§ 11. Names and designation of parties.
§ 12. Judgment against sureties and secondary parties.

B. RESPONSIVENESS AND CONFORMITY.

§ 13. To pleadings and issues.
§ 14. ——In respect to amount or items of recovery.
§ 15. To evidence and proof.
§ 16. To verdict and findings.

C. AS TO JOINT AND SEVERAL ISSUES, PARTIES AND RIGHTS.

§ 17. Joint and several judgments in general.
§ 18. Judgments upon joint obligations or demands.
§ 19. ——Nonjoinder of some joint parties.
§ 20. ——Want of service on part of defendants.
§ 21. ——Discontinuance, dismissal or personal defense as to some defendants.
§ 22. Judgments upon joint and several obligations or demands.

D. AMOUNT, TERMS AND CERTAINTY; NECESSITY OF VERDICT OR FINDINGS.

§ 23. Verdict, findings or conclusions to support.
§ 24. ——Conclusions of law and reasons therefor.
§ 25. ——Statements and findings of referee.
§ 26. ——To support judgment for costs.
§ 27. ——Judgment non obstante veredicto.
§ 28. Terms and amount.
§ 29. ——Recovery of interest.
§ 30. Recitals and descriptions.
§ 31. Incorporating findings and conclusions.
§ 32. Construction and interpretation.

III. Rendition, entry or enrollment, recording and indexing.

§ 33. In general; hearing and formal decision.
§ 34. Functions and powers of clerk.
§ 35. Entry or enrollment in general.
§ 36. Time for entry or enrollment.
§ 37. ——On findings filed in vacation.
§ 38. ——Entry nunc pro tunc.
§ 39. Judgment roll or record.
§ 40. ——Requisites and recitals.

IV. Arrest of judgment.

§ 41. In general; grounds.

V. Opening, amending and vacation on motion or petition.

A. Power of Trial Court and Expiration of Control.

§ 42. Power to modify or vacate.
§ 43. ——Consent judgments or decrees.
§ 44. ——Judgments of courts of concurrent jurisdiction.
§ 45. Discretion of court.
§ 46. After appeal or error or decision thereon.
§ 47. Pending equitable proceedings for like relief.
§ 48. At subsequent term.
§ 49. Amendments nunc pro tunc.

B. Grounds and Objections; Laches or Want of Equity.

§ 50. Right to relief and persons entitled.
§ 51. Grounds for opening or vacating.
§ 52. ——Want of notice or process.
§ 53. ——Fraud or collusion.
§ 54. ——Neglect or default of attorney.
§ 55. ——Absence of findings.
§ 56. Errors, mistakes and omissions warranting amendments.
§ 57. ——Amendments as to parties.
§ 58. ——Terms and conditions of dismissal.
§ 59. ——Amount or items of recovery.
§ 60. Grounds for denying relief.
§ 61. ——Laches of applicant.

C. Motion, Petition and Procedure Thereon.

§ 62. In general.
§ 63. Notice of application.
§ 64. Affidavits in support of application.
§ 65. Conditions upon opening, vacating or amending.
§ 66. Mode and manner of amendment.
§ 67. Necessity of actual amendment.

D. Effect of Opening, Amending or Vacation.

§ 68. In general; time when effectual.
§ 69. Defenses available upon opening decree.
§ 70. Effect of vacation as to one joint party.
§ 71. Effect on rights of purchasers.

VI. Suit to set aside, for injunction or other relief.

A. In General; Grounds and Defenses.

§ 72. In general; equitable considerations.
§ 73. Persons entitled to seek relief.
§ 74. Diligence and laches.
§ 75. Grounds for relief in general.
§ 76. Want of jurisdiction.
§ 77. Fraud, collusion, accident or mistake.
§ 78. Perjury or false testimony.
§ 79. Judgment on premature default.
§ 80. Defenses prevented or not interposed.
§ 81. ——Defenses prevented by act or fraud of adversary.
§ 82. Neglect, failure or inability to prosecute appeal or error.
§ 83. Satisfaction or discharge without proper record.
§ 84. Newly discovered evidence.
§ 85. Existence of other remedy; election and waiver.
§ 86. Grounds for enjoining enforcement of judgment.

B. Pleading and Procedure.

§ 87. In general; leave to file bill.
§ 88. Bill or complaint.
§ 89. Dismissal or relief.

VII. Collateral attack, conclusiveness and effect.

§ 90. Collateral impeachment in general.
§ 91. Persons concluded.
§ 92. ——Estoppel to attack.
§ 93. Grounds of attack; invalidity of judgment or decree in general.
§ 94. Want of jurisdiction.
§ 95. ——Adjudication by court as to its own jurisdiction.
§ 96. ——Waiver of jurisdiction.
§ 97. Fraud and collusion.
§ 98. Disqualification of judge.
§ 99. Nonjurisdictional errors and irregularities.
§ 100. ——Sufficiency or validity of cause of action.
§ 101. ——Failure to perform conditions precedent.
§ 102. ——Objections as to remedy.
§ 103. ——Misjoinder of actions.
§ 104. ——Suit brought without leave of court.
§ 105. ——Unauthorized appearance by attorney.
§ 106. ——Objections as to parties.
§ 107. ——Defects in pleadings.
§ 108. ——Defects in notice or process.
§ 109. ——Amount and propriety of relief.
§ 110. ——Irregularities in entering, enrolling or recording judgment.
§ 111. Collateral attack upon particular kinds of decisions.
§ 112. ——Default or pro confesso decrees.
§ 113. ——Judgments by confession.
§ 114. ——Orders amending judgment.
§ 115. Presumptions supporting judgments and decrees.
§ 116. ——As to regularity of proceedings.
§ 117. Verity of record; parol evidence to explain or vary.

§ 118. ——Supplying jurisdictional defects.
§ 119. ——Contradicting recitals of jurisdiction.
§ 120. Retroactive operation or effect of judgment or decree.

VIII. Lien and duration.

§ 121. In general.
§ 122. Judgments declaring specific liens.

IX. Assignment and devolution.

§ 123. In general.
§ 124. Rights of assignee.

X. Revival.

§ 125. In general.
§ 126. Nunc pro tunc revival.

XI. Payment, discharge and set-offs.

§ 127. In general; sufficiency of satisfaction or tender.
§ 128. Arrest of debtor or levy of execution as satisfaction.
§ 129. Satisfaction of judgment of restitution or in specie.
§ 130. Effect of payment, discharge or satisfaction.
§ 131. Setting aside satisfaction.
§ 132. Set-off of judgments.
§ 133. Recovery of money paid on judgment afterwards reversed or vacated.

XII. Actions and proceedings to enforce.

§ 134. In general.
§ 135. Enforcement of federal decisions in state courts.
§ 136. Possessory and execution or other final process.
§ 137. Action at law on decree or judgment.
§ 138. ——Pleading.
§ 139. ——Presumptions, burden of proof and evidence.

I. GENERAL NATURE, CLASSES AND INCIDENTS.

Judgments in actions respecting particular matters and in particular proceedings, see the appropriate topics, e. g., Arbitration § 14; Attachment, XII; Bastardy § 13; Bonds § 8; Creditors' Suits, IV; Fraudulent Conveyances § 137; Insurance, XX, D; Master and Servant, III, H.

Decrees in equity in general, see Equity, X, B.

Sentence and judgment in criminal cases, see Indictment, XI.

Judgments on appeal or error, see Appeal, XIII.

On retrial after remand, see Appeal §§ 562-564.

Judgment on certiorari, see Certiorari §§ 62-64.

Justice's judgments, see Justices of the Peace.

Judgments of municipal courts, see Municipal Corporations; Municipal Courts.

Judgments and decrees of probate courts, see Probate Courts.

Foreign judgments, see Foreign Judgments.

Summary judgment against surety on appeal bond, see Appeal § 578.

Summary judgment against surety for costs, see Surety for Costs.

Review of judgment generally, see Appeal; Certiorari.

Estoppel or bar by judgment, see Former Adjudication.

§ 1. Definition, nature and purpose.

Of interlocutory judgment, see post § 2.

Allowance of bill of inquest as judgment, see post § 8.

Necessity of formal decision, see post § 33.

Judgment non obstante veredicto, see post § 27.

Nature and contents of judgment record, see post § 39.

Form and requisites of judgments, see post II.
Noncontractual nature of judgment under contract clause of constitution, see Constitutional Law § 171.
Dissolution of attachment as a judgment, see also Attachment ¶ 364.
On trial of issues on suggestion of fact, see Jud. Act, chap. XX, § 27; Comp. L. 1915, § 12763.
Provisions as to judgment notwithstanding verdict, see Comp. L. 1915, § 14568.
Provisions as to summary judgments, Jud. Act, chap. XVIII, §§ 9-15; Comp. L. 1915, §§ 12581-12587.

¶ 1. A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it.—Whitwell v. Emory, 3 Mich. 84.

¶ 1a. A judgment is the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein.—Crippen v. People, 8 Mich. 117.

§ 2. Interlocutory judgments.

On overruling demurrer, see post ¶ 9.

¶ 2. The only object of an interlocutory judgment is to direct the ascertainment of damages for the purposes of a final judgment; and its form is immaterial if the method of assessment is correct.—Wilcox v. Sweet, 24 Mich. 355.

§ 3. By default or pro confesso.

Amendment nunc pro tunc to correct error in entering judgment as if taken on default, see post ¶ 144.
Amendment nunc pro tunc of default order in action on judgment, see post ¶ 145.
Grounds for vacating judgment, see post § 51 et seq.
Equitable relief from judgment on premature default, see post § 79.
Collateral attack of default or pro confesso decrees, see post § 112.
General law as to defaults, see Defaults.
Sufficiency of default proceedings to admit of judgment, see Defaults.
Grounds for opening defaults, see Defaults §§ 28-31.
Nature of order taking bill as confessed, see Defaults ¶ 46.

¶ 3. A judgment by default in the technical sense cannot be said to be entered, where an issue of fact was joined, and the case was set and regularly called; since in that situation it is incumbent on plaintiff to make proof of his case.—Leahy v. Wayne Circuit Judge, 144 Mich. 304.

¶ 4. A decree of the court of chancery reciting a hearing on bill, answer and stipulations and arguments of counsel for complainants "no person appearing to argue" for defendants was held not to show such a default by defendant at the hearing as would deprive him of the right of appeal. As to the limitations, if any, on that right, where default was made below, see Stevens v. Townsend, 1 D. 77.

¶ 5. While an order pro confesso permits taking of a decree without proofs it is only such decree as the court thinks just and only in conformity with the material allegations.—Messenger v. Peter, 129 Mich. 93.

§ 4. On demurrer.

General law as to demurrers, see Pleading, IV.

¶ 6. On overruling a demurrer, judgment goes for plaintiff, unless defendant is given leave to plead; such leave may be conditioned as the case requires.—Tefft v. McNoah, 9 Mich. 201.

¶ 7. A court cannot render final judgment on the whole record upon demurrer to certain counts in the declaration while an issue of fact is pending on other counts.—Bosman v. Akeley, 39 Mich. 710.

¶ 8. Judgment on demurrer goes against the pleader committing the first error in substance, not in form merely.—Wales v. Lyon, 2 Mich. 276; People ex rel. Speed v. Hartwell, 12 Mich. 508; People ex rel. Benoit v. Miller, 16 Mich. 56.

¶ 9. On overruling a demurrer a court can do no more than award an interlocutory judgment.—Mason v. Reynolds, 33 Mich. 60.

§ 5. Nonsuit or dismissal.

General law as to nonsuit and dismissal, see Discontinuance.
Judgment upon joint obligations after discontinuance or dismissal as to some defendants, see post § 21.
Amendment of judgment of dismissal, see post § 58.
Provisions prohibiting judgment of nonsuit after verdict, see Jud. Act, chap. XXII, § 1; Comp. L. 1915, § 12791.

¶ 10. Judgment as in case of nonsuit is rendered against a plaintiff who fails to appear on trial before a referee.—Abbott v. Mathews, 26 Mich. 176.

¶ 11. The county judge, in his return to a certiorari, set forth that he rendered judgment of "no cause of action, nonsuit, I think"; but as the judgment was rendered upon proofs and a submission on the merits, it was held to be in law a judgment for defendant, and not a nonsuit.—Lee v. Hardgrave, 3 Mich. 77.

§ 6. On confession.

Modification of consent judgment, see post § 43.
Collateral attack of judgments on confession, see post § 113.

Confession of judgment without action, see Confession of Judgment.
Provisions as to judgments upon confession, Jud. Act, chap. XXII, § 3; Comp. L. 1915, § 12793.

¶ 12. Powers of attorney to confess judgment are to be construed strictly against the holders of such instruments.—In re Raymor's Estate, 165 Mich. 259; Raymor v. Michigan Trust Co., Id.

§ 7. Upon stipulation or stipulated facts.

Judgments on confession, see ante § 6.
Power to modify consent judgments, see post § 43.
General law as to stipulations, see Stipulations.

¶ 13. Judgment for plaintiff cannot be rendered upon a stipulation of facts that does not unequivocally show a liability.—Gillett v. Detroit Board of Trade, 46 Mich. 309.

¶ 14. Pursuant to a statement in the record made by one counsel that the testimony in the case on trial and the one following was identical and that it could be agreed that the testimony in the one would be the testimony in the other, followed by a statement by the court that the judgment would be the same in both cases, and a statement by the other counsel that the bonds filed covered both cases; the same judgment was entered in both cases.—Brown v. Smedley, 136 Mich. 70.

§ 8. Certification or allowance of claim or fee bill as judgment.

Nature of judgment, see ante § 1.

¶ 15. The allowance of a bill of inquest by a circuit judge does not amount to a judgment.—Edwards v. Auditor General, 161 Mich. 639.

¶ 16. The action of the circuit judge in auditing and certifying a coroner's bill for expenses of an inquest to the end that it may be presented for allowance is not a judgment conclusive of the facts so certified, and it does not conclude the auditor general in the exercise of his ministerial function of determining whether the claim shall be allowed.—People v. Hoffmann, 142 Mich. 531.

II. REQUISITES, AND TERMS OR SUBSTANCE GENERALLY.

Requisites of decrees, and propriety and sufficiency of the relief, see Equity §§ 204-222.
Finality essential to review, see Appeal, III; Certiorari § 22.
Form and terms of appellate judgment in general, see Appeal, XIII.
Form of appellate judgment on abatement or for want of jurisdiction, see Appeal § 492.
Requisites of judgment to operate as res adjudicata, see Former Adjudication, II.

A. ACTION, PARTIES AND SUBJECT-MATTER BEFORE COURT.

Matters admitted by default of one of joint parties, see Defaults § 18.
Defense by answering defendants as preventing judgment as to any defaulted ones, see Defaults § 18.
Judgment against answering and defaulted defendants on verdict finding issues and assessing damages against all, see Defaults § 21.
Necessity that party appear of record to be regarded as party, see also Equity § 64.
Separate appearance by joint party, see Appearance § 5.

§ 9. Basis for judgment.

Basis of default judgments, see also ante § 3.
Judgment on demurrer, see ante § 4.
Of nonsuit or dismissal, see ante § 5.
Judgment on confession, see ante § 6.
Entering same judgment in two or more cases, see ante ¶ 14.
Conformity to pleadings, issues and evidence, see post §§ 13-15.
Conformity to verdict and findings, see post § 16.
Verdict, findings or conclusions to support, see post § 23.
Validity of judgment entered by clerk without authority of court, see post ¶ 95.
Nunc pro tunc entry of rule to plead to support judgment, see post ¶ 105.
Propriety of judgment non obstante veredicto, see post § 27.
Grounds for vacating judgment on motion, see post § 51.
Grounds for equitable relief from judgment, see post § 75.
Grounds for collateral attack of judgment, see post § 93.
Precedents as rules for decision, see Courts, IV.

¶ 17. A judgment for possession and also for a money debt following a declaration in which it was sought to combine in one count a declaration in replevin with one in assumpsit for the balance due on a promissory note is void for such a declaration confers no jurisdiction to render the judgment.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

§ 10. Jurisdiction requisite to personal judgment.

Necessity that record show jurisdictional facts, see post § 40.
Vacating judgment for want of notice or process, see post § 52.
Want of jurisdiction as ground for equitable relief from judgment, see post § 76.
Collateral attack for want of jurisdiction, see post § 94.
Personal judgment or judgment in rem in log lien proceedings, see Forestry § 27.
Effect of foreign judgment on partnership note on service of only one partner, see Foreign Judgments § 10.

¶ 18. Where a nonresident has not appeared, a decree for the payment of a sum of money by him is void. And where another defendant in the case appealed, and the decree against him was reversed, the void decree against the nonresident defendant was also set aside.—Outhwite v. Porter, 13 Mich. 533.

¶ 19. A personal decree against one who has never been served with process nor appeared in the case is a mere nullity and cannot be made the basis of any equitable remedy.—Tyler v. Peatt, 30 Mich. 63.

¶ 20. A personal decree cannot lawfully be rendered against a defendant who has been brought in by publication but has not been served with process or appeared in the case.—Innes v. Stewart, 36 Mich. 285.

¶ 21. A personal decree cannot be made in one jurisdiction against parties living in another and not personally served or not voluntarily appearing.—Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299.

¶ 22. A judgment for a joint conversion cannot include a defendant who was not served with process and who did not appear. —McLean v. Isbell, 44 Mich. 129.

¶ 23. In the case of substituted service a judgment is void if the statutory requirements are not followed.—Peninsular Sav. Bank v. Ward, 118 Mich. 87.

¶ 24. A judgment in a suit against an insurance company by declaration and rule under Comp. L. 1897, §§ 10444, 10445, is void on its face for want of jurisdiction where no rule to plead was filed with the declaration, and where the declaration fails to show that the plaintiff was a resident of the county in which the suit was brought and that the defendant is a corporation subject to the provisions of such statute.—Monger v. New Era Ass'n, 145 Mich. 683.

§ 11. Names and designation of parties.

Judgments as to joint parties and rights, see post II, C.

Amending judgment as to parties, see post § 57.

Error in names as affecting right to enforce the judgment, see post ¶¶ 436, 437.

Record showing as to person appearing as attorney, see Appearance § 3, ¶ 5.

Sufficiency of showing in record as to party dying without service or appearance, see also Equity ¶ 809.

Rules of court as to names of parties in judgments, see 1916 C. C. Rule 8.

¶ 25. Where the correct name of a defendant is given in the summons, and in the judgment rendered on default, after personal service, the judgment cannot be reversed, impaired or in any way affected by reason of defendant's name having been incorrectly stated in the declaration; How. St. § 7635.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 239.

¶ 26. A man sued by actual service of process, under a name by which he is called and known, may be held upon a judgment under that name.—Field v. Plummer, 75 Mich. 437.

¶ 27. A judgment entry is not invalid because it designates the defendants only by reference to the title of the cause whereby they may be identified.—First Nat. Bank v. Garland, 109 Mich. 515.

¶ 28. The practice of the courts of this state authorizing the files and journal entries to be used in place of a record does not dispense with any of the essential requisites and evidences of a judgment. An order for final judgment must not only ascertain the determination of the court upon the matters submitted, but the parties in favor of and against whom it operates.—Whitwell v. Emory, 3 Mich. 84.

§ 12. Judgment against sureties and secondary parties.

Entering judgment on error or appeal against sureties on appellant's bond, see Appeal § 573.

Entering judgment for costs against sureties for costs, see Security for Costs, III.

¶ 29. The power to render judgments against sureties on bonds in legal proceedings, without a separate action, is statutory, and cannot be extended by implication to cases outside the statutes.—Willard v. Fralick, 31 Mich. 431.

B. RESPONSIVENESS AND CONFORMITY.

§ 13. To pleadings and issues.

Conformity of decree pro confesso, see ante ¶ 5.

Judgment on demurrer where part of issues undetermined, see ante § 4.

Judgment non obstante where plaintiff's pleadings insufficient, see post § 27.

Conformity of decrees to bills, see Equity § 208.

¶ 30. Where the judgment entered upon special findings of fact was one appropriate to assumpsit, not, as it should have been, to trespass, the imperfection being cured by the statute of amendments is not available on appeal; and, moreover, a proper judgment could be entered in the supreme court on the findings.—Ferton v. Feller, 33 Mich. 199.

¶ 31. A recital in an order has no force as an adjudication if it relates to a matter not alleged in the pleadings and not put in issue. —Rice v. Rice, 50 Mich. 448.

¶ 31a. The question of the boundary line between two cities will not be determined where it is not necessarily raised upon the record, and where neither city is impleaded in the proceeding.—People ex rel. Attorney General v. Hatch, 60 Mich. 229.

§ 14. In respect to amount or items of recovery.

Amendment nunc pro tunc of judgment in excess of damages claimed, see post ¶ 143.

¶ 32. A judgment in excess of the damages claimed in the declaration is erroneous.—Kenyon v. Woodward, 16 Mich. 326.

¶ 33. A party on a note has always a right to suppose that judgment will not be taken upon it for a larger sum than appears upon its face to be due, and he is under no obligation to watch the proceedings to see that a judgment in excess is not taken.—Mitchell v. Shuert, 16 Mich. 444.

§ 15. To evidence and proof.

Necessity of proofs to support default judgment or pro confesso decree, see ante § 3.
Judgments of nonsuit or dismissal, see ante § 5.
Sufficiency of stipulated facts to support judgment, see ante § 7.
Conformity in assumpsit to the contract as proved, see Assumpsit ¶ 244.
Conformity of decree pro confesso to bill as confessed, see also Defaults § 24.

¶ 34. Where no basis is shown for a judgment for plaintiff, if there has been no mistrial defendant must have judgment; and it is immaterial whether the reason assigned for it is correct or not.—Seeley v. Albrecht, 41 Mich. 525.

§ 16. To verdict and findings.

Incorporating findings and conclusions in judgment, see post § 31.
Entry of judgment on findings filed in vacation, see post § 37.
General law as to verdicts and findings, see Verdicts.
Findings and amendments thereto made after term of judge expired, see Judges ¶¶ 18, 19.
Conformity to special findings or verdict in trover, see also Conversion ¶ 218.
Provisions requiring judgment upon verdict, see Jud. Act, chap. XXII, § 1; Comp. L. 1915, § 12791.

¶ 35. It is error to enter a judgment after the discharge of the jury, upon a verdict for a certain sum "and interest," for an amount in excess of that sum and the interest accruing on the verdict at the statutory rate up to the time of the entry of the judgment.—Wright v. Seeley, 96 Mich. 491.

C. AS TO JOINT AND SEVERAL ISSUES, PARTIES AND RIGHTS.

Affirmance or reversal in part on appeal or error, where judgment is severable, see Appeal § 486.
Effect of judgment against one joint debtor when record shows premature return as to other, see also Attachment ¶ 252.
Joint Debtor Act as due process, see Constitutional Law § 145.
Valid default as to one as essential basis for judgment against other, see also Defaults ¶ 29.
Vacating default judgment as to one joint defendant as vacation entire, see Defaults § 39.
Direction of verdict as to some of several counts, see Directing Verdict § 23.
Direction of verdict as to some of several parties, see Directing Verdict § 25.
Taking judgment against one codefendant as discontinuance of others, see Discontinuance § 4.
Several relief in equity to several parties, see Equity § 214.
Completeness and decisiveness of judgment to operate res adjudicata, see Former Adjudication, II.
Effect of judgment against one of two joint debtors as bar or estoppel, see Former Adjudication §§ 41, 71.
Form and sufficiency of decree to interplead, Adjudication, II.
Separate judgments against or for defendants as to whom plaintiff might have discontinued, see 1916 C. C. Rule 43, § 3.

§ 17. Joint and several judgments in general.

Judgments upon joint obligations, see post § 18 et seq.
Judgments upon joint and several obligations, see post § 22.
Amendment of judgment by striking out parties, see post ¶ 166.
Effect of vacating judgment as to one joint party, see post § 70.
Set-off of joint and several judgments against each other, see post ¶ 431.
Several judgment on retrial after joint judgment appealed, see Appeal § 562.

¶ 36. A judgment against several defendants may only be had where all of them are jointly liable upon the cause of action.—Anderson v. Fruitvale Transp. Co., 195 Mich. 734.

¶ 37. Under Circuit Court Rule No. 27, when an action is brought against several persons the plaintiff may proceed against the several defendants and obtain a joint judgment against all, or a judgment against one or more of them, in accordance with the facts as the jury may find them.—Rimmele v. Huebner, 190 Mich. 247.

¶ 38. Where a plaintiff sues several defendants he cannot be required under Circuit Court Rule No. 27 to elect at the beginning

of the trial, or during its progress, whether he will ask for a joint judgment or for a several judgment.—Rimmele v. Huebner, 190 Mich. 247.

¶ 39. Where a wife approves and ratifies an agreement, which is part of a joint transaction for the purchase of real estate in which both are interested, and which is the basis of a suit by both, a joint judgment is proper.—Cutler v. Spens, 191 Mich. 603.

§ 18. Judgments upon joint obligations or demands.

Amendment of record in suit against joint tort feasors, see post ¶ 162.

Provisions as to judgments in actions on joint obligations, see Jud. Act, chap. XXII, §§ 8-14, Comp. L. 1915, §§ 12798-12804.

¶ 40. In an action upon a joint obligation, plaintiff cannot have judgment against less than all the defendants.—Ballou v. Hill, 23 Mich. 60; Anderson v. White, 39 Mich. 130; City of Detroit v. Houghton, 42 Mich. 459; Munn v. Haynes, 46 Mich. 140; Post v. Shafer, 63 Mich. 85; Seligman v. Gray, 66 Mich. 341.

¶ 41. In an action against two defendants, as upon their joint promise, plaintiff cannot recover if he fails to show a joint undertaking.—Mace v. Page, 33 Mich. 38; Larkin v. Butterfield, 29 Mich. 254.

¶ 42. On a joint debt there can be no suit or recovery against part of the obligors except where one debtor has been legally discharged, or where, in fact, there was never any joint obligation.—Post v. Shafer, 63 Mich. 85.

¶ 43. Where two defendants against whom there had been a joint award were sued thereon, a judgment against one was held erroneous.—Ballou v. Hill, 23 Mich. 60.

¶ 44. Where one of three joint debtors was proceeded against by garnishee process, and a judgment recovered, it was held that the judgment was void, and no bar to a subsequent suit against all three on the joint demand.—Wetherwax v. Paine, 2 Mich. 555.

¶ 45. Suit cannot be brought against an individual party to a joint contract, and judgment taken upon it, without giving defendant an opportunity to plead nonjoinder in abatement.—Munn v. Haynes, 46 Mich. 140.

¶ 46. In an action brought upon a joint obligation of husband and wife, a judgment against the husband alone is erroneous unless it is affirmatively shown that the obligation was one she could not legally make.—Post v. Shafer, 63 Mich. 85.

¶ 47. Where a joint judgment is recovered on a joint demand and one defendant dies, pending appeal, judgment cannot be taken against the other in the circuit court.—Anderson v. Robinson, 38 Mich. 407.

¶ 48. A separate verdict against one of several joint parties will not authorize a judgment against all where there has been no assessment against the rest.—People ex rel. Ellison v. Marquette Circuit Judge, 41 Mich. 222.

¶ 49. Where in an action against several defendants one of them has not pleaded to the action, and no default against such defendant has been taken, and, under the proofs, the judgment must be joint, no judgment at all can properly be rendered.—Rimmele v. Huebner, 190 Mich. 247.

¶ 50. A judgment under the Civil Damage Act cannot be in one sum against the bondsmen, to wit, the amount of the bond, and against the saloonkeeper for a larger sum, all of them being joint defendants and the action being one sounding in tort.—Merrinane v. Miller, 157 Mich. 279.

§ 19. ——Nonjoinder of some joint parties.

¶ 51. Where one of two persons who have jointly entered into an undertaking is sued alone, he may, in the absence of a plea in abatement, be proceeded against to judgment and execution.—Purvis v. Butler, 87 Mich. 248.

§ 20. ——Want of service on part of defendants.

¶ 52. The Joint Debtor Act authorizing judgment, etc., in form against joint debtors though only one has been served with process, held valid.—Brooks v. McIntyre, 4 Mich. 316.

¶ 53. The proceedings for joint judgments when part only of joint debtors are served are special and statutory, and cannot be extended.—Hamilton v. Rogers, 67 Mich. 135.

¶ 54. An action on a joint claim cannot be put in judgment where service has been had on one defendant only, without a strict compliance with the rules of law on the subject.—Landsberg v. Bullock, 79 Mich. 278.

¶ 55. Joint judgment cannot be entered against several defendants when service of process against a portion of them has neither been made nor attempted.—Proctor v. Lewis, 50 Mich. 329.

¶ 56. Plaintiff in an action against joint defendants is allowed to proceed on service against only one defendant. But process must issue against all, and the intentional omission to serve either defendant, if seasonably found within the jurisdiction, would be an abuse of the writ. And the judgment, though joint in form, preserves all rights which defendants would have at common law.—Ralston v. Chapin, 49 Mich. 274.

¶ 57. Joint judgment may be entered on a joint obligation against parties, one of whom is outside of the jurisdiction and cannot there-

fore be lawfully served.—Gunzberg v. Miller, 39 Mich. 80.

¶ 58. Under Comp. L. 1897, § 840, when alleged partners are sued before a justice and all are not served with process, a judgment against all is not void for want of service.—Hirsh v. Fisher, 138 Mich. 95.

§ 21. ——Discontinuance, dismissal or personal defense as to some defendants.

Effect of discontinuance generally, see Discontinuance § 6.

¶ 59. In an action of assumpsit against joint defendants on a joint agreement, plaintiff cannot discontinue as to a part of the defendants, and recover against the remaining one alone.—Strohschein v. Kranich, 157 Mich. 335.

¶ 60. Where an exception is admitted in consequence of some defense that is purely personal, like infancy, good practice requires that, as a preliminary to judgment against the others, there should be a discontinuance as to the exempt party and an amendment of the record. In a particular case a severance on the record before judgment, and the entry of separate judgments, were held to have accomplished substantial justice without circuity, and such action was sustained.—Reading v. Beardsley, 41 Mich. 123.

¶ 61. Comp. L. 1871, § 7162, How. St. § 8727, which in an action on a joint contract, allows judgment to be given against such defendants as remain liable while others are released by the statute of limitations, does not allow a separate judgment in a case where the party against whom the statute would otherwise have run was never legally bound; as where it appears that such party entered into the contract as a surety for her husband.—Reading v. Beardsley, 41 Mich. 123.

§ 22. Judgments upon joint and several obligations or demands.

¶ 62. Comp. L. 1871, § 6146, How. St., § 7730, concerning joint debtors, applies to all joint undertakings or liabilities, and covers obligations that are joint and several as well as those that are joint.—Goebel v. Stevenson, 35 Mich. 172.

¶ 62a. A party cannot, upon a joint and several demand, take a joint judgment against less than all the debtors; the demand must be treated as joint as to all, or several as to all.—Winslow v. Herrick, 9 Mich. 380.

D. AMOUNT, TERMS AND CERTAINTY; NECESSITY OF VERDICT OR FINDINGS.

§ 23. Verdict, findings or conclusions to support.

Incorporating findings and conclusions in judgment, see post § 31.

Opening or vacating for absence of findings, see post § 55.

Collateral attack of judgment filed before filing of findings, see post ¶ 356.

General law as to verdicts and findings, see Verdicts.

Sufficiency of findings on which to base final judgment on appeal or error, see Appeal §§ 505-507.

Assessment of damages by clerk as basis for judgment, see Defaults § 22.

Judgment or decree on findings of referee, see Reference.

¶ 63. There must be either a general or special verdict in a jury trial to support a judgment, or the pleadings must authorize its entry.—Plunkett v. Detroit Elec. Ry. Co., 140 Mich. 299.

¶ 64. There must be a verdict on which to base a judgment, and hence the form of a directed verdict entered without trial on granting a motion for new trial and setting aside a contrary verdict will not suffice.—Prowell v. Neuendorf, 141 Mich. 272.

¶ 65. When the cause is tried by the judge alone, and a finding of facts is seasonably demanded, there is nothing, until such finding is made, upon which to found a judgment.—Stansell v. Corning, 21 Mich. 242.

¶ 66. Judgment cannot be rendered on an alleged state of facts which has not been found, nor be given for damages if there is no finding of damages set forth in the record.—Wiley v. Lovely, 46 Mich. 83.

¶ 67. Under the provision of Comp. L. 1897, § 10260, for the giving of decisions in vacation or at next term, a judgment may be rendered upon findings "of law" made by a trial judge as well as upon "findings of fact," the last clause thereof increasing the time within which filing of conclusions of law should be made over that specified in the cases of trial of questions of fact.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 68. A judgment cannot be based upon a judge's special finding which consists merely of an informal statement made up of facts, items of evidence, offers of proof, rulings on objections and an opinion on the result.—Steele v. Matteson, 50 Mich. 313.

¶ 69. A special finding that is immaterial in itself and is based on an erroneous instruction does not preclude the right to a judgment on other findings.—Detroit, G. H. & M. R. Co. v. Hayt, 55 Mich. 347.

¶ 70. A finding of facts will not support a judgment for plaintiff if it does not contain all that is essential to the plaintiff's recovery.—Burdick v. Chamberlain, 38 Mich. 610; Peck v. City Nat. Bank of Grand Rapids, 51 Mich. 353.

§ 24. ——Conclusions of law and reasons therefor.

Effect of opinions and recitals as conclusion on parties, see Former Adjudication §§ 23, 24.

¶ 71. If the findings of fact support the judgment rendered, it is unimportant whether or not the conclusions of law, apart from the judgment, are correct.—Nelson v. Ferris, 30 Mich. 497.

¶ 72. Where, upon a trial by the court without a jury, judgment has passed for defendant, and the facts found show the plaintiff was not entitled to judgment, the reasons stated by the court for its conclusions are immaterial.—Botsford v. Simmons, 32 Mich. 352.

§ 25. ——Statements and findings of referee.

General law as to reference, see Reference.

¶ 73. A judgment for plaintiff cannot be based upon a mere statement by a referee as to what sums he should allow.—Weirich v. Cook, 39 Mich. 134.

§ 26. ——To support judgment for costs.

General law as to costs, see Costs.

¶ 74. No final judgment as to costs can be given until the amount of damages is found. —Hemingway v. Peter, 25 Mich. 202.

§ 27. ——Judgment non obstante veredicto.

Statutory provision for judgment notwithstanding verdict, see Comp. L. 1915, §§ 14568, 14569.

¶ 75. A judgment non obstante veredicto is proper in case of a special verdict inconsistent with the general verdict.—Central Savings Bank v. O'Connor, 132 Mich. 578.

¶ 76. The defendant in an action for personal injuries was entitled to a judgment non obstante veredicto, where the pleadings were not sufficient to support a judgment in his favor, and where it appeared on the record that the verdict could not be supported as a matter of law.—Plunkett v. Detroit Elec. Ry. Co., 140 Mich. 299.

¶ 77. The defendant in an action for personal injuries was not entitled to a judgment non obstante veredicto, on the ground merely that, under the evidence, a verdict should have been directed in its favor, and in such case the proper practice is to move for a new trial, or review the case on writ of error and exceptions.—Plunkett v. Detroit Elec. Ry. Co., 140 Mich. 299.

¶ 78. A declaration for injuries inflicted by defendant's dogs contained two counts upon the common-law liability and one upon Comp. L. 1857, § 1645, How. St., § 2119, allowing double damages. Held, that a verdict for defendant upon the common-law counts was not inconsistent with one for plaintiff on the other, as the counts could not, as matter of law, be said to be for the same cause of action, and that the court did not err in refusing to give judgment for defendant on the whole record with costs on the issues found in his favor.—Swift v. Applebone, 23 Mich. 252.

¶ 78a. In an action by an elevator operator for damages for injuries received as a result of the falling of an automatic gate while the operator was closing the iron shutters in front of the gates for the day, such falling being due to some unknown cause, held that the court properly directed a judgment non obstante veredicto because of failure to prove negligence.—Guido v. Detroit Stove Works, 188 Mich. 359.

¶ 79. Neither the trial court nor the supreme court can render a judgment non obstante veredicto for the full amount claimed in a case where there had been a verdict rendered for less than the amount claimed and for less than the sum which the evidence clearly showed plaintiff was entitled to; the proper procedure being the granting of a new trial by the trial court, or reversal by this court on denial of such new trial.—County of Montmorency v. Putnam, 144 Mich. 185.

¶ 79a. Where a judgment has already been entered upon a verdict, a motion to enter judgment for plaintiff notwithstanding the verdict is unavailable.—Yerkes v. Antrim Circuit Judge, 200 Mich. 443.

§ 28. Terms and amount.

Interlocutory judgment directing ascertainment of damages, see ante ¶ 2.
Judgment in excess of damages claimed in declaration, see ante § 14.
Judgment in excess of verdict, see ante § 16.
Findings to sustain judgment for costs, see ante § 26.
Amount of judgment non obstante, see also ante § 27.
Amendment of judgment, see post V.
Curing excessive judgment by amendment nunc pro tunc, see post ¶ 143.
Recitals and descriptions, see post § 30.
Amending as to amount, see post § 59.
Collateral attack based on amount or terms of judgment, see post § 109.
Remission of part of amount as waiver of right to complain on appeal, see Appeal § 228.
Amount as element of recovery on appeal bond, see Appeal, XVI.
Amount of judgment recovered as fixing liability and right to costs, see Costs § 17.
Right to costs and general law of costs, see Costs.
Costs as incident of judgment, see Costs § 3.
Offer of judgment to avoid costs, see Costs § 20.

Practice and procedure to tax costs, see Costs, IV.
When judgment for plaintiff should be for nominal damages, see Damages § 210.
Error as to amount of judgment as affecting its force as res adjudicata, see Former Adjudication ¶ 41.
Effect of inclusion of improper allowance of attorney's fees in log lien judgment, see Forestry ¶ 130.

¶ 80. Where the performance of certain work sued for and its value are undisputed, and the controversy is whether defendant originally agreed to pay for the labor in order to have it go forward, or agreed orally to become security up to a certain lesser sum for third parties, at whose mill it was performed, plaintiff, if entitled to a verdict, should recover the full amount of his claim, since on defendant's version nothing could be recovered on an oral contract.—Mitchell v. Beck, 88 Mich. 342.

¶ 81. Under an agreement made in the probate court, the two children of the deceased agreed that his widow should have a certain sum of money, in the settlement of the estate. The plaintiff sued on the common counts only the defendant, one of the children, who in fact had received and used up only half the sum. Defendant did not plead the nonjoinder of the other child. Held, that in the absence of this plea, plaintiff might recover the whole sum from the defendant, though she had received only a portion of it.—Garvin v. Stone, 152 Mich. 594.

¶ 82. Where the jury in an action against two joint tort feasors renders a verdict for the plaintiff for a certain sum and improperly apportions such amount between the defendants a judgment which is rendered for the entire sum is erroneous.—Rathbone v. Detroit United Ry., 187 Mich. 586. (Bird, J., dissenting.)

¶ 83. Judgment in covenant on the covenant in a replevin bond may be for damages instead of for the penalty.—Prentiss v. Spalding, 2 D. 84.

§ 29. ——Recovery of interest.
Judgment in excess of verdict for certain sum "and interest," see ante ¶ 35.
General law of interest, see Interest.
Right to interest on judgments, see Interest §§ 11, 12.
Provisions as to interest on judgment or decree, see Jud. Act, chap. XXIII, § 20; Comp. L. 1915, § 12835.

¶ 84. A judgment for interest, where there are no data showing how much was due, amounts to a mistrial.—Bell v. Ardis, 38 Mich. 609.

¶ 85. An insignificant excess of interest allowed in a judgment will be overlooked.—Bowen v. Rutland School Dist. No. 9, 36 Mich. 149.

¶ 85a. A verdict having been returned for a certain sum "and interest," judgment entered for such sum and for an amount of interest largely exceeding what is allowed by How. St., §§ 1597, 1598, providing for interest upon verdicts from rendition thereof until entry of judgment, is erroneous where the record gave no data for fixing the time or rate of interest.—Wright v. Seeley, 96 Mich. 491.

¶ 85b. In case of affirmance of a justice's judgment on certiorari interest may be reckoned on the costs given below.—Whelpley v. Nash, 46 Mich. 25.

§ 30. Recitals and descriptions.
Conformity to pleadings and issues, see ante § 13.
Terms and amount of judgment, see ante § 28.
Construction and interpretation of judgment, see post § 32.
Effect of amending judgment, see post § 68 et seq.
Amendment of judgment, see post V.
Opinion of supreme court as necessary part of decision, see Appeal §§ 487, 488.
Description of judgment in appeal bond, see Appeal § 84.
Necessity for judgment for purchase price to so recite to be free from exemption, see Exemptions ¶ 24.

¶ 86. A description of lands in a decree is sufficiently definite if they can be located from the data given.—Dunlap v. Byers, 110 Mich. 109.

¶ 87. The judgment for purchase price of chattels need not recite that the recovery is for purchase money in order to defeat exemption.—Lillibridge v. Walsh, 97 Mich. 459.

¶ 88. Where, in entering judgment for plaintiff in an action for work and labor in which a lien on defendant's personal property only is claimed under How. St., § 4063, a lien on realty as well as on personalty is given, the recital in the judgment as to a lien on realty is to be treated as surplusage, and does not affect the validity of the judgment or the lien upon the personalty.—Conlin v. Lamont Iron Co., 116 Mich. 626.

§ 31. Incorporating findings and conclusions.
Necessity of findings to support judgment, see ante § 23.
Responsiveness of judgment to findings, see ante § 16.

¶ 89. The statute does not require a finding of facts and conclusions of law to be incorporated into the judgment on a trial by the court without a jury.—Lorman v. Benson, 9 Mich. 237.

¶ 90. After a trial without a jury and judgment for plaintiff in the ordinary form, defendant moved for a new trial, and the court set aside the order for judgment and immediately entered judgment again for the same amount, embodying therein a finding of the facts and law by the judge. Defendant brought error, contending that the court could not wholly set aside and vacate a judgment without granting a new trial. Held, that the action of the court amounted substantially to an amendment of the judgment, and was not erroneous. But the amendment was unnecessary, as the statute does not require the judge's finding to be embraced in the judgment.—Lorman v. Benson, 9 Mich. 237.

§ 32. Construction and interpretation.

Terms and recitals, see ante §§ 28-30.
Presumptions supporting judgment, see post § 115.
Evidence to explain or vary judgment, see post § 117 et seq.
Retroactive operation or effect of judgment, see post § 120.
Judgment as lien, see post § 121.
Construction of judgments on appeal and presumptions in favor of regularity, see Appeal § 338.
Construction of several judgment as joint for purposes of error, see Appeal ¶ 1420.
Matters made res adjudicata by the judgment, see Former Adjudication.
Construction and effect of judgment on certiorari, see Certiorari § 63.
Operation and effect of decrees, see Equity § 227.
Clerk's report of assessment as surplusage when assessment was by court, see Defaults ¶ 70.
Construction of alimony award as personal decree or property award, see Divorce ¶ 602.
Construction of interpleader decree as final adjudication without further litigation, see Interpleader ¶ 37.

¶ 91. A cause having been removed to the supreme court by certiorari, an order made by the supreme court dismissing a case of the same title must be presumed to relate to the same case.—Howard v. Rockwell, 1 D. 315.

¶ 92. Pleas of abatement to the jurisdiction were filed by several defendants, one of whom was a railway company. Both were tried, but in giving judgment the court, while reciting only that the railway company had pleaded in abatement, ordered that the declaration of "said plaintiffs be quashed, and that the said defendants go thereof without day; and that said defendants do recover of and from the plaintiffs its costs and charges by it in its defence in this behalf expended." Held, that the word "defendants" in this judgment referred only to the railway company.—Barnes v. Michigan Air Line R. Co., 54 Mich. 243.

III. RENDITION, ENTRY OR ENROLLMENT, RECORDING AND INDEXING.

§ 33. In general; hearing and formal decision.

Entry of default judgments, see also ante § 3.
Entering same judgment in two or more cases, see ante ¶ 14.
Requisites and terms of judgment, see ante II.
Basis of judgment, see ante § 9.
Amount and terms of judgment, see ante § 28.
Verdict, findings and conclusions to support, see ante § 23.
Judgment recitals, see ante § 30.
Signing decrees of supreme court, see post ¶ 98.
Necessity for motion for judgment, see post ¶ 101.
Necessity of judgment record, see post § 39.
Rendering judgment at subsequent term under form of amendment, see post ¶ 138.
Validity upon collateral attack of judgment rendered by disqualified judge, see post § 98.
Amendment of judgment, see post V.
Rendition of decrees, see also Equity § 202.
Necessity of rendition and entry before appeal or error will lie, see Appeal § 34.
Sufficiency of bill or case to present irregularity in judgment not appearing on its face, see Appeal § 193.
Fee for decree in chancery, see also Courts ¶ 18.
Necessity for judgment to entitle to relief against fraudulent transfers, see Fraudulent Conveyances §§ 101-103.

¶ 93. A judgment does not exist until put in due form by the court.—Green v. McCutcheon, 40 Mich. 244.

¶ 94. A decree setting aside a deed is not void for want of jurisdiction, though the circuit judge, after the proof had been closed and the case submitted, filed an opinion stating that the testimony was conflicting and not very clear and that the decree would remain open and subject to further hearing as to matters to happen in the future, and later without any further hearing, rendered the decree since such delay amounted in effect to no more than taking the case under advisement.—Krebs v. Senig, 132 Mich. 346.

§ 34. Functions and powers of clerk.

Powers and duties of clerks generally, see Courts § 2.
Control of court over officers having files and record, see Courts § 5.

¶ 95. A judgment entered by the clerk of the circuit court upon a reference to him to assess plaintiff's damages, after the court has adjourned, and in the absence of the presiding judge and without his authority, is absolutely void.—Upham v. Caldwell, 100 Mich. 264.

§ 35. Entry or enrollment in general.

Amendment nunc pro tunc to correct error in entering judgment, see post § 49.
Vacating judgment entered on premature default, see post § 79.
Collateral attack for irregularities in entering or enrollment, see post § 110.
Motion to tax costs before entry of judgment, see Costs § 70.
Contempt of judgment not yet enrolled, see Contempt § 10.
Entry of orders in the cause, see also Motions and Orders § 6.
Entry and record of defaults, see Defaults § 15.
Judgment on default, see Defaults §§ 24-27.
Calendar entries as secondary evidence of matters anterior to judgment, see Evidence § 152.
Insufficiency of docket entry alone as evidence of judgment, see Evidence § 545.
Waiver of irregularity in entering pro confesso decree while plea was standing by motion to open decree, see also Equity ¶ 215.
Provisions as to enrollment of decrees, Jud. Act, chap. XXII, §§ 16-17; Comp. L. 1915, §§ 12805-12806.
Entry of order made and signed in other county, see 1916 C. C. Rule 69.
Condition and enrollment necessary to proceed to judicial sale, see also Judicial Sales ¶ 1.

¶ 96. To constitute an enrollment of the decree and proceedings in a cause, under How. St. §§ 6648-49, the papers must be attached together, with the register's certificate annexed under the seal of the court, and filed in his office.—Low v. Mills, 61 Mich. 35.

¶ 97. The enrollment of chancery proceedings is not invalidated by omitting bills of costs not theretofore taxed; such bills can be afterwards included among the enrolled papers.—Mickle v. Maxfield, 42 Mich. 304.

¶ 98. Decrees of the supreme court are made complete by entry on the journal, no separate signing or enrollment being needed. —Ryerson v. Eldred, 18 Mich. 490.

§ 36. Time for entry or enrollment.

Sufficiency when collaterally attacked of judgment filed before filing of findings, see post ¶ 356.
Rendition of judgment at subsequent term under form of amendment, see post ¶ 138.
Time for entry of divorce decrees, see Divorce § 98.
Entry of order discontinuing action, see Discontinuance § 5.
Enrollment of decree as prerequisite of execution, see Executions § 3.

¶ 99. The time of entering judgment after verdict is a matter of practice within the discretion of the court.—Harvey v. McAdams, 32 Mich. 472.

¶ 100. The entry of a judgment fifteen days after verdict, though a stay of proceedings granted for the purpose of giving time to make a motion in arrest of judgment and for a new trial has not yet expired, is not error; the judgment is only provisional, and does not deprive a party of the right to move for a new trial.—Harvey v. McAdams, 32 Mich. 472.

¶ 101. "It has been customary for judges to hear in open court and take under advisement questions of fact and of law, and to file decisions in writing during vacation, or in term without oral announcement, with the clerks of their respective courts, and it has been a common practice for the clerks to enter judgment in the journal in accordance with such findings or determinations. * * * In some circuits the practice has prevailed of deferring the entry until a formal motion for judgment should be made and granted in open court, but that practice has generally given way to the custom, on the part of the clerks, of entering judgment immediately, or after a limited time within which a motion to set aside a verdict might be made."—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 101a. Defendant in certiorari to a justice's judgment may apply to the successor of the trial judge for entry of judgment conformable to Comp. L. 1897, § 10260, where the judge hearing the certiorari erroneously rendered judgment dismissing the writ and the clerk entered the judgment accordingly. —Knack v. Wayne Circuit Judge, 147 Mich. 485.

§ 37. ——On findings filed in vacation.

¶ 102. Judgment on a special finding filed in vacation in a civil case must, under Comp. L. 1871, § 4966, be entered as of the last day of the preceding term or it will be irregular.—Steele v. Matteson, 50 Mich. 313.

§ 38. ——Entry nunc pro tunc.

Inserting omitted bills of costs, see ante ¶ 97.
Amendment of judgment nunc pro tunc, see post § 49.
Effect of amending judgment entry, see post § 68 et seq.
Entry of appearance nunc pro tunc, see Appearance § 2.
Nunc pro tunc entry of order to show cause in voluntary dissolution proceedings, see also Corporations ¶ 934.
Nunc pro tunc entry of discontinuance, see Discontinuance ¶ 17.
Nunc pro tunc entry of divorce decree, see Divorce § 99.
Sufficiency of nunc pro tunc judgment to be a termination of prosecution, see Malicious Prosecution ¶ 59.
Provisions as to enrollment nunc pro tunc, see Jud. Act, chap. XXII, § 22; Comp. L. 1915, § 12811.

¶ 103. Where a defendant in a chancery proceeding has died after the submission of the case, the decree may be entered nunc pro tunc as of the day when the case was heard.—Gunderman v. Gunnison, 39 Mich. 313.

¶ 104. Decree cannot be entered in a divorce suit so as to relate back to a period before the death of a party.—Wilson v. Wilson, 73 Mich. 620.

¶ 105. A rule to plead in the principal cause may be entered nunc pro tunc as of the time of filing the declaration, under How. St., § 7635, in order to support a judgment against a garnishee, where a copy of the rule to plead served was indorsed on the copy of the declaration returned.—Coe v. Hinkley, 109 Mich. 608.

¶ 106. A judgment against a principal defendant was rendered and the clerk entered on his blotter or "short book" the following: "Judgment for plaintiff entered. Fee paid $2.00." By a mistake of the clerk the judgment was not entered on the docket. A suit was proceeding against the garnishee defendant when this mistake was discovered. Held, the court might then correct the record by entering a nunc pro tunc judgment. —Taber v. Wayne Circuit Judge, 156 Mich. 652.

¶ 107. A judgment against a principal defendant was rendered, and the clerk entered on his blotter or "short book" the following: "Judgment for plaintiff entered. Fee paid $2.00." By a mistake of the clerk the judgment was not entered on the docket. A suit was proceeding against the garnishee defendant when this mistake was discovered. Held, the garnishee defendant could not object to a correction of the record by a nunc pro tunc judgment on the ground that he had no notice of the entry of such judgment. —Taber v. Wayne Circuit Judge, 156 Mich. 652.

¶ 108. A clerk cannot render void the proceedings disbarring an attorney by omitting to enter the judgment of disbarment; and it is competent for the judge to cause a record to be made of his judgment nunc pro tunc, when its omission is discovered.—In re Shepard, 109 Mich. 631.

¶ 109. Entry of judgment nunc pro tunc will not cure an antecedent levy and sale as against persons who have bought the premises in good faith, and after the levy and sale were set aside, reasonably supposing the judicial proceedings to be abandoned. So held where judgment was not entered on a verdict for sixteen years and the premises were bought in eight.—Ninde v. Clark, 62 Mich. 124.

§ 39. Judgment roll or record.

Entry or enrollment, see ante § 35 et seq.

Entry of judgment nunc pro tunc, see ante § 38.

Amendment of record, see post V.

Irregularities in recording judgment as ground for collateral attack, see post § 110.

Verity of record and evidence to explain or vary, see post § 117 et seq.

Evidence of judgment, see also post § 139.

Judgment roll or record for appeal, see Appeal § 99.

Adjournments and continuances distinguished as regards necessity of recording, see Continuances ¶ 1.

Necessity and sufficiency of showing of jurisdiction on the record, see also Courts § 79.

Presumptions as to jurisdiction in general, see also Courts § 80.

Sufficiency of finding as record of election to take under statute instead of will, see Estates of Decedents ¶ 1166.

Mode of proving judgments, see Evidence §§ 545, 546.

Judicial notice of court's own records, see Evidence § 19.

Best evidence of judgments and records, see Evidence § 122.

Mode of certifying transcripts of judgments for evidence, see Evidence §§ 558-561.

Bill and amendments as one single record, see also Equity § 150.

Admissibility in evidence upon question of res adjudicata of record of former action, see Former Adjudication § 96.

Provisions as to recording nunc pro tunc, see Jud. Act, chap. XXII, § 22, Comp. L. 1915, § 12811.

Provisions as to recording judgments in actions affecting real property, see Comp. L. 1915, §§ 11778, 11779.

Provisions as to recording decrees, see Jud. Act, chap. XXII, § 18; Comp. L. 1915, § 12807.

¶ 110. The enrollment of the decree and proceedings constitute collectively the record in a chancery cause.—Thayer v. McGee, 20 Mich. 205.

¶ 111. No formal judgment record need be made up in the circuit court except when required by one of the parties.—Emery v. Whitwell, 6 Mich. 474.

¶ 112. A decree of a court of record, reciting that both parties were present, duly enrolled with the petition and presumably other papers, constitute the record which is sufficient.—Gage v. City of Saginaw, 128 Mich. 682.

¶ 113. Under our practice the files and journal entries of the circuit court are a substitute for the judgment record.—Norvell v. McHenry, 1 Mich. 227; Crane v. Hardy, 1 Mich. 56; Prentiss v. Holbrook, 2 Mich. 372; Whitwell v. Emory, 3 Mich. 84; Emery v. Whitwell, 6 Mich. 474; Kenyon v. Baker, 16 Mich. 373; Hovey v. Smith, 22 Mich. 170.

¶ 114. In an auxiliary proceeding in garnishment the judgment against the principal debtor may be proved by the judgment entry merely.—Strong v. Hollon, 39 Mich. 411.

§ 40. ——Requisites and recitals.

Jurisdiction necessary to personal judgment, see ante § 10.

Presumptions supporting judgments, see post § 115.

Sufficiency of record showing of time of rendering judgment after submission to review judgment, see Appeal § 193.

Necessary record showing to sustain jurisdiction over foreign corporation, see also Foreign Corporations ¶ 83.

¶ 115. In special proceedings in chancery to acquire jurisdiction over nonresidents without actual notice, no presumption can be indulged, and all the necessary facts to confer jurisdiction must appear upon the record. —Platt v. Stewart, 10 Mich. 260.

¶ 116. Where the clerk fails to record the impaneling of the jury and proceeding to trial, but enough appears to show that they took place, the omission is to be disregarded. —Kenyon v. Woodward, 16 Mich. 326.

¶ 117. A clerical misnomer in the style and name of a court, appearing in the record of its judicial proceedings, can only be amended or rendered harmless by construction when the evidence of mistake is clear and comes under circumstances such as to leave no doubt.—Richards v. Morton, 18 Mich. 255.

¶ 118. A judgment was taken against P. and F. on their joint covenant that P. should pay all costs and damages that should be awarded against him in a certain cause. The entry did not show that it was shown to the court, nor did the record show it to be certified by the clerk, which of the defendants was principal, and which surety or bail (R. S. 1838, p. 451, § 9). Held no ground for reversing the judgment.—Prentiss v. Spalding, 2 D. 84.

IV. ARREST OF JUDGMENT.

§ 41. In general; grounds.

Entry of judgment pending stay to make motion in arrest, see ante ¶ 100.

Vacating or setting aside judgment, see post V.

Omission in action on bail bond to allege that principal was party to it as ground for arrest of judgment in action on bail bond, see also Arrest ¶ 151.

New trial, see New Trial.

Rules of court respecting motions in arrest, see 1916 C. C. Rule 48.

¶ 119. On a motion in arrest of judgment only errors in substance will be considered; and such only can prevail as are not cured by verdict.—Dayton v. Williams, 2 D. 31.

V. OPENING, AMENDING AND VACATION ON MOTION OR PETITION.

A. POWER OF TRIAL COURT AND EXPIRATION OF CONTROL.

Equitable relief from judgment, see post VI.

§ 42. Power to modify or vacate.

Grounds for opening or vacating, see post § 51.

Matters as to which amendments allowable, see post § 56.

Power to revoke adoption order, see Adoption ¶ 3.

Modification and amendment of divorce decrees, see Divorce § 102.

Effect of appeal or error and of stay thereby on power of amendment or on control over judgment, see Stay of Proceedings.

Opening defaults, see Defaults, VI.

Opening defaults in divorce cases, see Divorce § 97.

Power to grant rehearing in equity before enrollment, see Equity § 229.

Amendments and corrections of foreclosure decree, see Foreclosure of Mortgages § 104.

Modification of injunction decrees, see Injunctions § 149.

Provisions as to time for vacating judgment on motion, see Jud. Act, chap. XXII, § 2, Comp. L. 1915, § 12792.

Provisions as to amendments of judgments, Jud. Act, chap. XVI, § 3, Comp. L. 1915, § 12480.

Disability of commissioner to vacate orders made by court or judge, see 1916 C. C. Rule 54, § 1.

¶ 120. The court of chancery has the power to direct the alteration or correction of a decree after it has been entered, either upon motion or petition, where there is evidently a mistake or clerical error.—Bates v. Garrison, H. 221.

¶ 121. Where the files and records in the case clearly show that the court intended to render a certain judgment, to which the party was entitled, but the entry actually made was defective, the court may amend the record to what it should have been at any time thereafter.—Emery v. Whitwell, 6 Mich. 474.

¶ 122. An entry of judgment in the journal of the court may properly be corrected by order of the judge if nobody has been misled by the error, and the party against whom the judgment was rendered knew what it actually was and took action accordingly.—Souvais v. Leavitt, 53 Mich. 577.

¶ 123. Where there has been no unnecessary delay, and where the rights of third persons will not be prejudiced, the circuit court has power to vacate, on motion, a judgment erroneously entered, and to enter the proper judgment.—Frederick v. Mecosta Circuit Judge, 52 Mich. 529.

¶ 124. A court in chancery has inherent power to open its decrees to correct errors, and such power is also conferred by statute. —Cole v. Auditor General, 132 Mich. 262.

¶ 125. Redress as to a cause of action in relation to household articles which arose before the rendition of a decree in divorce proceedings and was therefore merged therein, or which arose simply from the performance of the decree, should be sought from the court which gave the decree.—Jackson v. Jackson, 135 Mich. 549.

¶ 126. The trial court only can grant relief from a decree because of changes subsequently arising which unbalances or destroys the equities on which the decree was based. —Slote v. Constantine Hydraulic Co., 182 Mich. 260.

§ 43. ——Consent judgments or decrees.

Judgments on confession or upon stipulation, see ante §§ 6, 7.

¶ 127. Relator was the defendant in a suit in which the complainant asked to have him declared trustee of certain lands. An agreement to compromise the suit was reached, and a consent decree entered by which the complainant was to pay the defendant $6,000 for his interest in the land by a named date or give up all claim in the matter. The respondent circuit judge upon application of the complainant extended the time of payment sixty days to enable the complainant to procure the money. Held, the respondent had no power to so modify the consent decree.—Horning v. Saginaw Circuit Judge, 161 Mich. 413.

¶ 128. Where it appears that the judgment was entered by consent of the plaintiff and one of two defendants without costs, in the absence of and without the consent of the other party, it is within the discretion of the court to deny a motion to tax costs, but to set aside and vacate the judgment of nonsuit, sua sponte.—Alspaugh v. Ionia Circuit Judge, 126 Mich. 67.

§ 44. ——Judgments of courts of concurrent jurisdiction.

Concurrent and conflicting jurisdiction of courts, see Courts § 68.

¶ 129. The superior court of Grand Rapids has no jurisdiction to set aside or modify the decrees of the circuit court of Kent county, which is a court of concurrent jurisdiction.—Dodge v. Northrop, 85 Mich. 243.

§ 45. Discretion of court.

See also ante ¶ 128, post ¶ 154.

Grounds for opening or modifying, see post § 51 et seq.

Grounds for denying relief, see post § 60.

Review of discretion as to vacation, see Appeal § 415.

Power and discretion of court to open defaults, see Defaults § 32.

¶ 130. Each application to open a decree regularly obtained by default must depend upon its own circumstances and the sound discretion of the court.—Russell v. Waite, W. 31.

¶ 131. Refusal to open a judgment that an affidavit of nonexecution may be supplied is discretionary.—Chicago & N. E. R. Co. v. Genesee Circuit Judge, 40 Mich. 168.

¶ 132. The allowance of a motion to set aside a judgment against a garnishee is addressed to the sound discretion of the trial court.—Nichol v. Nevers, 196 Mich. 203.

§ 46. After appeal or error or decision thereon.

Power of trial court to amend judgment after appeal and remand, see Appeal § 564.

Modification or correction on review, see Appeal, XIII, C.

Amendments of or relief from appellate judgments, see Appeal, XIII, F.

Reversal opening cause as to parties other than appellant, see Appeal § 558.

¶ 133. The clerk's entries may, even after error brought, be amended in affirmance of the judgment.—The Milwaukie v. Hale, 1 D. 306.

¶ 134. After a reversal of a joint judgment against husband and wife upon an appeal by the wife only, a motion cannot be entertained in the trial court to vacate the judgment as to the wife and affirm it as to the husband.—Hall v. Calhoun Circuit Judge, 123 Mich. 555.

§ 47. Pending equitable proceedings for like relief.

Existence of other remedy as ground for refusing equitable relief from judgment, see post § 85.

Equitable proceedings to obtain relief from judgment, see post VI.

¶ 135. Where it is claimed that a judgment has been obtained by fraud the proper remedy, after a lapse of five or six years, is not a motion based on ex parte affidavits to set it aside, but resort should be had to an original suit, where a distinct issue may be made by pleadings, and tried upon oral examination of witnesses. An order setting aside judgment on such a motion after such a lapse of time, and while a suit in equity in which considerable progress had been made, and in which like relief was sought, was still pending, was held erroneous.—Jennison v. Haire, 29 Mich. 207.

¶ 136. A judgment against a principal defendant was rendered, but the clerk, by mistake, failed to enter it on the docket, and defendant executed a cognovit and took a stay. During the course of a suit against a garnishee on this judgment, the principal defendant filed a petition to vacate the judgment and set aside the cognovit. Proceedings

were being taken in another court in equity, at that time, to determine the effect of said judgment, since it had been rendered after the said principal defendant had been adjudged a bankrupt and before his discharge. Held, the court on the petition had no right to vacate the judgment and cognovit while the same questions were pending in the equity court.—Taber v Wayne Circuit Judge, 156 Mich. 652.

§ 48. At subsequent term.

Neglect of attorney as ground for vacating judgment at subsequent term, see post ¶ 157.

¶ 137. Even after the lapse of a term the court, in the exercise of its discretion, may set aside its judgment.—Loree v. Reeves, 2 Mich. 133; Hurlburt v. Reed, 5 Mich. 30.

¶ 138. Although under our statute courts may amend clerical errors at any time, yet, after the term, that which enters into the consideration of the court, and forms a part of the judgment, cannot be changed; nor can courts at a subsequent term, under the form of an amendment, render a judgment.—Whitwell v. Emory, 3 Mich. 84.

¶ 139. A judgment rendered by the late supreme court when but two of the judges were present who had heard the argument of the case is irregular, and will be vacated on motion, though more than a term has elapsed since its entry.—Jagger v. Coon, 5 Mich. 31.

¶ 140. The circuit court may set aside a judgment at a term subsequent to its rendition.—Van Renselaer v. Whiting, 12 Mich. 449; Campau v. Coates, 17 Mich. 235.

¶ 141. The right to an amendment of a judgment in replevin held to have been waived by delay for several terms and by proceeding on execution.—Gray v. Saginaw Circuit Judge, 49 Mich. 628.

¶ 142. It is within the power of the court, after the expiration of the term in which an order has been made, to modify such order, even though the motion upon which the modifying order is based was not made nor entered until after the opening of the next term; where, it appears that the motion papers were served upon the opposing counsel and the matter was before the court, during the term in which such order was made; and that the hearing upon the motion was continued by consent of the parties in open court to the next term of court, and that without such consent the party objecting would have been in default under the unmodified order.—Hews v. Hews, 145 Mich. 247.

§ 49. Amendments nunc pro tunc.

Entry of judgment nunc pro tunc, see ante § 38.

Power of judge's successor to supply omitted signature in decree or record, Jud. Act, chap. XXII, §§ 20, 21, Comp. L. 1915, §§ 12809, 12810.

¶ 143. Error in rendering judgment in excess of the damages claimed in the declaration cannot be cured by amendment nunc pro tunc of the ad damnum clause.—Kenyon v. Woodward, 16 Mich. 326.

¶ 144. A mistake of the clerk in entering a judgment as if taken on default, where issue had been duly joined, and no defense was interposed, defendant consenting to judgment, may be corrected by an amendment nunc pro tunc, under How. St. §§ 7633, 7635.—Grand Rapids Sav. Bank v. Widdicomb, 114 Mich. 639.

¶ 145. Where a default was entered in an action upon a justice's judgment, without reference for an assessment of damages, and some months later judgment was entered as for an amount assessed upon the hearing for that purpose by the circuit judge, the court may, at a later date, after overruling a motion to vacate the judgment and default, amend the original default order nunc pro tunc so as to provide for an assessment of damages by the court.—Goebel Brewing Co. v. Medbury, 153 Mich. 49.

B. GROUNDS AND OBJECTIONS; LACHES OR WANT OF EQUITY.

§ 50. Right to relief and persons entitled.

Discretion of court as to granting relief, see ante § 45.

Right to relief at subsequent term, see ante § 48.

Considerations warranting denial of relief, see post § 60.

Procedure to obtain relief, see post § 62.

Effect of modifying or vacating, see post § 68.

Persons entitled to equitable relief from judgment, see post § 73.

¶ 146. A judgment in an attachment suit cannot be set aside for irregularity, on the motion of a person to whom the property attached had been conveyed by the defendant, after service of the attachment, but who is a stranger to the record.—People ex rel. Hyde v. Calhoun Circuit Judges, 1 D. 417.

¶ 147. An attachment defendant, being in contempt and a fugitive, will not be heard on a bondsman's motion to set aside a judgment of forfeiture of the bond based on defective publication.—Peterson v. Swenningston, 178 Mich. 294.

¶ 148. Parties cannot claim under a decree of partition and at the same time seek to avoid or open it.—Walsh v. Varney, 38 Mich. 73.

§ 51. Grounds for opening or vacating.

Discretion of court as to opening judgment, see ante § 45.

Affidavits showing grounds for relief, see post § 64.
Effect of opening judgment, see post § 69 et seq.
For equitable relief from judgment, see post § 75.
Grounds for collateral attack of judgment, see post § 93 et seq.
Presumption on appeal as to reason for vacating default decree, see Appeal § 392.
Vacation of judgment to enforce payment of costs imposed as condition, see Costs § 150.
Grounds for opening defaults, see Defaults §§ 28-31.

¶ 149. To open a decree regularly entered a stronger case must be made than to vacate an order pro confesso before decree.—Hart v. Lindsay, W. 72.

¶ 150. Purely technical irregularities not affecting the merits are not ground for setting aside a decree unless complained of at the first opportunity.—Johnson v. Johnson, W. 309; Long v. Long, 59 Mich. 296.

¶ 151. After judgment by default in attachment a petition praying for the default to be set aside and that the petitioner might be permitted to appear and defend is properly granted, where the petition expressly states that the petitioner has acquired title to the attached lands through a mortgage sale, that the owner is a foreign corporation and under present conditions cannot appear or defend a suit, and that there is a just and meritorious defense to the action.—Meads v. Belt Copper Mines, 125 Mich. 456.

¶ 152. A decree may be opened so as to permit the court to pass upon a demurrer inadvertently overlooked.—Antoszewski v. City Plumbing Co., 185 Mich. 215.

§ 52. ——Want of notice or process.
See also ante ¶ 147.
As ground for equitable relief, see post § 76.
As ground for collateral attack, see post § 94.

¶ 153. A judgment on issue joined, which is rendered without notice of trial or appearance at the trial, though not void is irregular, and should be set aside.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

¶ 154. In a suit against a nonresident the circuit court may, in the exercise of a sound discretion, set aside the judgment and permit defendant to plead, where he has had no notice of the proceedings and has been guilty of no laches. And this though a term has elapsed.—Hurlburt v. Reed, 5 Mich. 30.

¶ 155. Omission to give notice of hearing to a defendant who has appeared is an irregularity which entitles him to have the decree set aside.—Martin v. McReynolds, 6 Mich. 70.

§ 53. ——Fraud or collusion.
As ground for equitable relief from judgment, see post § 77.
As ground for collateral attack, see post § 97.
General law as to fraud, see Fraud.

¶ 156. A motion to vacate and set aside a decree, or for leave to file a bill for that purpose, on the ground of fraud practiced upon the court by complainant's solicitor, will be denied, where such decree was based upon the fact that a long form warranty deed on paper folding like legal cap, upon examination was found to have been severed at the line of folding, and the two sheets attached by paper and mucilage, and the edges of the half sheet were smooth and had no appearance of having been worn like the other folded edges, and the further fact that one of the halves was wider than the other, and the marginal red lines failed to correspond with each other; where the affidavits upon which such motion was based failed to show that complainant's solicitor practiced or attempted to practice a fraud upon the court with reference to the appearance or condition of such deed.—Crawford v. Hoeft, 58 Mich. 1.

§ 54. ——Neglect or default of attorney.
Duties and powers of attorneys, see Attorneys.

¶ 157. A client whose attorney has neglected his case and suffered judgment to pass against him, but who has himself been guilty of no laches, is not confined to his remedy against the attorney, but the court in the exercise of its discretion may set aside the judgment and allow him to defend though a term has elapsed.—Loree v. Reeves, 2 Mich. 133.

§ 55. ——Absence of findings.
Responsiveness and conformity of judgment to findings, see ante § 16.
Necessity for findings and conclusions, see ante § 23.

¶ 158. Where a written request is made seasonably for a finding of facts, and judgment is entered without such finding, it is not error to set aside the judgment and enter a new one after the finding is filed.—Hunt v. Patterson, 38 Mich. 95.

¶ 159. Where in a suit before a court without a jury plaintiff files a request before judgment for findings of law and fact, and defendant, believing the court will make findings, fails to prefer a like request, after the court has entered judgment without making such findings, defendant is not entitled to have the judgment vacated in order to protect his rights.—Silfver v. Daenzer, 167 Mich. 362.

¶ 160. Some injury must be shown before a judgment which is inadvertently entered

before filing of findings of fact and law by trial court will be vacated.—Wisconsin Chair Co. v. Charlevoix Circuit Judge, 189 Mich. 548.

§ 56. Errors, mistakes and omissions warranting amendments.

¶ 161. Where by mistake a decree directed a sale of mortgaged premises in two years and three months, when complainant was entitled to take his decree for a sale in one year and three months from the filing of the bill, a correction was directed.—Bates v. Garrison, H. 221.

See also ante § 42.
Correction of record by entry of judgment nunc pro tunc, see ante § 38.
Discretion of court as to modifying judgment, see ante § 45.
Requisites and terms of judgments, see ante II.
Time when amendment takes effect, see post § 68.
Effect of amending judgment, see post § 69 et seq.
Amendment to incorporate direction for execution, see also Executions ¶ 8.

¶ 162. The court has power to amend the record to show a directed verdict for one of the alleged tort feasors after the jury has disagreed and been discharged on the question of the liability of the other, who was the active agent in the wrong.—Johnston v. Cornelius, 193 Mich. 115.

¶ 163. In ejectment for recovery of dower, a provision in the judgment for the recovery of rent is no ground for reversal, where it is conceded by plaintiff's counsel that such provision is surplusage, and the judgment may be opened in the supplemental proceedings, and an amendment in accordance with such concession may be made if deemed necessary. Killackey v. Killackey, 156 Mich. 127.

¶ 164. A decree cannot be amended by adding a reference to take proofs as to a matter to which nothing in the pleadings or decree is germane.—Jordan v. Jordan, 53 Mich. 550.

¶ 165. An ex parte order of the court allowing a receiver $200 per month instead of $125, may be modified on the final accounting by reducing it back to $125 where such final order is made while the receiver is still an officer of the court and the circuit judge stated in the order that he was not advised of the facts or he would not have made the extra allowance.—In re Angell, 131 Mich. 345.

§ 57. ——Amendments as to parties.

Names and designation of parties in judgment, see ante § 11.
Vacation of premature decree for want of parties, see also Equity ¶ 800.

¶ 166. A court of record, in which judgment has been rendered against two persons, may on motion amend the judgment record by striking out the name of one defendant who appears to have been sued as indorser of the note declared on, but who was not served.—Arnold v. Nye, 23 Mich. 286.

¶ 167. When John R. Wyllie and John Wyllie were by mistake named as plaintiffs, instead of John R. Wyllie and Hannah Wyllie, an amendment was properly allowed on the trial inserting the right name wherever necessary, and the judgment was admissible in evidence although the entry thereof showed the same mistake.—Barmon v. Clippert, 58 Mich. 377.

§ 58. ——Terms and conditions of dismissal.

Judgment of nonsuit or dismissal, see ante § 5.

¶ 168. Where leave had been granted complainant to dismiss his bill on payment of costs, and the order was entered generally without mentioning costs, on application of the defendant it was ordered to be amended so as to correspond with the terms on which leave was granted.—Jerome v. Seymour, W. 359.

¶ 169. Where a bill making out a strong case of fraud was dismissed as improperly framed for specific performance the decree below was so modified as to make such dismissal without prejudice.—Wilson v. Eggleston, 27 Mich. 257.

¶ 170. A decree which, on bill, answer and evidence, and in the absence of any cross bill, not only dismisses a bill to set aside a cloud on title, but affirmatively declares defendant's title, should be so modified, on affirmance, as to confine it to a mere dismissal.—Vroman v. Thompson, 51 Mich. 452.

¶ 171. The circuit court, sitting in chancery may, after its oral decree, dismissing a bill without prejudice, has been drawn, signed and enrolled in form simply dismissing the bill, make an order to the effect that "without prejudice" be added.—Township of Hiawatha v. Schoolcraft Circuit Judge, 90 Mich. 270.

§ 59. ——Amount or items of recovery.

Amendment of ad damnum clause nunc pro tunc, see ante ¶ 143.

¶ 172. Where in a summary proceeding for the possession of land under an executory contract the court directed the jury to find a verdict, but there was no amount found due, the complainant, it was proper for the court to amend the judgment by inserting the proper amount due as shown by the evidence.—Gould v. Young, 143 Mich. 572.

¶ 173. A foreclosure decree was upon rehearing modified so as to exclude a lot that was occupied as a homestead, the mortgage not having been signed by the mortgagor's wife.—Hammon v. Rathbone, 113 Mich. 501.

¶ 174. A record in an action of replevin, which shows the replevin of the property from the defendant, a verdict fixing the value of the property and no lien or special property in either party, is sufficient to entitle the defendant to an amendment of the verdict and judgment so as to allow the recovery of the property or its value.—Salter v. Sutherland, 125 Mich. 662.

§ 60. Grounds for denying relief.

Discretion of court in passing on application, see ante § 45.

Voluntary payment of judgment as waiver of objections to it, see post ¶ 424.

Right to relief and grounds, see ante § 50 et seq.

Denial of relief to party in contempt, see Contempt § 43.

¶ 175. Reopening of a foreclosure decree was denied where defendants had not complied with the conditions of a rehearing previously granted them which were that defendants answer within 10 days, pay the taxed costs, and deposit the amount reported due with the register, to abide the event of the suit.—Bope v. Ferris, 77 Mich. 299.

§ 61. ——Laches of applicant.

Laches in seeking equitable relief from judgment, see post § 74.

¶ 176. A motion to set aside a judgment for irregularity comes too late when made two years after its rendition, the delay being unexplained.—Hyde v. Judge, 1 Doug. 217.

¶ 177. A defendant wishing to have a judgment vacated should use due diligence in the matter and one who has failed to appear is entitled to no more indulgence than one who has.—Johnson v. Johnson, W. 309.

¶ 178. Dismissal of an appeal from the probate of a will is a final judgment which remands the proceedings to the probate court, and which cannot be set aside if not complained of within the two years allowed for removing proceedings to the supreme court on error or certiorari.—Ellair v. Wayne Circuit Judge, 46 Mich. 496.

¶ 179. The nonenrollment of a decree will not help a defendant, applying to open and vacate it, who has been guilty of gross laches in objecting to an irregularity in entering an order pro confesso.—Long v. Long, 59 Mich. 296.

¶ 180. An application for leave to amend defective proceedings comes too late when not made until seventeen years have passed; and though the defect remained for a long time undetected, a delay of three years or more after its detection is not excused by the mere fact that the circuit judge had been of counsel and was incompetent to hear the application. The utmost promptness is required in moving to correct mistakes in the record.—Montgomery v. Merrill, 36 Mich. 97.

¶ 181. A formal judgment was prepared and approved by counsel on both sides, which did not provide for the recovery of costs. The judgment was entered and satisfaction thereof was filed. The judgment was not entered through any mistake, carelessness or fraud on the part of the clerk or on the part of the attorneys for plaintiff or defendant. Held, a motion made after the expiration of the term, to amend the judgment by a clause allowing costs, to set aside the satisfaction of judgment and to credit the amount paid upon the judgment as amended, was properly denied.—Ostrowski v. Wayne Circuit Judge, 170 Mich. 563.

C. MOTION OR PETITION AND PROCEDURE THEREON.

§ 62. In general.

See also ante § 42.

Application addressed to discretion of court, see ante § 45.

Application made pending equitable proceedings for like relief, see ante § 47.

Application at subsequent term, see ante § 48.

Grounds for opening or amending, see ante § 51 et seq.

Motion or petition as remedy for relief rather than appeal or error, see Appeal § 3.

Writ of error coram nobis explained, see Appeal ¶ 32.

Impropriety of asking retaxation of costs on motion to modify judgment, see Costs § 76.

Nature of motion to set aside judgment by default against garnishee, see Defaults ¶ 125.

Proceedings under statutes for opening of or relief from tax decrees, see Taxes, XI, XII.

¶ 182. A decree is not to be set aside on a mere motion, and if so set aside mandamus lies to vacate the action, but without prejudice to the right which any party may have had to proceed in a regular way.—York v. Ingham Circuit Judge, 57 Mich. 421.

§ 63. Notice of application.

¶ 183. Where the files and records in the case clearly show a certain judgment to which the party was entitled, but the entry actually made was defective, notice of the application to amend the record is not necessary because the effect of the record is not changed by it, and no one's rights are affected.—Emery v. Whitwell, 6 Mich. 474.

¶ 184. The amendment of a decree without notice is irregular; and though the amendment be one that could not injure the defend-

ant, yet if the decree is in some particulars not warranted by the case made, the defendant can take advantage of the error.—Berry v. Innes, 35 Mich. 189.

¶ 185. The right to amend ought not to be confined any further than safety requires, and should be liberally recognized wherever the record itself furnishes the data for the amendment. But where it is based on an outside showing, all practicable precautions should be taken to see that no one is wronged, and the party adversely interested ought always to be notified, where possible, especially if the proceedings are ancient.—Montgomery v. Merrill, 36 Mich. 97.

¶ 186. A judgment cannot be materially changed, if at all, without giving notice to the party injured by such action.—Green v. McCutchen, 40 Mich. 244.

¶ 187. The fact that a decree quieting title was irregularly obtained does not justify the court in granting an order setting it aside without notice to a purchaser of the premises involved.—Vincent v. Benzie Circuit Judge, 139 Mich. 90.

§ 64. Affidavits in support of application.

Grounds for vacating judgment, see ante § 51 et seq.

Grounds for modifying judgment, see ante § 56.

¶ 188. On motion to set aside a decree for irregularity the affidavits should show that the party is injured by the irregularity.—Mich. Ins. Co. v. Whittemore, 12 Mich. 427.

¶ 189. On a judgment against several defendants an affidavit merely reciting that an affidavit of one defendant's infancy had been filed in another court and cause does not conclude his codefendants and authorize the setting aside of the judgment so as to allow a discontinuance as to him, thus enlarging the liability of the codefendants.—Watson v. Hinchman, 41 Mich. 716.

§ 65. Conditions upon opening, vacating or amending.

¶ 190. Where a new trial is granted on conditions the judgment remains in force subject to the conditions, and is not absolutely vacated until they are performed.—People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31.

¶ 191. On application for leave to move the circuit court to modify a judgment after appeal and affirmance, a condition may be imposed that applicant consent to the hearing of an application for a new trial as of the proper term, where there has been delay for which the adverse party was not responsible.—Salter v. Sutherland, 125 Mich. 662.

¶ 192. A stipulation between the parties that a judgment should be set aside without costs upon the reversal, on writ of error, of another judgment, upon certain specified conditions, has no binding force without compliance with the conditions, and the court should not act upon it.—People ex rel. Roche v. Branch Circuit Judge, 26 Mich. 370.

§ 66. Mode and manner of amendment.

Incorporation of findings as constituting an amendment, see ante ¶ 90.

¶ 193. A judgment in excess of the amount of the bond against a saloonkeeper and his bondsmen for illegal sale of liquor, being erroneous against the bondsmen, cannot be corrected by remitting it to the amount of the bond as against the bondsmen and letting it stand for the amount found as against the principal; for being a joint judgment it should have been reduced as to all of them to the amount of the bond.—Merrinane v. Miller, 157 Mich. 279.

§ 67. Necessity of actual amendment.

Treating amendment as made in order to set aside default nunc pro tunc, see also Equity ¶ 578.

¶ 194. No actual amendment need be made where the entry of the judgment is defective in not conforming to the judgment which the files and records show the court intended to render. The whole record shall be read, when brought up collaterally, precisely as if the amendments due as a matter of right had actually been made.—Emery v. Whitwell, 6 Mich. 474.

D. EFFECT OF OPENING, AMENDING OR VACATION.

§ 68. In general; time when effectual.

Mandamus to vacate order setting aside decree on mere motion, see ante ¶ 182.

Collateral attack of orders amending judgments, see post § 114.

Recovery of money paid on the judgment, see post § 133.

Effect of moving to vacate as enlarging time for error, see Appeal § 75.

Effect of order opening default, vacation of original decree, see also Divorce ¶ 362.

Modification of order opening default in divorce, see Divorce ¶ 365.

Amended decree as carrying direction for execution contained in original decree, see Executions ¶ 2.

Rights under pending executions on reversal or modification of judgment, see Executions, XIII.

Vacation of judgment in ejectment and grant of new trial as abating procedure to award rents and profits as an incident of the judgment, see Ejectment, VI.

Abatement of suggestion for damages in ejectment on setting aside of main judgment, see Ejectment ¶ 255.

Effect of vacating or setting aside on conclusiveness of the judgment, see Former Adjudication § 30.

¶ 195. The incorporation by amendment into a judgment of matter that is mere surplusage does not vitiate.—Lorman v. Benson, 9 Mich. 237.

¶ 196. A judgment, the entry of which was corrected by mandamus, was ordered to take effect from the date of the correction, so that full opportunity to ask for a review thereof might be saved.—Frederick v. Mecosta Circuit Judge, 52 Mich. 529.

§ 69. Defenses available upon opening decree.

Opening defaults and admitting pleas or answers, see Defaults, VI.

¶ 197. A party let in on the opening of a decree to defend by answer is entitled, where no restrictions have been imposed, to make any defense which can be made under that pleading.—Stone v. Welling, 14 Mich. 514.

§ 70. Effect of vacation as to one joint party.

Vacating default judgment as to one joint defendant as vacation entire, see Defaults § 39.

¶ 198. Where the court makes an order vacating a judgment as to one of two joint debtors, the effect is to vacate it as to both.—Van Renselaer v. Whiting, 12 Mich. 449.

¶ 199. Where a judgment against two is set aside as to one, but all concerned treat it as set aside as to both, it may be so considered and as neither relied upon such judgment as a bar to subsequent proceedings, error could not be assigned on the assumption that it remained in force against either.—McArthur v. Oliver, 53 Mich. 299.

§ 71. Effect on rights of purchasers.

Setting aside execution sales and effect thereof, see Executions §§ 102-104.

Effect of vacation on rights under execution sale, see Executions § 124.

¶ 200. A purchaser under a decree must ascertain at his peril whether the decree was warranted or not; and though the time for appealing from the decree had expired when he purchased, he cannot claim immunity, as a bona fide purchaser, from the effects of a subsequent order without notice to him, setting the decree aside as unwarrantably entered.—Ritson v. Dodge, 33 Mich. 463.

¶ 201. One who buys land relying upon a decree in his grantor's favor cannot claim immunity from the effect of a subsequent order vacating such decree.—Cook v. French, 96 Mich. 525.

VI. SUIT TO SET ASIDE, FOR INJUNCTION OR OTHER RELIEF.

A. IN GENERAL; GROUNDS AND DEFENSES.

§ 72. In general; equitable considerations.

Setting aside judgment on motion pending equitable proceedings for like relief, see ante § 47.

Modifying and vacating judgments on motion, see ante § 42 et seq.

Grounds for equitable relief, see post § 75 et seq.

Existence of other remedy, see post § 85.

Grounds for enjoining enforcement of judgment, see post § 86.

Pleading and procedure, see post § 87 et seq.

Collateral impeachment of judgments, see post § 90 et seq.

General considerations controlling equitable relief, see Equity.

Bills of review in equity, see Equity, XI.

Bills of supplement after decree, see also Equity §§ 237-239.

Matters precluded by the judgment, see Former Adjudication.

Decree as bar to suit to set it aside, see Former Adjudication ¶ 162.

Injunction against proceedings at law, see also Injunctions, II, B.

Jurisdiction of equity to set aside law judgment for tort suffered by infant, see Infants ¶ 140.

Proceedings under statutes for opening of or relief from tax decrees, see Taxes, XI, XII.

¶ 202. Generally, courts of equity will not assume jurisdiction to retry cases which have already been disposed of in the courts of law upon the very point made by the bill.—Miller v. Morse, 23 Mich. 365.

¶ 203. A bill in equity will not lie to retry matters already adjudicated in proceedings at law, in the absence of any showing that such proceedings were void or fraudulent, or that they could not have fully disposed of all the equities in the case made by the bill.—Spoon v. Baxter, 31 Mich. 279.

¶ 204. The exercise of jurisdiction in equity to vacate a judgment in law is proper but very rare and exercisable only in cases of injustice done.—Finn v. Adams, 138 Mich. 258.

¶ 205. A judgment obtained in a court of law should stand unless manifestly against conscience.—Cleveland Iron Mining Co. v. Husby, 72 Mich. 61.

¶ 206. Chancery will not interfere with a judgment at law until it is made to appear very clearly that injustice has been done.—Mueller v. Marsh, 116 Mich. 375.

¶ 207. Relief against a void partition decree in probate will not be denied to an infant because of any supposed tendency to invalidate other titles to real property.—Prince v. Clark, 81 Mich. 167.

¶ 208. The jurisdiction of courts of equity to stay proceedings at law after judgment though recognized in exceptional cases is very limited, and as a rule the remedy is not allowed against a sale of realty or of personal property, on execution where relief was

available in a proceeding at law.—City Bank & Trust Co. v. Hurd, 179 Mich. 454.

¶ 209. A judgment at law was had in the Circuit Court of Saginaw County upon which execution was issued upon land located in Gladwin County. Defendant filed a bill in Gladwin County to restrain the execution of said judgment. Held, the Gladwin Circuit Court had no jurisdiction to interfere with the process issued from the Saginaw Circuit Court.—Steele v. Bliss, 170 Mich. 175.

¶ 210. Relief in equity on a void transcript of judgment based on notes agreed to be canceled in consideration of a transfer of a patent right, will not be denied because of an agreement thereafter made between one of the judgment debtors and the judgment plaintiff for the reconveyance of a half-interest in the patent which agreement, if made, has not been performed; since it is an agreement distinct from that by which the notes were discharged.—Child v. Emerson, 99 Mich. 38.

§ 73. Persons entitled to seek relief.

Persons entitled to have judgment modified or vacated, see ante § 50.
Waiver of objections by payment of judgment, see post ¶ 424.

¶ 211. Infants cannot sue to set aside on the ground of collusion a divorce granted to one of their parents against the other.—Baugh v. Baugh, 37 Mich. 59.

§ 74. Diligence and laches.

Setting aside or modifying judgment upon motion at subsequent term, see ante § 48.
Laches in seeking to vacate or amend judgment on motion, see ante § 61.
Laches as ground for refusing leave to file bill, see post § 87.
Necessity that bill show diligence on part of petitioner, see post § 88.
General law as to laches, see Equity, IV.
Want of notice or knowledge as excuse for delay in suing to annul or have relief, see Equity § 55.
Laches as bar to relief from appellate decree, see Appeal § 535.

¶ 212. Where a decree establishing a title to real estate is sought to be impeached for fraud and collusion, the bill must be brought within a reasonable time, having reference to the nature and all the circumstances of the particular case.—Campau v. Van Dyke, 15 Mich. 371.

¶ 213. A party to a judgment or decree cannot, after any considerable delay, impeach its validity without showing a proper cause or reasonable justification for the delay, but a bill seeking relief must be brought within a reasonable time, considerng the nature and all the circumstances of the particular case. Such party should act promptly where a city is growing up on land he claims, built by those who are relying in good faith on an adverse title acquired with his apparent consent.—McVickar v. Filer, 31 Mich. 304.

¶ 214. An unexcused delay of nine years and until complainant's death in attacking a decree of divorce is fatal to a proceeding to set it aside for the purpose of obtaining an interest in decedent's estate.—Zoellner v. Zoellner, 46 Mich. 511.

¶ 215. When defendants claimed that a case was not called for hearing at the term for which it was noticed, but that a decree was nevertheless entered against them, and it appeared that they were served with notice of an application to amend the decree at a subsequent term, but did not appear, held, that if they intended to object to the decree as irregularly entered they were chargeable with laches in not moving when the applicatin to amend was made.—Lyon v. Brunson, 48 Mich. 194.

§ 75. Grounds for relief in general.

Invalidity of judgment entered by clerk without authority, see ante ¶ 95.
For opening or vacating, see ante § 51.
Equitable considerations controlling relief, see ante § 72.
Want of jurisdiction, see post § 76.
Fraud, collusion, mistake or accident, see post § 77.
Failure or inability to interpose defense, see post § 80.
Grounds for collateral attack, see post § 93.

¶ 216. Equity will not set aside a law judgment against a copartnership by reason of the insanity of one of the partners, where it does not appear that injustice has been done.—Johnson v. Cook, 179 Mich. 117.

¶ 217. Equity will not relieve against the enforcement of a justice's judgment from which no appeal was taken unless defendant, without his own or his agent's negligence, has been hindered by fraud or accident from availing himself of his defense.—Kelleher v. Boden, 55 Mich. 295.

¶ 218. Equity will not relieve a party against a judgment at law on the ground of its being contrary to justice, unless the defendant was ignorant of his defense pending the suit, or facts could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defense.—Gray v. Barton, 62 Mich. 186.

¶ 219. Equity will not relieve a party against a judgment at law on the ground of its being contrary to justice, unless the defendant was ignorant of his defense pending the suit, or facts could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented

by fraud or accident, or the act of the opposite party, from availing himself of his defense.—Lafayette Benev. Society v. Richardson, 188 Mich. 57.

¶ 220. A court of equity will not assume jurisdiction to set aside a judgment of a court of law of competent jurisdiction on the ground that it is contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident or the act of the opposite party from availing himself of the defense.—Valley City Desk Co. v. Travelers Ins. Co. of Hartford, 143 Mich. 468.

¶ 221. Equity will not set aside a judgment against a garnishee, rendered in the justice court and a sale on an execution issued out of the circuit court upon a transcript of the judgment where the garnishee was not denied opportunity to present his defense, and the proceedings before the justice were maintained by the creditor in good faith, the case having been adjourned several times by consent, and judgment having been rendered at the date the case was last continued to by consent in the absence of the garnishee.—Lafayette Benev. Society v. Richardson, 188 Mich. 57.

¶ 222. The fact that the plaintiff company suing to enjoin collection of a judgment on a fire policy was not allowed in the action at law to put in all of its proof, because of the condition of its pleadings, cannot be urged in support of the equitable remedy, where it does not appear that it asked leave to amend its pleadings so as to render such proof admissible.—Farmers' Fire Ins. Co. v. Johnston, 113 Mich. 426.

¶ 223. Where a default judgment had been entered against an insane person for whom a guardian had been appointed, upon the service of the summons on the defendant personally at an insane asylum, and no guardian ad litem had been appointed, and no notice of the action or judgment had been given his guardian or heirs until after his death, such judgment may be vacated in equity where it appears that the defendant had a complete defense in the statute of limitations.—Godde v. Marvin, 142 Mich. 518.

§ 76. Want of jurisdiction.

Jurisdiction requisite to personal judgment, see ante § 10.

As ground for collateral attack, see post § 94.

¶ 223a. Where through error on the part of the officer serving process the summons in a justice's court case was served upon a daughter of the same name instead of upon the true defendant, and she informed the defendant thereof immediately, and she consulted an attorney, who advised her to pay no attention thereto, but she was kept advised of the progress of the suit by the attorney, although she took no steps to guard her interests but knew that judgment had been rendered, no jurisdiction was obtained and the judgment was void, and as such could be vacated in chancery.—Wilcke v. Duross, 144 Mich. 243.

¶ 224. The charge in a bill to vacate a decree in a mortgage foreclosure of one of notice of the pendency of the foreclosure proceeding is disproved where there was personal service of a subpoena upon both the mortgage defendants and notice of appearance for them was filed by a solicitor who was thereafter recognized as such and copies of all papers and notice of all proceedings were served upon him and the case proceeded in the usual and regular manner.—Gaines v. Simons, 124 Mich. 477.

§ 77. Fraud, collusion, accident or mistake.

Vacating judgment on motion for fraud and collusion, see ante § 53.

Laches in seeking relief, see ante § 74.

Fraud preventing defense, see post § 81.

Pleading fraud or collusion, see post § 88.

Collateral attack for fraud or collusion, see post § 97.

General law as to fraud, see Fraud.

¶ 225. A bill will lie to set aside a judgment for having been obtained by fraud between the judgment debtor and defendant, even though it has already been made the foundation in another state of a suit in which defendant has attached the judgment debtor's property there. And complainant need not himself have obtained a judgment against the debtor as a foundation for the suit to set the judgment aside.—Edson v. Cumings, 52 Mich. 52.

¶ 226. A manufacturer and patentee may be restrained from using a decree fraudulently obtained to the injury of complainant, who was engaged in the manufacture of goods like those made by defendant, and from claiming that the decree was an adjudication upon the merits as to the validity of the patent; where on the case stated defendant is unfairly intimidating trade by it.—Grand Rapids School Furniture Co. v. Haney School Furniture Co., 92 Mich. 558.

¶ 227. A court of equity has a right to purge its records of an order, obtained by fraud upon it, for the vacation of its decree, and to require notice to an innocent third party who has acquired rights in reliance upon the decree sought to be set aside.—Carlisle v. Carlisle, 96 Mich. 128.

¶ 228. Equity may assume jurisdiction to set aside a judgment procured by fraud, and this is especially true where the court which rendered the judgment is powerless to give relief.—Ewing v. Lamphere, 147 Mich. 659.

¶ 229. A decision of the probate court procured by fraud and collusion is not within the rule that a court of chancery cannot review a decision of the probate court, especially where it is being enforced against one not a party to the probate proceedings. —Babcock v. Babcock, 150 Mich. 558.

¶ 230. The assignee of the rights of other persons to property involved in the probate court cannot rely on fraud committed against his assignor in said probate court, for the purpose of maintaining a bill in equity to set aside the orders and decrees made by said court.—Davis v. McCamman, 168 Mich. 587.

¶ 231. Complainant alleged that after his injuries in defendant's factory he was treated by defendant's physician, who informed him that his injuries were not serious and would not be permanent, and that he would be entirely well in a few months; that defendant's agent represented four hundred dollars to be an adequate sum for his injuries; that relying on these statements he accepted four hundred dollars in settlement of the claim and allowed judgment to be entered for that sum; that instead of recovering he became worse and unable to do any work; that defendant knew he was a minor at the time of the injury and settlement; and that he repudiated the settlement. Held, the bill presented a case entitling the complainant to relief against the judgment.—Barr v. Packard Motor Car Co., 172 Mich. 299.

¶ 232. A court of equity may relieve against fraud, even to the extent of setting aside its own decrees, when founded thereon.—Raniak v. Pokorney, 198 Mich. 567. (Ostrander, J., dissenting.)

¶ 233. Where, after the judgment, statements that it was a mere form to be ignored were made, under such circumstances as to justify the indorser in believing and acting upon them, and in supposing he was not liable, and he was thereby induced to abstain from securing himself when he might easily have done so, until the maker became insolvent, and an execution was then levied upon his property, it was held that he was entitled to a perpetual injunction.—Roberts v. Miles, 12 Mich. 297.

§ 78. Perjury or false testimony.

¶ 234. Equity cannot relieve against a judgment at law on the mere allegation that the successful party committed perjury upon the trial.—Gray v. Barton, 62 Mich. 186.

¶ 235. A court of equity should not grant a new trial because a witness in the suit at law has committed perjury, except where the perjury has been fully established by judicial determination or by written documents.—Cleveland Iron Mining Co. v. Husby, 72 Mich. 61.

¶ 236. Equity will not relieve a party against a judgment at law, and grant a new trial, upon the ground that the verdict was obtained by perjury on the part of the prevailing party, after a motion for a new trial has been denied by the court which rendered the judgment, and such denial has been affirmed on appeal.—Codde v. Mahiat, 109 Mich. 186.

¶ 237. Equity will not interfere to restrain the collection of a judgment in an action at law, on the ground that it was obtained by perjury.—Steele v. Culver, 157 Mich. 344.

§ 79. Judgment on premature default.

Judgment by default, see ante § 8.

¶ 238. Both the judgment and the default on which it was based were ordered set aside on mandamus, where the default was entered for want of a plea on the same day that plaintiff filed security for costs in obedience to an order on defendant's motion, such default being premature.—Rankans v. Ottawa Circuit Judge, 97 Mich. 623.

§ 80. Defenses prevented or not interposed.

See also ante § 75.

¶ 239. A party who has a defense at law, of which he is advised, and neglects to make it, or to apply to equity for a discovery in aid thereof where necessary, comes too late into the supreme court to ask to be relieved against the judgment.—Barrows v. Doty, H. 1; Wright v. King, H. 12.

¶ 240. If a party's ignorance of his defense at law is connected with negligence, and might have been avoided by the use of ordinary means to obtain the necessary information, equity will not relieve.—Wixom v. Davis, W. 15.

¶ 241. Where a defendant was ignorant of the facts which constituted his defense at law pending the suit, or the defense was not available at law, the case forms an exception to the general rule that equity will not interfere to relieve against a judgment at law.—Wales v. Bank of Michigan, H. 308.

¶ 242. Complainants were sureties for another party, for whom defendant had from time to time extended the payment, without their consent, until the principal had become insolvent. Suits being brought against complainants, they appeared and pleaded, and the suits were discontinued; but the witness by whom the defense could be made out having died, suits were again brought and judgments recovered. It was held that complainants were entitled to relief against the judgments.—Mack v. Doty, H. 366.

¶ 243. Where one is induced to become indorser of a note by the statements of the payee that it is mere matter of form, and he will not be troubled about it, and afterwards

suit is brought upon the note, and he makes no defense, and judgment is obtained, he is thereafter precluded from claiming that the judgment is not binding upon him.—Roberts v. Miles, 12 Mich. 297.

¶ 244. The jurisdiction to grant new trials in actions at law is exercised by courts of equity only when the judgment recovered is against conscience, and when the applicant had no opportunity to make defense or was prevented from doing so by accident or by the fraud or improper conduct of the opposite party and without fault on his own part. Equity will never interfere where a party under no disability has neglected to make his defense at law.—Miller v. Morse, 23 Mich. 365.

¶ 245. A married woman was sued upon a promissory note which she had signed with her husband, and though personal service was made on her she did not appear, but suffered judgment by default, on which execution was levied. Held, that as she neglected to make her defense at law, and allowed the judgment to stand, she could not maintain a bill in equity to set aside the execution on the ground that she had signed as surety for her husband, and the judgment was void as against her.—Wilson v. Coolidge, 42 Mich. 112.

§ 81. ——Defenses prevented by act or fraud of adversary.

Fraud and collusion as ground for vacating judgment on motion, see ante § 53.

Fraud and collusion as ground for relief, see ante § 77.

Newly discovered evidence as ground, see post § 84.

Fraud and collusion as ground for collateral attack, see post § 97.

¶ 246. Where complainants were prevented from making their defense at law by the act of the plaintiff, until the only witness by whom the defense could be proved was dead, it was held that they were entitled to relief in equity, and that it was not necessary to entitle them to this relief that they should appeal from the judgment at law.—Mack v. Doty, H. 366.

¶ 247. Equity will relieve against a judgment at law where complainant, without neglect or default on his part, was prevented from making his defense at law by defendant's fraudulent conduct.—Burpee v. Smith, W. 327.

§ 82. Neglect, failure or inability to prosecute appeal or error.

Right to have judgment reviewed, see Appeals, I.

¶ 248. A bill to set aside a judgment of restitution alleged that complainants purchased certain land from defendants, paying a part of the purchase price at the time; that upon complainants' failure to make some of the deferred payments, defendants obtained a judgment of restitution; that on the last day allowed for an appeal from said judgment, defendants agreed to take the balance of the purchase money and convey the land to some person to be designated by complainants; that except for this arrangement, complainants would have appealed; that defendants now refuse to proceed further with the matter; that complainant has expended a certain sum of money in making repairs, and that defendants owe complainant a certain sum as rent for a part of a barn on the premises, which defendants have used, and prayed that a decree be entered in favor of complainants for the amount expended on repairs, for rent of the barn, and for rent which complainant has been compelled to pay since the judgment of restitution. Held, that complainants are not entitled to the relief sought.—Anglewicz v. Freda, 150 Mich. 634.

¶ 249. An allegation that the complainant and his attorney were arrested on criminal charges and hence could not take an appeal, is not sufficient ground for a bill of review where the attorney was detained in prison but a few days and the complainant was allowed full freedom of correspondence and leave of absence for business purposes.—Murphy v. Schoder, 126 Mich. 607.

¶ 250. A petition for a bill of review cannot be granted as a substitute for an appeal and an allegation as a ground that the petitioner has lost his right of appeal is not sufficient reason for granting the relief.—Simmons v. Conklin, 129 Mich. 190.

§ 83. Satisfaction or discharge without proper record.

Satisfaction and discharge of judgments, see post XI.

¶ 251. Equity may decree that a judgment has been paid and enforce the rights of parties by injunction against its enforcement or assertion, the fact being that a check given for that purpose and good when given was by collusion caused to be dishonored by nonpresentment until another previously dishonored check was presented and the account exhausted.—Kallander v. Neidhold, 98 Mich. 517.

¶ 252. In a suit by the indorser of a promissory note to restrain the enforcement of a judgment thereon, it appeared that the maker of the note had given a check to the attorney for the judgment creditor for the amount of the judgment, against a fund deposited for that express purpose, and had received from him the note upon which the judgment was rendered, with the indorsement, "Paid by check"; that the check was dishonored upon presentation, because a third person, whom the attorney had informed of the deposit, had presented a check

theretofore disallowed, and had obtained the fund. It further appeared that the person obtaining the money was the real party in interest in the original suit, and that the attorney was of his selection. Held, that collection and assignment of the judgment should be restrained.—Kallander v. Neidhold, 112 Mich. 329.

§ 84. Newly discovered evidence.

Defenses prevented or not interposed, see ante § 80.

¶ 253. Chancery will not award a new trial in a suit at law on the ground of newly discovered evidence when the proposed evidence only goes to contradict the evidence given on the former trial in an immaterial point.—Morris v. Hadley, 9 Mich. 278.

¶ 254. Equity will not relieve on the ground of newly discovered evidence, nor will it decree a new trial to enable a defendant to make a defense wholly different from that which he made and failed in on the first bill.—Morris v. Hadley, 9 Mich. 278.

¶ 255. A judgment against an estate will not be set aside in equity merely because of the discovery, subsequent to its rendition, of a receipt from claimant to decedent, where claimant, who took judgment merely for the balance of an account, admitted certain moneys had been paid, and where it was not clear but that the receipt referred to the admitted payment.—Mueller v. Marsh, 116 Mich. 375.

¶ 256. A court of chancery will take jurisdiction of a bill to set aside a judgment at law on the ground of newly discovered evidence only on allegation of new facts, and will not undertake to determine questions which the record of the action at law shows were discussed and adjudicated on the law side of the court.—American Fidelity Co. v. R. L. Ginsburg Sons' Co., 192 Mich. 693.

§ 85. Existence of other remedy; election and waiver.

Amending or vacating judgment on motion pending equitable proceedings for relief from judgment, see ante § 47.

Petition or bill of review as proper practice to open or amend decree, see also Equity § 225.

Granting leave to file bill after time for appeal has elapsed, see post ¶ 269.

¶ 257. An equitable remedy against a judgment is not lost by moving for a new trial at law.—Wright v. Hake, 38 Mich. 525.

¶ 258. Complainant, as defendant in a suit at law, handed the summons in that suit to his attorney, who arranged by telephone with the plaintiff's attorney to postpone the return day one week. The clerk of the plaintiff's attorney was not informed of this, and appeared on the return day and took judgment. The defendant's attorney paid no further attention to the suit, and did not appear on the day postponed to. Held, in a bill to set aside the judgment and execution, that complainant's bill did not lie, since he should have appeared on the day postponed to, and have had the judgment set aside.—Weisman v. Newton Beef Co., 154 Mich. 511.

¶ 259. Complainant having filed his bill for relief against judgment at law, and having subsequently sued out a writ of error upon the judgment, he was required to make election in which court he would proceed.—Webb v. Williams, W. 452.

§ 86. Grounds for enjoining enforcement of judgment.

Equitable considerations controlling relief, see also ante § 72.

Proper parties to bill to restrain enforcement of judgment, see post § 88.

Payment of judgment as ground for staying proceedings, see also post § 130.

Injunction against proceedings at law, see Injunctions, II, B.

Provisions as to enjoining enforcement of judgment, see Jud. Act, chap. XIX, § 10 et seq.; Comp. L. 1915, § 12864 et seq.

¶ 260. In sustaining a bill to enjoin the enforcement of a judgment against a garnishee defendant, it is not necessary to interfere with the judgment against the principal defendant, since the jurisdiction of the equity court may be predicated upon its power and right to act upon the person who wrongfully obtains the judgment.—Steele v. Bliss, 170 Mich. 175.

¶ 261. Where the plaintiff in a garnishment suit assures defendant garnishee that the suit will not be pressed and that defendant need pay no attention to it, and thereafter takes a judgment by default for defendant's failure to file his disclosure, a case for equitable relief against the judgment is presented.—Steele v. Bliss, 170 Mich. 175.

¶ 262. A judgment debtor sought to enjoin the collection of the judgment to the amount of a draft which he had given as collateral security, but which the creditor had failed to collect. It had been accepted merely for accommodation and without funds to pay it, and the drawee had afterward failed. The suit for injunction was brought more than seven years after it had gone to protest, and it was decreed that complainant pay the amount found due on the judgment. Held, that the objection that defendant should have been required to surrender the draft, or, if it were lost, give an indemnifying bond, had no force, especially if raised for the first time in the supreme court.—Compton v. Blair, 46 Mich. 1.

¶ 263. Where the maker of a note, upon which a judgment has been rendered, deposits

the amount of the judgment in a bank, and the attorney for the judgment creditors accepts the maker's check on the bank for the amount of the deposit in satisfaction and payment of the judgment, and surrenders the note, and then notifies the original payee, who is the real owner of the judgment, and who holds a dishonored check given by the maker on the same bank for nearly the amount of the deposit, and he presents said check, and it is paid from the deposit, the sureties on the note, against whom the judgment was also rendered, may file a bill to enjoin its assignment or enforcement in advance of any attempt in that direction.—Kallander v. Neidhold, 98 Mich. 517.

¶ 264. Sale of land on execution issued upon an irregular and void transcript of a justice's judgment rendered in a suit wherein summons, it is claimed, had not been served, will be enjoined where the note upon which the judgment was rendered had been surrendered and canceled in consideration of the transfer of a patent right.—Child v. Emerson, 99 Mich. 38.

¶ 265. A decree on mortgage foreclosure for the face of a bond with interest, when the bond is in double the sum owed, is a fraud on defendant's rights and entitles him to an injunction against a sale under such decree.—Scriven v. Hursh, 39 Mich. 98.

¶ 266. Where a law court has entered a judgment pursuant to the settlement of a personal injury suit, a court of chancery has jurisdiction, on the ground that such judgment was fraudulently obtained, to restrain the defendant in the law suit from setting up such judgment as a defense to any action brought by the plaintiff for damages.—Barr v. Packard Motor Car Co., 172 Mich. 299.

B. PLEADING AND PROCEDURE.

§ 87. In general; leave to file bill.

Equitable considerations controlling remedy, see ante § 72.

Disability of co-ordinate court to annul or relieve from judgment, see Courts § 74.

Jurisdiction of domestic court to entertain bill to annul its judgment on which suit has been brought in another state, see Courts ¶ 230.

Necessity of independent suit to modify decree for custody of children, see Divorce § 119.

Joint maker of note as party to suit to enjoin enforcement of judgment on note, see Injunctions ¶ 356.

¶ 267. To some extent considerations of public policy will govern a chancellor in allowing or disallowing leave to file bills of review.—Pomeroy v. Noud, 145 Mich. 37.

¶ 268. An application for leave to file a bill of review made more than four years after a writ of assistance was awarded will be denied with costs where it appears that the applicant had the defense he wishes to interpose within his knowledge all the time, and that he had never offered to make his adversaries whole by tendering even their disbursements, while he has put them to much expense in defending litigation involving his title and wherein he had been unsuccessful.—Brown v. Napper, 143 Mich. 636.

¶ 269. The court should be slow in granting a petition for leave to file a bill of review where the time for appeal has been allowed to pass.—Simmons v. Conklin, 129 Mich. 190.

§ 88. Bill or complaint.

Petition or bill of review as proper practice to open or amend decree, see also Equity § 225.

Parties complainant and defendant on bill of review, see Equity § 248.

Propriety of bill praying setting aside partition and also order appointing commissioners, see Equity ¶ 290.

Proper bills to obtain relief from decree whose subject-matter has been destroyed pending appeal, see Equity ¶ 944.

¶ 270. If fraud is the ground upon which the aid of equity is asked in relieving against a judgment, it is not sufficient to incorporate in the bill general allegations of fraud, deceit, or misconduct; the specific facts constituting the alleged fraud must be set forth.—Andrews v. Osborn, 159 Mich. 77.

¶ 271. The allegations of a bill of complaint in equity to obtain an injunction against a judgment at law must be positive, explicit, and certain.—Andrews v. Osborn, 159 Mich. 77.

¶ 272. He who invokes equity to set aside a judgment rendered against him in a court of law must show by his bill that he has been diligent in prosecuting his remedy at law, and if he had the opportunity to interpose his defense at law, and failed to avail himself of it, equity will not aid him.—Weisman v. Newton Beef Co., 154 Mich. 511.

¶ 272a. Where, in a bill to restrain the collection of a judgment obtained in a justice's court, the complainant states that the judgment was secured by default, and upon his information and belief the default was due to a mistake of his attorney as to the day the justice suit was adjourned to, no grounds for equitable relief are shown, and a demurrer will be sustained.—Kramer v. Schulte, 154 Mich. 632.

¶ 273. A magistrate before whom a judgment was rendered is not a proper party to a bill to restrain proceedings upon it. But an officer having an execution in his hands still in force is.—Burpee v. Smith, W. 327.

§ 89. Dismissal or relief.

General law as to dismissal of equitable suits, see Equity, X, A.

¶ 274. Where, under a complaint in equity to set aside certain orders and decrees of the probate court with respect to an estate on the ground of fraud, complainant takes no issue with the plea filed by defendant which states the details of the proceeding had before the probate court, shows that each and every matter complained of was before that court, and was heard, tried and determined by it, and the complainants had due notice and knowledge thereof and were represented by counsel in every step of said proceedings, the bill must be dismissed.—Davis v. McCamman, 168 Mich. 587.

¶ 275. A bill in equity to set aside a judgment and sale in attachment is properly dismissed upon evidence that the defendant who was plaintiff in the attachment paid out money to the support of complainant's abandoned children notwithstanding he received the money by an unlawful but bona fide conversion of defendant's property in the first instance but restored the property prior to the attachment.—Finn v. Adams, 138 Mich. 258.

¶ 276. A bill of review of a foreclosure decree is improperly dismissed though nothing is offered which might not have been produced on the foreclosure suit, where it appears that complainant in that suit was a mortgage trustee operating mills and trade enterprises under a mortgage to secure him as indorser, that it was necessary to carry this through some years and to supply money, that he eventually foreclosed and made and rendered accurate reports from which the making of charges now disputed might have been ascertained, but where he did not account as trustee in the foreclosure suit or by any separate suit, and where the legality of his charges was never submitted or passed on by any one learned in the law, and where petitioner is an administrator of the mortgagor and cestui que trust and also his widow suing individually.—Pomeroy v. Noud, 145 Mich. 37.

¶ 277. After granting leave to file a bill of review chancery has power to dismiss it at the hearing thereof, if it then appears contrary to the averments of the bill that there is in fact no new matter or no matter which might not have been produced on hearing of the original bill; and it need not inquire whether the alleged omitted matter would or could have varied the decree rendered.—Pomeroy v. Noud, 145 Mich. 37.

¶ 278. The judge before whom a bill to enjoin the execution of a judgment at law is tried, upon dismissing the bill of complaint and dissolving the injunction, may grant an order for the execution of the judgment in the suit at law; and, if such order is conditional, the appellant must comply with it, or rely upon such protection as is afforded by the statutory appeal bond, which does not continue the protection afforded by the injunction previous to its dissolution.—Hulan v. Wayne Circuit Judge, 159 Mich. 605.

¶ 279. On a bill to review a foreclosure decree, where an accounting of his doings under the decree was ordered of the defendant, a trustee under the mortgage and also the person secured thereby, it was ordered that the foreclosure decree be set aside and held void, he having bid in the property, if on the accounting it be found that nothing was due, or being due should be paid to him within a time limited, or alternatively that the decree stand in force.—Pomeroy v. Noud, 145 Mich. 37.

¶ 280. On a bill in the nature of a bill of review by a city which had been omitted as a party from a decree setting aside assessments for local improvements, it is error to dismiss the original bill in addition to vacating the decree to let the city in to defend.—Maxwell v. Auditor General, 125 Mich. 621.

¶ 280a. A judgment in an action of assumpsit was rendered in favor of plaintiffs on December 24, 1910, by a justice of the peace. The docket entry showed that the case was heard and the judgment rendered on December 26, 1910, which latter date was a holiday upon which said justice of the peace was forbidden to hold court. Defendant in said suit moved in the circuit court to vacate the transcript and recall the execution. Pending said hearing plaintiffs filed their bill in equity setting up said facts, alleging that said judgment was rendered December 24, 1910, and was inadvertently entered up as being rendered December 26th, and asked for a decree correcting the docket and transcript accordingly. Held, said bill was properly dismissed, since the docket showing a void judgment, plaintiffs had an adequate remedy at law by beginning a new suit.—Orban v. Northwestern Fire & Marine Ins. Co., 169 Mich. 404.

VII. COLLATERAL ATTACK, CONCLUSIVENESS AND EFFECT.

Right to appeal or error, judgments reviewable and general law of appeal and error, see Appeal.
Effect of dismissal of writ of error, see Appeal § 169.
Judgments reviewable on certiorari, see Certiorari §§ 10-21.
As contracts within federal inhibition of impairment, see Constitutional Law § 171.
Judgments as vested rights not affected by retrospective legislation, see Constitutional Law § 243.
Effect of repeal after verdict and before judgment allowing specific relief, see Constitutional Law § 243.
Disability of legislature to accomplish reversal, see Constitutional Law §§ 191, 251.
Nisi prius decisions as precedents, see Courts § 27.

the amount of the judgment in a bank, and the attorney for the judgment creditors accepts the maker's check on the bank for the amount of the deposit in satisfaction and payment of the judgment, and surrenders the note, and then notifies the original payee, who is the real owner of the judgment, and who holds a dishonored check given by the maker on the same bank for nearly the amount of the deposit, and he presents said check, and it is paid from the deposit, the sureties on the note, against whom the judgment was also rendered, may file a bill to enjoin its assignment or enforcement in advance of any attempt in that direction.—Kallander v. Neidhold, 98 Mich. 517.

¶ 264. Sale of land on execution issued upon an irregular and void transcript of a justice's judgment rendered in a suit wherein summons, it is claimed, had not been served, will be enjoined where the note upon which the judgment was rendered had been surrendered and canceled in consideration of the transfer of a patent right.—Child v. Emerson, 99 Mich. 38.

¶ 265. A decree on mortgage foreclosure for the face of a bond with interest, when the bond is in double the sum owed, is a fraud on defendant's rights and entitles him to an injunction against a sale under such decree.—Scriven v. Hursh, 39 Mich. 98.

¶ 266. Where a law court has entered a judgment pursuant to the settlement of a personal injury suit, a court of chancery has jurisdiction, on the ground that such judgment was fraudulently obtained, to restrain the defendant in the law suit from setting up such judgment as a defense to any action brought by the plaintiff for damages.—Barr v. Packard Motor Car Co., 172 Mich. 299.

B. PLEADING AND PROCEDURE.

§ 87. In general; leave to file bill.

Equitable considerations controlling remedy, see ante § 72.

Disability of co-ordinate court to annul or relieve from judgment, see Courts § 74.

Jurisdiction of domestic court to entertain bill to annul its judgment on which suit has been brought in another state, see Courts ¶ 230.

Necessity of independent suit to modify decree for custody of children, see Divorce § 119.

Joint maker of note as party to suit to enjoin enforcement of judgment on note, see Injunctions ¶ 356.

¶ 267. To some extent considerations of public policy will govern a chancellor in allowing or disallowing leave to file bills of review.—Pomeroy v. Noud, 145 Mich. 37.

¶ 268. An application for leave to file a bill of review made more than four years after a writ of assistance was awarded will be denied with costs where it appears that the applicant had the defense he wishes to interpose within his knowledge all the time, and that he had never offered to make his adversaries whole by tendering even their disbursements, while he has put them to much expense in defending litigation involving his title and wherein he had been unsuccessful.—Brown v. Napper, 143 Mich. 636.

¶ 269. The court should be slow in granting a petition for leave to file a bill of review where the time for appeal has been allowed to pass.—Simmons v. Conklin, 129 Mich. 190.

§ 88. Bill or complaint.

Petition or bill of review as proper practice to open or amend decree, see also Equity § 225.

Parties complainant and defendant on bill of review, see Equity § 248.

Propriety of bill praying setting aside partition and also order appointing commissioners, see Equity ¶ 290.

Proper bills to obtain relief from decree whose subject-matter has been destroyed pending appeal, see Equity ¶ 944.

¶ 270. If fraud is the ground upon which the aid of equity is asked in relieving against a judgment, it is not sufficient to incorporate in the bill general allegations of fraud, deceit, or misconduct; the specific facts constituting the alleged fraud must be set forth.—Andrews v. Osborn, 159 Mich. 77.

¶ 271. The allegations of a bill of complaint in equity to obtain an injunction against a judgment at law must be positive, explicit, and certain.—Andrews v. Osborn, 159 Mich. 77.

¶ 272. He who invokes equity to set aside a judgment rendered against him in a court of law must show by his bill that he has been diligent in prosecuting his remedy at law, and if he had the opportunity to interpose his defense at law, and failed to avail himself of it, equity will not aid him.—Weisman v. Newton Beef Co., 154 Mich. 511.

¶ 272a. Where, in a bill to restrain the collection of a judgment obtained in a justice's court, the complainant states that the judgment was secured by default, and upon his information and belief the default was due to a mistake of his attorney as to the day the justice suit was adjourned to, no grounds for equitable relief are shown, and a demurrer will be sustained.—Kramer v. Schulte, 154 Mich. 632.

¶ 273. A magistrate before whom a judgment was rendered is not a proper party to a bill to restrain proceedings upon it. But an officer having an execution in his hands still in force is.—Burpee v. Smith, W. 327.

§ 89. Dismissal or relief.

General law as to dismissal of equitable suits, see Equity, X, A.

¶ 274. Where, under a complaint in equity to set aside certain orders and decrees of the probate court with respect to an estate on the ground of fraud, complainant takes no issue with the plea filed by defendant which states the details of the proceeding had before the probate court, shows that each and every matter complained of was before that court, and was heard, tried and determined by it, and the complainants had due notice and knowledge thereof and were represented by counsel in every step of said proceedings, the bill must be dismissed.—Davis v. McCamman, 168 Mich. 587.

¶ 275. A bill in equity to set aside a judgment and sale in attachment is properly dismissed upon evidence that the defendant who was plaintiff in the attachment paid out money to the support of complainant's abandoned children notwithstanding he received the money by an unlawful but bona fide conversion of defendant's property in the first instance but restored the property prior to the attachment.—Finn v. Adams, 138 Mich. 258.

¶ 276. A bill of review of a foreclosure decree is improperly dismissed though nothing is offered which might not have been produced on the foreclosure suit, where it appears that complainant in that suit was a mortgage trustee operating mills and trade enterprises under a mortgage to secure him as indorser, that it was necessary to carry this through some years and to supply money, that he eventually foreclosed and made and rendered accurate reports from which the making of charges now disputed might have been ascertained, but where he did not account as trustee in the foreclosure suit or by any separate suit, and where the legality of his charges was never submitted or passed on by any one learned in the law, and where petitioner is an administrator of the mortgagor and cestui que trust and also his widow suing individually.—Pomeroy v. Noud, 145 Mich. 37.

¶ 277. After granting leave to file a bill of review chancery has power to dismiss it at the hearing thereof, if it then appears contrary to the averments of the bill that there is in fact no new matter or no matter which might not have been produced on hearing of the original bill; and it need not inquire whether the alleged omitted matter would or could have varied the decree rendered.—Pomeroy v. Noud, 145 Mich. 37.

¶ 278. The judge before whom a bill to enjoin the execution of a judgment at law is tried, upon dismissing the bill of complaint and dissolving the injunction, may grant an order for the execution of the judgment in the suit at law; and, if such order is conditional, the appellant must comply with it, or rely upon such protection as is afforded by the statutory appeal bond, which does not continue the protection afforded by the injunction previous to its dissolution.—Hulan v. Wayne Circuit Judge, 159 Mich. 605.

¶ 279. On a bill to review a foreclosure decree, where an accounting of his doings under the decree was ordered of the defendant, a trustee under the mortgage and also the person secured thereby, it was ordered that the foreclosure decree be set aside and held void, he having bid in the property, if on the accounting it be found that nothing was due, or being due should be paid to him within a time limited, or alternatively that the decree stand in force.—Pomeroy v. Noud, 145 Mich. 37.

¶ 280. On a bill in the nature of a bill of review by a city which had been omitted as a party from a decree setting aside assessments for local improvements, it is error to dismiss the original bill in addition to vacating the decree to let the city in to defend.—Maxwell v. Auditor General, 125 Mich. 621.

¶ 280a. A judgment in an action of assumpsit was rendered in favor of plaintiffs on December 24, 1910, by a justice of the peace. The docket entry showed that the case was heard and the judgment rendered on December 26, 1910, which latter date was a holiday upon which said justice of the peace was forbidden to hold court. Defendant in said suit moved in the circuit court to vacate the transcript and recall the execution. Pending said hearing plaintiffs filed their bill in equity setting up said facts, alleging that said judgment was rendered December 24, 1910, and was inadvertently entered up as being rendered December 26th, and asked for a decree correcting the docket and transcript accordingly. Held, said bill was properly dismissed, since the docket showing a void judgment, plaintiffs had an adequate remedy at law by beginning a new suit.—Orban v. Northwestern Fire & Marine Ins. Co., 169 Mich. 404.

VII. COLLATERAL ATTACK, CONCLUSIVENESS AND EFFECT.

Right to appeal or error, judgments reviewable and general law of appeal and error, see Appeal.

Effect of dismissal of writ of error, see Appeal § 169.

Judgments reviewable on certiorari, see Certiorari §§ 10-21.

As contracts within federal inhibition of impairment, see Constitutional Law § 171.

Judgments as vested rights not affected by retrospective legislation, see Constitutional Law § 243.

Effect of repeal after verdict and before judgment allowing specific relief, see Constitutional Law § 243.

Disability of legislature to accomplish reversal, see Constitutional Law §§ 191, 251.

Nisi prius decisions as precedents, see Courts § 27.

Misrecital as to mode of service on which default rests as surplusage and immaterial, see Defaults ¶ 45.
Right to appear and put in answer after default judgment on published service, see Defaults § 29.
Decrees for conveyances as equivalent to the conveyance, see also Equity § 227.
Doctrine of relation as applied to decree for conveyance, see Equity ¶ 899.
Conclusiveness of decree for final account of representative, see Estates of Decedents ¶ 1115.
Annulment of garnishment judgment by subsequent bankruptcy, see also Garnishment ¶ 274.
Decree for conveyance as in effect a conveyance, see Equity § 227.
Conclusiveness of foreclosure decree as to priority of right between mortgagee and defendant claiming paramount title, see Foreclosure ¶ 435.
General law of res adjudicata, whether as bar, merger or estoppel, see Former Adjudication.
Conclusiveness as bar or estoppel of judgments vacated or set aside, see Former Adjudication § 30.
Decree as bar to suit to set it aside, see Former Adjudication ¶ 162.
Necessity and manner of pleading former adjudication, see Former Adjudication § 94.
Effect of opinions and recitals as conclusions on parties, see Former Adjudication §§ 23, 24.
When judgment regarded as final and complete for purposes of bar or estoppel, see Former Adjudication, II, B.
Judgment as prima facie evidence when not conclusive as bar or estoppel, see Former Adjudication § 3.
Operation and effect of decrees in injunction, see Injunctions § 150.

§ 90. Collateral impeachment in general.

Collateral attack on judgment, see post § 90.
Who may attack the judgment, see post § 91.
Attack upon jurisdictional grounds, see post §§ 93-94.
Fraud or collusion as grounds for attack, see post § 97.
Want of proper tribunal, see post § 98.
Errors or irregularities in proceedings after jurisdiction acquired, see post §§ 99-108.
Errors in amount or terms of judgment, see post § 109.
Errors in entering or recording judgment, see post § 110.
Conclusiveness of record recitals, see post § 117.
Upon particular decisions, see post § 111.
Presumptions as to regularity of proceedings, see post § 115.
Collateral question of judgment on appeal from related judgment, see Appeal ¶ 1299.
Attack on judicial sale in gross instead of in parcels, see Judicial Sales ¶ 6; Executions § 91.
Collateral attack on and conclusiveness of judgments of foreign nations, see Foreign Judgments §§ 12, 13.

¶ 281. Where a court has jurisdiction its proceedings cannot be impeached collaterally. —Clark v. Holmes, 1 D. 390.

¶ 282. In an action of ejectment, a decree by which the premises in dispute had been conveyed to the defendant may not be collaterally attacked.—Stranach v. Stranach Lumber Co., How. N. P. 122.

¶ 283. The regularity of the judgment and execution cannot be inquired into on a judgment creditor's bill.—Williams v. Hubbard, 1 Mich. 446.

¶ 284. Where the record of a case is questioned collaterally only such objections can be noticed as affect the jurisdiction to dispose of it.—Pettiford v. Zoellner, 45 Mich. 358.

¶ 285. In mandamus proceedings against a supervisor to compel the assessment of taxes to pay a judgment rendered against the commissioner of highways, properly certified to him, and which has been appealed from, vacated or discharged, the only inquiry open was whether the court had jurisdiction.—Commissioner of Highways of Township of Garfield v. Supervisor of Township of Springfield, 77 Mich. 228.

¶ 286. In an action upon a bond given by a party intervening in a log lien suit, which bond is conditioned for the payment of any judgment that might be rendered against the property, neither he nor his sureties can question the validity of the judgment so rendered, unless it is void in whole or in part upon its face.—Gill v. Backus, 108 Mich. 417.

¶ 287. A decree of the circuit court which has not been appealed from cannot be attacked in a collateral proceeding except for want of jurisdiction.—Potter v. Ranlett, 116 Mich. 454.

¶ 288. A judgment rendered by a court possessing the requisite jurisdiction cannot be impeached collaterally, although it might be successfully attacked in a direct proceeding.—Wilkin v. Keith, 121 Mich. 66.

¶ 289. Under 1897 Chancery Rule 27 which provides that no bill of review, "or other bill in the nature of a bill of review" shall be filed without special leave of the court first obtained, a decree cannot be collaterally attacked by an answer in the nature of a cross bill or otherwise impeached collaterally.—Salliotte v. Williams, 130 Mich. 36.

¶ 290. Objections to the validity of the judgment in question in a bill in aid of the execution, constituting a collateral attack upon such judgment, will not be considered.—Morley Bros. v. Stringer, 133 Mich. 690.

¶ 291. The validity of a judgment in attachment, in favor of sureties on a bond who had paid a judgment against their principal, was not subject to attack in a proceeding in aid of execution, where the record showed

jurisdiction under the attachment writ and levy, and the declaration contained counts upon which the court had jurisdiction to render a judgment.—Archer v. Laidlaw, 135 Mich. 88.

¶ 292. A defense of bar by former adjudication cannot be avoided by collaterally assailing the former judgment, where the record shows no ground for such an attack.—Hatch v. Wayne Circuit Judge, 138 Mich. 184.

§ 91. Persons concluded.

[Note. Collateral attack, so called by strangers to the judgment or decree, presents a question whether the attacking party is in such privity to the judgment as to be bound thereby (see Former Adjudication, V), for if not bound there is nothing to attack; and if bound then the attack is by a privy to the party and is permissible if otherwise within the rules permitting collateral attack. See language in Baugh v. Baugh, 37 Mich. 59 at page 62, and see ante VI, as to persons entitled to relief from judgments.]

Stockholders' right to impeach void judgment against corporation, see post ¶ 300.

Right of stockholder sued for corporate debt to assail judgment against the corporation, see also Corporations ¶ 1236.

Attack by creditors on validity of judgment in creditors' suit, see also Creditors' Suits § 11.

Rule that judgment is not binding or conclusive on persons not parties or privies, see Former Adjudication §§ 63-76.

Validity or conclusiveness of judgment rendered against infant upon admissions of his guardian ad litem, see Guardian ad Litem ¶ 42.

¶ 293. The rule that the judgment of a court having jurisdiction of the parties and of the subject-matter is binding until reversed, and cannot be attacked collaterally, applies only to parties and their privies and to such third persons, or strangers to the record, as would be prejudiced in regard to the same pre-existing right, if the judgment were given full credit and effect.—Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 489.

¶ 294. An executor's surety, who, having been notified of application for leave to sue bond, did not appear, and made no objection, was not allowed, in suit on bond, to attack correctness of decree made on executor's final accounting.—Holden v. Lathrop, 65 Mich. 652. See Clark v. Fredenburg, 43 Mich. 263.

¶ 295. A judgment in a proceeding for a forfeiture under the United States revenue laws, pro forma in rem, but practically against the claimant of the property, is not conclusive evidence against parties who have no notice of the proceedings, as to facts on which the judgment was founded.—Dean v. Chapin, 22 Mich. 275.

¶ 296. A defendant in a suit to set aside a deed, who is not a privy to the judgment of a probate court allowing claims of creditors, may show the invalidity of such claims.—Seymour v. Wallace, 121 Mich. 402.

§ 92. ——Estoppel to attack.

Effect of payment of judgment, see post § 130.

General law of estoppel, see Estoppel.

Estoppel by unjust judgment, see Former Adjudication ¶ 8.

Effect of consent or of waiver or failure to object in court rendering judgment, see Courts §§ 63, 64, 83.

Disability of party to have divorce decree annulled because of his own collusion, see Divorce ¶ 387.

¶ 297. On a bill in aid of execution, and attacking the validity of a receivership on the ground of disqualification of the judge in the receivership proceeding, evidence that the complainant in its suit at law against the defendant acquiesced in the view of the court that a receiver should be appointed, does not show an estoppel or a waiver of the right to attack the receivership in the absence of any evidence that the complainant then knew of the existence of the disqualification.—Davis Colliery Co. v. Charlevoix Sugar Co., 155 Mich. 228.

§ 93. Grounds of attack; invalidity of judgment or decree in general.

Invalidity of judgment entered by clerk without authority, see ante ¶ 95.

Grounds for vacating or modifying judgment, see ante § 51 et seq.

Invalidity arising from fraud or collusion, see post § 97.

Invalidity arising from judge's disqualification, see post § 98.

Errors and irregularities of court possessing requisite jurisdiction, see post §§ 99-110.

Necessity that defect appear upon face of record, see post §§ 115-119.

Exclusion in contempt of questions as to regularity or effect of judgment disobeyed, see Contempt § 33.

Right to make collateral attack after objection made and overruled in court rendering judgment, see also Courts ¶ 302.

Irregularities and defects invalidating execution sales collaterally, see Executions §§ 90-93.

¶ 298. A decree of foreclosure rendered during the infancy of a feme covert who did not come of age until the time for appeal expired was held absolutely void as to her.—Chandler v. McKinney, 6 Mich. 217.

¶ 299. It is immaterial how fair on its face may be any judgment, order, decree or license of a court when back of it lies an absolute legal impediment to making it.—Eberstein v. Oswalt, 47 Mich. 254.

¶ 300. A stockholder may show, even aliunde the record, as a defense to his liability

as a stockholder, that a judgment against the corportion is wholly void.—McBryan v. Universal Elevator Co., 130 Mich. 111.

§ 94. Want of jurisdiction.

Jurisdiction obtained by fraud or collusion, see post § 97.
Nonjurisdictional defects in notice or process, see post § 108.
Evidence to supply jurisdictional defects, see post § 118.
Evidence to contradict record recitals of jurisdiction, see post § 119.
Presumptions as to jurisdiction, see post § 115.
Impeachment of jurisdictional recitals, see post § 117 et seq.
Requisites of jurisdiction, how acquired, scope and subjects, and loss or ouster, see Courts, V.
Jurisdiction as essential to bar or estoppel, see Former Adjudication § 5 et seq.
Right under full faith and credit clause to question jurisdiction of foreign judgments, see Foreign Judgments § 5.

¶ 301. Parties whose interests are prejudiced may always take advantage of want of jurisdiction in the court where the injury occurred.—Gillett v. Needham, 37 Mich. 143; Breen v. Pangborn, 51 Mich. 29; King v. Merritt, 67 Mich. 194.

¶ 302. Where the want of jurisdiction appears on the record of a court of general jurisdiction the record is a nullity.—Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498; Wilson v. Arnold, 5 Mich. 98.

¶ 303. If, in fact, the subject-matter of a suit was not within the jurisdiction of the state from which the court derives its authority, its judgment is a nullity, and may be so treated everywhere.—People v. Dawell, 25 Mich. 247.

¶ 304. A failure to comply with statutory requirements where the jurisdiction conferred is special by published notice, and no personal service is obtained, renders the judgment void, and the proceedings may be attacked collaterally.—Nugent v. Nugent, 70 Mich. 52.

¶ 305. A judgment rendered upon withdrawal of plea that was not filed by defendant or in his behalf, but was filed in a suit purporting to have been commenced by a declaration which was not served upon defendant, is void.—Hoffman v. Estate of Pope, 74 Mich. 235.

§ 95. ——Adjudication by court as to its own jurisdiction.

¶ 306. The decision of a circuit judge that he has jurisdiction to hold a probate court—and his ignoring a specific objection is equivalent to such decision—cannot be attacked collaterally, and is final unless appealed from.—Landon v. Comet, 62 Mich. 80.

¶ 307. If a court act without authority its judgments will be regarded as nullities; and the jurisdiction of a court exercising authority over a subject-matter may be inquired into in every court where the proceedings of the former are relied upon by a party claiming the benefit of such proceedings.—Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498.

§ 96. ——Waiver of jurisdiction.

General rule as to waiving objections to jurisdiction and distinction between jurisdiction of person and jurisdiction in that respect, see Courts § 83.
Waiver of jurisdictional errors on appeal or error, see Appeal § 225 et seq.
Waiver of objections by failure to make same properly and seasonably in trial court for review, see Saving Questions.
Waiver of matter of abatement by pleas in bar, see Pleading, III, XI.

¶ 308. The jurisdiction of a court is admitted where the defendant answers without raising the question, goes to trial upon the merits, and finally compromises the decree rendered by the court which is one within its powers if rightly before it, and he cannot later question it.—Cole v. Cole, 144 Mich. 346.

§ 97. Fraud and collusion.

As ground for vacating judgment on motion, see ante § 53.
As ground for equitable relief from judgment, see ante § 77.
General law of fraud, see Fraud.

¶ 309. Parties and their privies can obtain relief from a fraudulent decree only in a direct proceeding for that purpose, and in the court where the original proceeding was had.—Dunlap v. Byers, 110 Mich. 109.

¶ 310. The rule, that a plea to the merits waives irregularities in obtaining jurisdiction of the person, has no bearing when the method of obtaining jurisdiction constitutes a fraud upon the court as well as upon the party.—Watkins v. Plummer, 93 Mich. 215.

§ 98. Disqualification of judge.

Estoppel to urge disqualification, see ante ¶ 297.
Disqualification of judge generally, see Courts § 4.
Nullity of order or decree by interested judge, see also Judges ¶ 23.

¶ 311. A decree in a foreclosure suit by a judge who is disqualified for consanguinity or affinity to either of the parties is void, and may be attacked collaterally where the bill was taken as confessed for want of appearance.—Horton v. Howard, 79 Mich. 642.

¶ 312. A party against whom a judgment or decree has been rendered by a judge who was disqualified by reason of relationship to

the adverse party, and who has not appeared or consented to such action, is not estopped from questioning its validity, nor need he make such contest by appealing from said decree.—Horton v. Howard, 79 Mich. 642.

¶ 313. The grantee of a purchaser at a foreclosure sale under a decree which was void by reason of the disqualification of the circuit judge who signed it, who does not rely upon such title, but secures deeds from purchasers at sales under subsequent mortgages, is not estopped from questioning the validity of the decree.—Horton v. Howard, 79 Mich. 642.

¶ 314. Judgments and orders made by a disqualified judge may be collaterally attacked, as they are not voidable merely, but void; and the objection as to such disqualification, if not taken before decision is rendered, is available in the appellate court. —Bliss v. Caille Bros. Co., 149 Mich. 601.

¶ 315. An order entered by a judge who was disqualified to sit in the case is absolutely void, and a subsequent order nunc pro tunc, affirming the first order, made by another judge, does not cure the jurisdictional defect.—Davis Colliery Co. v. Charlevoix Sugar Co., 155 Mich. 228.

¶ 316. A judgment or order rendered or made by a disqualified judge is void.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

¶ 317. The acts of a judge of the Court of Domestic Relations created under the unconstitutional act of 1913 held to be considered as those of a de facto judge, not open to question upon jurisdictional grounds. —Attorney General ex rel. Dingeman v. Lacy, 180 Mich. 329.

§ 99. Nonjurisdictional errors and irregularities.

Attack upon jurisdictional grounds, see ante § 93 et seq.
Fraud or collusion not going to jurisdiction of court, see ante § 97.
Presumptions as to regularity of proceedings, see post § 116.
Noncompliance with rule of court as mere irregularity, see also Courts ¶ 36.

¶ 318. Mere irregularities or errors will not justify the rejection of a collateral judgment offered in evidence; to warrant such rejection its defects must make the judgment jurisdictionally invalid.—Bigalow v. Barre, 30 Mich. 1.

¶ 319. The validity of a decree of foreclosure cannot be attacked collaterally for mere irregularities that do not go to the jurisdiction.—Torrans v. Hicks, 32 Mich. 307.

¶ 320. Proceedings in another court, when introduced collaterally, cannot be questioned for error or irregularities where no jurisdictional defect is alleged against them. —Mitchell v. Chambers, 43 Mich. 150.

¶ 321. A court of law will not in a collateral case review irregularities in the procedure of a court of equity, if they were not jurisdictional.—Ruggles v. First Nat. Bank, 43 Mich. 192.

¶ 322. An irregularity is such a defect in legal proceedings as may be waived; a nullity is one that cannot.—Jenness v. Lapeer Circuit Judge, 42 Mich. 469.

¶ 323. Objections to the validity of proceedings involved in a suit cannot be raised in a later case if purposely withheld or reserved in the first one.—Clark v. Wiles, 54 Mich. 323.

¶ 324. Plaintiffs in replevin against whom judgment for return has been rendered are estopped from setting up in defense to suit on replevin bond any infirmity in the proceedings by which they obtained possession. —Jennison v. Haire, 29 Mich. 207.

¶ 325. The special statutory methods of obtaining jurisdiction, where actual notice is not given, stand entirely on their own regularity, and, if not regular, proceedings based on them are nullities. But where personal service has been had, further proceedings are not necessarily fatally defective for all purposes, especially if rights based on them are allowed to become established by lapse of time without resorting to common-law remedies to set such proceedings aside.—Granger v. Detroit Superior Court Judge, 44 Mich. 384.

¶ 326. If, in a proceeding to condemn land for public use, the court had jurisdiction of the subject-matter and of the person, irregularities that were not taken advantage of on appeal cannot be set up in an action of ejectment; the judgment is conclusive.—Tuller v. City of Detroit, 97 Mich. 597.

¶ 327. A judgment in another circuit court, in form on the merits in favor of the defendant, constitutes a complete bar to a subsequent suit on the same cause of action notwithstanding the claim that the plaintiff was not present and introduced no evidence, as such facts cannot be shown in a collateral attack.—Hatch v. Wayne Circuit Judge, 138 Mich. 184.

§ 100. ——Sufficiency or validity of cause of action.

Failure to perform conditions precedent, see post § 101.
Merger of cause of action in judgment, see Former Adjudication, IV.

¶ 328. Where a judgment after due service against a married woman is not impeached on error or appeal, its conclusiveness

cannot be questioned on account of the invalidity of the cause of action.—Wilson v. Coolidge, 42 Mich. 112.

¶ 329. The presumption of the validity of a judgment cannot be overcome by averments of an answer to a creditor's bill, to the effect that such judgment was obtained upon notes in the giving of which the defendant was grossly swindled, that the defendant was not aware of the trial of the case, and that the complainant and his agents, and attorneys were engaged in a conspiracy against the defendant.—Central Nat. Bank of Cleveland v. Graham, 118 Mich. 488.

¶ 330. A married woman who after being previously served with summons allows a judgment to be taken against her by default upon a note signed by herself and husband cannot, in a suit in equity brought to set aside a levy made under an execution issued on the judgment, attack the judgment as invalid on the ground that the consideration of the note was not for her individual benefit or for the benefit of her estate.—Evans v. Calman, 92 Mich. 427.

¶ 331. A foreclosure decree and sale thereunder cannot be collaterally attacked because of an assignment by complainant not appearing of record and not brought to the court's notice in the former suit.—Bigelow v. Booth, 39 Mich. 622.

§ 101. ——Failure to perform conditions precedent.

Sufficiency of cause of action, see ante § 100.

¶ 332. Irregularities anterior to the decree under which the state purchased land for taxes are not open to question in opposition to a petition for a writ of assistance by the purchaser; where no want of jurisdiction in the original proceeding is shown; and accordingly it cannot be urged that the township treasurer made no demand for payment of the tax and made no effort to collect from personal property of the owner as required by Pub. Acts 1893, No. 206, § 46.—Hughes v. Jordan, 118 Mich. 27.

§ 102. ——Objections as to remedy.

¶ 333. The objection that one who holds city bonds cannot put his claim into judgment, but must resort to mandamus to compel an assessment to pay them as they become due, cannot, even if it were valid, be urged for the first time in a proceeding to enforce the judgment.—Hammond v. Place, 116 Mich. 628.

§ 103. ——Misjoinder of actions.

Defects in pleadings as ground for attack, see post § 107.

¶ 334. A judgment in assumpsit is not void because there was an ineffectual attempt in the same proceeding to enforce a mechanics' lien.—Allured v. Voller, 107 Mich. 476.

§ 104. ——Suit brought without leave of court.

¶ 335. A judgment given in a suit at law brought without leave pending foreclosure in chancery is not invalid.—Goodrich v. White, 39 Mich. 489.

§ 105. ——Unauthorized appearance by attorney.

General law as to appearance by attorney, see Appearance.

¶ 336. A judgment, in which an unauthorized attorney appeared for the defendant, can be set aside only by direct attack.—Corbitt v. Timmerman, 95 Mich. 581.

¶ 337. On the record of a federal court judgment showing answer for a defendant by an attorney of the court and consent to the judgment, the jurisdiction is supported by a presumption that the attorney had authority so to appear.—Arnold v. Nye, 23 Mich. 286.

¶ 338. The authority of an attorney who appeared for defendants in an action in the circuit court will be conclusively presumed where the judgment in such action is collaterally attacked.—Corbitt v. Timmerman, 95 Mich. 581.

¶ 339. Defendants to a creditor's bill and in aid of execution cannot collaterally attack the judgment at law on which the bill is based on the ground that the attorney filing the appearances for them and representing them at the trial had no authority to act, where defendants have made no motion nor taken steps to have the appearances vacated.—Rohrabacher v. Walsh, 170 Mich. 59.

¶ 340. A judgment of the circuit court cannot be collaterally attacked on the ground that the attorney who appeared for the defeated party was not authorized to do so; such authority is presumed so far as necessary to give jurisdiction.—Corbitt v. Timmerman, 95 Mich. 581.

§ 106. ——Objections as to parties.

Void foreclosure decree against infant, see ante ¶ 298.

General law as to parties, see Parties.

¶ 341. A decision on the hearing of a suit in equity, that complainants are proper parties to the bill, renders the question res judicata in a supplemental proceeding by them in aid of execution based upon the decree in such suit.—Campbell v. Western Electric Co., 113 Mich. 333.

¶ 342. Where a judgment is regularly rendered and not appealed from, it cannot be attacked collaterally on the ground that the suit should have been brought in the name

of a different official plaintiff.—Somers v. Losey, 48 Mich. 294.

¶ 343. A judgment regular on the record but against a minor is not void but voidable for failure to appoint a guardian ad litem.—Schimpf v. Wayne Circuit Judge, 129 Mich. 103.

¶ 344. A judgment cannot be collaterally attacked on the ground that the Christian name of the defendant was nowhere shown in the record—only the initials having been given.—Vicborn v. Pollock, 133 Mich. 524.

§ 107. ——Defects in pleadings.

Conformity of judgment to pleadings, see ante § 13.

Misjoinder of actions, see ante § 103.

¶ 345. Where the pleadings present an issue which it is within the province of the court to determine, his determination cannot be attacked collaterally for the invalidity of counts in the declaration.—Curtis v. Board Sup'rs Charlevoix Co., 154 Mich. 646.

¶ 346. A complaint not technically accurate but sufficient to give jurisdiction is not open to collateral attack.—Pardee v. Smith, 27 Mich. 33.

§ 108. ——Defects in notice or process.

Want of notice or process as ground for vacating judgment, see ante § 52.

Defects in notice or process as ground for collateral attack, see post § 108.

Presumptions as to validity and sufficiency of notice or process, see also post §§ 115, 116.

¶ 347. Where trover is brought against a foreign corporation and personal service of the writ is made upon the proper officer, the omission to notify the home office of the suit, as provided by law, is a mere irregularity and not a jurisdictional defect.—Emerson, Talcott & Co. v. McCormick Harvesting Mach. Co., 51 Mich. 5.

¶ 348. An injunction decree, though erroneous in law wherein it settled on petitions interposed between the complainant and another party certain questions affecting rights of the defendant in the subject-matter, cannot be assailed collaterally by defendant after he has failed to appeal for such errors.—Vincent v. Sherwood, 118 Mich. 64.

¶ 349. The signing of an erroneous order of publication in a divorce proceeding, which, as signed read "four months" instead of "five months," which mistake was corrected by solicitor for the complainant, and as such the order was duly published, does not affect the jurisdiction of the court, as the error was one which could have been corrected by the court under Comp. L. 1897, § 10260, How. St., 2nd Ed., § 12969.—Jankovich v. Wayne Circuit Judge, 188 Mich. 284.

¶ 350. Where proper service of declaration has been had in an action begun by declaration, failure to serve notice of the rule to plead is not such a defect as avoids the whole proceeding and subjects the default judgment to collateral attack.—Griffin v. McGavin, 117 Mich. 372.

§ 109. ——Amount and propriety of relief.

Terms and amount of judgment, generally, see ante § 28 et seq.

Collateral attack on sentence for excessiveness of costs, see Indictment ¶ 2336.

¶ 351. A judgment, reciting that the amount due plaintiff is for labor in "cutting, skidding, scaling, hauling, and manufacturing the property mentioned in the declaration," is not open to collateral attack on the ground that it includes a claim for scaling and hauling lumber, for which no lien is given by the statute, where the declaration avers the labor to have been performed in "cutting, skidding, scaling, hauling, banking, driving, running, rafting, booming, and manufacturing into lumber, boards, plank, and scantling" all of the lumber in and about a certain mill, the words "scaling" and "hauling," appearing in the judgment entry, being properly referable to labor upon the timber from which the lumber was manufactured.—Backus v. Barber, 107 Mich. 468.

¶ 352. Judgments and decrees cannot be attacked collaterally because they include items which courts, other than those by whom they were rendered, might hold to be illegal.—Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170.

¶ 353. A party to a judgment is precluded by it from going behind it to dispute the grounds on which it was rendered.—Pierson Tp. v. Reynolds Tp. Board, 49 Mich. 224.

¶ 354. The defendants in a suit upon a bond given to release logs in a log lien suit sought to attack the judgment, in so far as costs were included therein, on the ground that the amount of plaintiff's lien, as found by the jury, was less than $100, and that costs should have been awarded to the defendant. Held, that this was at most but an irregularity, remediable only by proceedings in the original suit, and did not render its judgment open to collateral attack.—Gill v. Backus, 108 Mich. 417.

§ 110. ——Irregularities in entering, enrolling or recording judgment.

Necessity and sufficiency of entry, enrollment or record, see ante §§ 35-40.

Necessity and sufficiency of entry or enrollment, see ante § 36 et seq.

¶ 355. Failure to enter all of the orders and papers in the common rule book is a mere irregularity, which can only be attacked by direct proceedings or appeal, and not collaterally.—Curtis v. Board Sup'rs Charlevoix Co., 154 Mich. 646.

¶ 356. A judgment, in a case tried by the court without a jury, which is inadvertently filed before the filing of findings of fact is not void, but may be regarded as in the nature of a provisional action, which only becomes perfected when the findings are completed.—Wisconsin Chair Co. v. Charlevoix Circuit Judge, 189 Mich. 548.

¶ 357. A sheriff sought to evade a writ of replevin by leaving the goods in the receiptor's hands while the writ was served on himself, and afterwards selling them. As he was then prevented from delivering them, however, he afterwards, and without further process, again seized the goods, delivered them, and was again sued in replevin. In the first suit he suffered judgment for acting on void process. In the second the same issue was tried and he recovered. Held, that in the second suit the validity of the process was res adjudicata; that the first judgment could not be collaterally assailed by retrying that issue until the errors of the first trial, if there were any, had been corrected by an appellate court; and that in making the second seizure the sheriff was a trespasser and could confer no right under it.—Mayhue v. Snell, 37 Mich. 305.

¶ 358. A judgment entry by default in ejectment that the plaintiff "do recover against the said defendant the possession of the premises aforesaid according to the description thereof contained in the said declaration," etc. (Comp. L. 1871, § 6234, How. St., § 7818), though formally inaccurate in omitting to describe the premises except by reference to the declaration, is not so defective as to render the judgment invalid when attacked collaterally; this imperfection is a mere technical irregularity, and the premises being specifically described in the declaration, and title in fee claimed, the recovery is made certain by the reference to the declaration; this miscarriage in the entry of the judgment is obviated by the statute of amendments (Comp. L. 1871, § 6051, How. St., § 7635). It cannot be said that such a judgment entry does not purport to decide that the plaintiff is entitled to the possession.—Morse v. Hewett, 28 Mich. 481.

§ 111. Collateral attack upon particular kinds of decisions.

Upon judgment in replevin for return of property, see ante ¶ 324.

Injunction decree, see also ante ¶ 348.

Effect and conclusiveness of judgment of sister state, see Foreign Judgments, II.

Collateral attack on foreign divorce, see Divorce § 191.

Collateral attack on unauthorized amendment of divorce decree, see Divorce ¶ 379.

Collateral attack and revision of alimony award, see Divorce § 175.

Collateral effect of probate court decrees in general, see Probate Courts, III.

Collateral attack on letters of administration or decrees of probate or other like decrees in course of administration, see specific topics treating of the particular letters, orders or decrees, e. g., Estates of Decedents, III, B, XII, D; Guardianship, III, V; Wills, V.

Collateral attack of bankruptcy discharge, see Bankruptcy § 13.

On distraint proceedings, see Animals § 11.

Collateral attack on capias, see Civil Arrest § 18.

Collateral attack on fraudulent debtor arrest for error in facts, see Civil Arrest ¶ 92.

Conclusiveness of deficiency decrees in foreclosure, see Foreclosure ¶ 752.

Conclusiveness of and collateral attack upon adjudication of insanity, see Insane Persons § 18.

Invalidity of judgment rendered against infant on stipulation with guardian ad litem waiving irregularities and allowing decree to be taken without answer, see Guardian ad Litem ¶ 41.

Collateral attack on letters of administration, see Estates of Decedents § 32.

Validity of foreclosure decree on collateral attack on letters of representative, see Estates of Decedents ¶ 33.

Conclusiveness of tax decrees against collateral attack, see Taxes.

¶ 359. A decree for alimony by a court having jurisdiction cannot be attacked collaterally.—Taylor v. Gladwin, 40 Mich. 232; Reeg v. Burnham, 55 Mich. 39.

¶ 360. A mortgagor filed a bill to set aside a statutory foreclosure sale on the ground that the amount claimed to be due in the notice of sale was excessive, and because the sale was made for the principal sum secured by the mortgage, which was not due, as well as for the accrued interest. The court made a decree holding the sale null and void, and permitting the mortgagor to redeem by paying the amount actually due at the date of the notice of sale, less the costs, in default of which payment the bill was to be dismissed. The mortgagor failed to make such payment, and a decree was entered dismissing the bill, from which he did not appeal; whereupon summary proceedings were instituted to recover possession of the mortgaged premises. Held, that the mortgagor cannot attack such decree collaterally, but must be held to have rested satisfied with it as a decree of strict foreclosure.—Huyck v. Graham, 82 Mich. 353.

¶ 361. On an ancillary petition, in proceedings for a receiver to harvest growing crops by the vendor of property against a contract purchaser who was holding over after a judgment against him in summary proceedings, for the payment to plaintiff of the proceeds of a judgment on a bond given by defendant conditioned upon his payment of the proceeds of such crops to the clerk of court if a judgment was entered against

defendant in the summary proceedings on appeal, held that the decision of the court in an action on the bond that a court of equity had jurisdiction to appoint a receiver or compel the giving of a bond was binding. —Brown v. Brown, 196 Mich. 677.

¶ 362. The orders, judgments and decrees of the circuit courts of the United States within the scope of their jurisdiction cannot be collaterally impeached; nor need their records and proceedings show jurisdiction. —Ward v. Cozzens, 3 Mich. 252.

¶ 363. A decree of a court of chancery under which complainant's lands were sold for taxes cannot be collaterally attacked.—Carpenter v. Auditor General, 144 Mich. 251.

§ 112. ——Default or pro confesso decrees.

Judgments by default or pro confesso, see ante § 3.

Disqualification of judge as ground for attack, see ante ¶ 311.

Premature default on attachment, see also Attachment §§ 77, 136.

Invalidity of default in attachment on face of the record, see also Attachment ¶ 390.

Collateral attack on pro confesso divorce, see also Divorce ¶ 393.

¶ 364. A pro confesso decree is as binding upon the parties thereto upon all questions involved in the suit as is a contested decree upon the same questions, and since if a party appears and makes defense to a suit by the auditor general for a sale of land for unpaid taxes, and does not appeal from a decree allowing the sale, he cannot attack the decree collaterally, he cannot make a collateral attack upon the decree if he did not appear and defend.—Harrington v. Dickinson, 155 Mich. 161.

§ 113. ——Judgments by confession.

Nature of judgments on confession, see ante § 6.

Judgments on stipulation or agreement as bar or estoppel, see Former Adjudication § 20.

¶ 365. The complainant in foreclosure proceedings who sought priority over a judgment against the mortgagor partnership, entered by confession prior to the recording of the mortgage, was not in a position to successfully question the judgment on the ground that the confession was signed by only one of the partners; the record failing to show that the other partner ever questioned the right of his copartner to confess judgment.—Belcher v. Curtis, 119 Mich. 1.

§ 114. ——Orders amending judgment.

Amendment of judgments, see ante V.

¶ 366. The court's action permitting such amendment after term is not, though irregular, void for want of jurisdiction; and it cannot be attacked collaterally.—Reynolds v. Reynolds, 115 Mich. 378.

§ 115. Presumptions supporting judgments and decrees.

See also ante ¶ 329.

Necessity that jurisdictional facts appear upon the record, see ante § 40.

Presumption as to authority of attorney to appear, see ante § 105.

Presumption on appeal or error in favor of judgment, see Appeal § 352 et seq.

Presumption on appeal as to penal and forfeiture judgments, see Appeal § 393.

Presumption on appeal as to jurisdiction below, see Appeal § 361.

Presumptions as to jurisdiction in general, see also Courts § 80.

¶ 367. Since equity has no general jurisdiction to grant money decrees, it cannot be presumed what was the basis for a decree on which execution issued.—Kintner v. Pickard, 67 Mich. 125.

¶ 368. Holding of probate court by circuit judge is presumed to have been regular on a record silent as to the statutory grounds for so doing.—Landon v. Comet, 62 Mich. 80.

¶ 369. A judgment dependent on published service pursuant to an affidavit and order cannot be supported by a presumption that there was a sufficient affidavit merely because an order for appearance recites that there was one; since the order and the affidavit being interdependent foundations of the jurisdiction are both essential things to appear affirmatively of record.—Platt v. Stewart, 10 Mich. 260.

¶ 370. An order of the probate court, within its jurisdiction, will, after a lapse of more than 20 years, be presumed to be based on due notice and appearance of the necessary parties.—Lasley v. Preston, 132 Mich. 208.

¶ 371. It cannot be presumed that an order appointing a special guardian was "upon such notice as [the probate judge] shall direct," required by Comp. L. 1897, § 8710, where the order recites that "on reading and filing the petition, duly verified * * * praying" for such appointment it was made, it also appearing that the appointment was made on the same day as the filing.—Devereaux v. Janes, 141 Mich. 265.

¶ 372. Suit was brought upon a statutory bond for discharge from imprisonment conditioned that one of the obligors should, within thirty days, apply for an assignment of his property and a discharge as an insolvent, and diligently prosecute the same until he procured his discharge. The plaintiff gave in evidence a petition for such discharge, dated on the thirtieth day, but so defective as not to confer jurisdiction upon the officer to proceed upon it; also an order made by the officer upon the petition, requiring creditors to appear. Held, that this petition and order raised a presumption that no proper applica-

tion was made within the prescribed time.—Young v. Stephens, 9 Mich. 500.

¶ 373. A party seeking relief by virtue of the proceedings of a court of inferior jurisdiction must set forth in his pleadings all the facts necessary to show that the court had jurisdiction in the case.—Miles v. Seitz, How. N. P. 55.

¶ 374. The presumption in favor of jurisdiction is overthrown if it appears from the record of a court of general jurisdiction, that a personal decree was rendered against the defendant, that the defendant was out of the court's territorial jurisdiction at the time of the alleged service, so that process could not have reached him, and that he never appeared in the action.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

§ 116. ——As to regularity of proceedings.

Presumptions and evidence as to regularity of execution sale, see Executions § 94.

§ 375. Where, in a suit against the board of supervisors of a county, service is had on the deputy clerk, the presumption, upon a collateral attack on the judgment rendered, is that the county clerk was absent, and the service valid under Comp. L. 1897, § 2477.—Curtis v. Board Sup'rs Charlevoix Co., 154 Mich. 646.

¶ 376. All intendments should be indulged in favor of the legality of judicial action when attacked collaterally where it appears that the court had jurisdiction of the subject-matter and the parties.—Stegeman v. Fraser, 161 Mich. 35.

¶ 377. Where the court has jurisdiction of the parties and the subject-matter, all possible intendments will be made in support of the judgment, and only jurisdictional defects appearing on the face of the judgment record can be attacked collaterally.—Curtis v. Board Sup'rs Charlevoix Co., 154 Mich. 646.

¶ 378. The presumption that official action is regular applies to justices of the peace when it appears that jurisdiction has attached.—Saunders v. Tioga Mfg. Co., 27 Mich. 520; Love v. Wood, 55 Mich. 451.

¶ 379. Where no attempt has been made to have an attachment dissolved, it is presumed in a collateral suit that there were valid grounds for its issue.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 380. A decree rendered upon the merits, notwithstanding a previous voluntary order of discontinuance made without leave or notice, cannot be questioned collaterally, if at all; it is presumed the court knew of the order and intended to disregard it.—Newark v. Newark, 22 Mich. 292.

§ 117. Verity of record; parol evidence to explain or vary.

Necessity and sufficiency of record, see ante §§ 39, 40.

Presumptions in support of judgment, see ante § 116.

Necessity and sufficiency of showing of jurisdiction in record of inferior court judgments, see also Courts § 79.

Necessity and sufficiency of showing in the record of jurisdiction in special and statutory proceedings, see Courts § 79.

Judgments and judicial records as documentary evidence, see Evidence §§ 544-546.

Parol evidence in action for money that judgment on which it was realized was recovered for assignor plaintiff's benefit, see Evidence ¶ 1070.

Conclusiveness and effect of returns to process, see Attachment § 75; Executions § 111; Process, II, D.

Admissibility of extrinsic evidence to show or rebut bar or estoppel by judgment, see Former Adjudication § 97.

Sufficiency of record of foreign judgment to show jurisdiction, and presumptions on the record, see Foreign Judgments § 6.

¶ 381. When a court of record has jurisdiction, no proof can be given in opposition to the record; and it seems that this rule applies to a justice's docket.—Clark v. Holmes, 1 D. 390.

¶ 382. When the written entries or files in the nature of a record, or constituting a record, furnish the only written evidence of the character of the proceeding, or of the identity of the tribunal, they must, when compatible with the general jurisdiction and course of such court, be necessarily conclusive in a collateral inquiry as to those points.—Richards v. Morton, 18 Mich. 255.

¶ 383. Where the judgment record recites that the judgment was rendered at a regular term of court, and no evidence is introduced to show that under Act No. 168, Pub. Acts 1887, the circuit judge had appointed another time for the term of court, the record imports absolute verity, and the judgment will be deemed as rendered at a regular term despite previous adjournments of court by the clerk, in the absence of the judge, which might indicate the contrary.—Curtis v. Board Sup'rs Charlevoix Co., 154 Mich. 646.

¶ 384. Evidence is admissible to show the assent of a party to and his understanding of a consent decree, not to vary the decree, but to establish that it was not entered without his knowledge and approval.—Owen v. Yale, 75 Mich. 256.

§ 118. ——Supplying jurisdictional defects.

¶ 385. Parol evidence is inadmissible to supply a jurisdictional defect.—New York Baptist Union v. Atwell, 95 Mich. 239.

¶ 386. Parol evidence is inadmissible to vary or explain a justice's docket so as to give him jurisdiction that does not appear on its face.—Toliver v. Brownell, 94 Mich. 577; Holmes v. Cole, 95 Mich. 272.

¶ 387. Where the record of the judgment in another cause is introduced in evidence in a cause, parol evidence is not admissible to supply jurisdictional defects. The record must be complete in itself.—Montgomery v. Merrill, 36 Mich. 97; Mudge v. Yaples, 58 Mich. 307.

¶ 388. An ambiguity apparent on the face of a transcript of a judgment cannot be explained by parol evidence.—Rood v. Bloomfield School Dist. No. 7, 1 D. 502.

§ 119. ——Contradicting recitals of jurisdiction.

Right of stockholder to show aliunde the record that judgment against corporation invalid, see ante ¶ 300.

¶ 389. The record of an inferior court may be contradicted for the purpose of showing a want of jurisdiction of the person or of the subject-matter.—Clark v. Holmes, 1 D. 390.

¶ 390. A judgment which on its face shows jurisdiction imports absolute verity when attacked collaterally, and cannot be impeached by parol testimony that the court had no jurisdiction of the party against whom it was rendered.—Allured v. Voller, 112 Mich. 357.

¶ 391. Parol testimony to impeach, for want of jurisdiction of the party against whom it was rendered, a judgment that on its face shows jurisdiction, is inadmissible.—Allured v. Voller, 112 Mich. 357.

¶ 392. Parol evidence is admissible to contradict a return of personal service made by a private person.—Campbell v. Wayne Circuit Judge, 111 Mich. 247.

¶ 393. The files in attachment proceedings, including the affidavit upon which the writ is based, may be introduced to impeach the docket entries and to show that the attachment judgment was void.—Dutcher v. Grand Rapids Fire-Ins. Co., 131 Mich. 671.

§ 120. Retroactive operation or effect of judgment or decree.

¶ 394. A decree for specific performance cannot relate back so as to make him a trespasser who was in possession under the holder of the legal title.—Goetchius v. Sanborn, 46 Mich. 330.

VIII. LIEN AND DURATION.

§ 121. In general.

Recitals as to lien upon realty as affecting lien upon personalty, see ante ¶ 88.
General law as to liens, see Liens.
Lien of attorney on judgment, see Attorneys §§ 46-56.
Attorney's lien as equitable assignment, see Attorneys § 47.
Priorities and liens by creditors' bill, see Creditors' Suits §§ 31, 32.
Duration of lien of levy with respect to duration of judgment, see Executions § 31.
Validity of sale after ten years on levy made during ten-year period, see also Executions ¶ 163.
Bar of judgment by time as barring execution, see Executions § 6.
Priority of chattel mortgage over judgment, see Chattel Mortgages, III.

¶ 395. A judgment in this state creates no lien.—Campau v. Barnard, 25 Mich. 381; West v. Laraway, 28 Mich. 464; Udell v. Kahn, 31 Mich. 195.

¶ 396. No lien is acquired in Michigan under a judgment until actual levy of an execution.—Schelowski v. Pawlowskik, 168 Mich. 664.

§ 122. Judgments declaring specific liens.

¶ 397. A judgment erroneously declared to constitute a lien under the log lien act, but unsupported by necessary findings, may be sustained as an ordinary personal judgment. —Demars v. Conrad, 73 Mich. 151.

¶ 398. The act of a court proceeding under a void mechanics' lien law (Laws 1887, Act No. 270) in the form of an ordinary action of assumpsit for materials in giving a personal judgment and by consent adjudging that it was lien on the land, is coram non judice in so far as it adjudges a lien, though valid as to the personal judgment.—Kirkwood v. Hoxie, 95 Mich. 62.

IX. ASSIGNMENT AND DEVOLUTION.

§ 123. In general.

As affecting rights of set-off of judgment, see post § 132.
Assignment as carrying incidentally the release bond in attachment, see Attachment ¶ 165.
Assignment of judgment to one of defendants to creditors' bill as bar to bill, see Creditors' Suits ¶ 115.
Contract to find leviable property for share of proceeds as pro tanto assignment of judgment, see Contracts ¶ 881.
Effect of assignment of invalid certificate of execution sale to carry assignment of the judgment, see Executions ¶ 205.
Assignment of right as affecting right to set-off executions, see Executions § 106.
Assignment of foreclosure decrees and rights thereunder, see Foreclosure § 105.
Provisions as to acknowledging and recording assignments, see Jud. Act, chap. XXIII, § 127; Comp L. 1915, § 12942.

¶ 399. An assignment by one partner of a part of a judgment owned by the firm is good

in equity against the judgment debtor.—Line v. McCall, 126 Mich. 497.

¶ 400. An assignment of a part interest in a judgment by one member of a partnership and an agreement by the partnership to pay 15 per cent of the amount recovered to other parties enables the assignees and the parties in interest to interfere to set aside a compromise and settlement made without their consent.—Line v. McCall, 126 Mich. 497.

¶ 401. An agreement between attorney and client for compensation to former out of prospective judgment operates as an assignment of judgment to extent of attorney's claims.—Weeks v. Wayne Circuit Judges, 73 Mich. 256.

§ 124. Rights of assignee.

Right of assignee of judgment to maintain creditors' suit on return of execution made before assignment, see Creditors' Suits ¶ 38.

Parties in creditors' suits by assignees, see Creditors' Suits § 24.

¶ 402. An assignee of a judgment takes with knowledge that it may be reversed on error and is in no better position than the assignor.—Bennett v. Hanley, 91 Mich. 143.

¶ 403. An assignee of a judgment takes subject to such matters of set-off as existed in favor of the judgment debtor against the assignor up to the time when the debtor received notice of the assignment.—Finn v. Corbitt, 36 Mich. 318.

¶ 404. Judgment cannot be discharged after assignment of a part interest therein, so as to cut off the assignee's rights without his asset, the debtor having notice of the assignment.—Line v. McCall, 126 Mich. 497.

¶ 405. Where a complainant has voluntarily assigned a regular decree in his favor, the assignee must resort to the court to obtain the benefit of it.—Terry v. McClintock, 41 Mich. 492.

¶ 406. Where the judgment creditor has assigned the demand upon which the judgment was rendered, to secure a debt of equal amount, the assignee alone, or those succeeding to his rights, can bring suit in equity to enforce the judgment.—Andrews v. Kibbee, 12 Mich. 94.

¶ 407. Where the assignee of a regular decree granted to a complainant files a bill for its enforcement, he thereby recognizes it and cannot be heard to impeach it, though he may have a mistake in it corrected or an omission supplied if necessary to carry out its principle. But the defendant is not precluded from asking that the hearing of the bill shall be conditioned on an examination into the justice of the original decree against him. The court will not usually change the decree or refuse to enforce it.—Terry v. McClintock, 41 Mich. 492.

¶ 408. After levy made a new security was accepted by plaintiff; there was no return of the execution, the levy was treated as discharged, and the judgment paid, and was so marked on the abstract of title to the property affected before a mortgage thereon was assigned to complainant with the negotiable note secured by it. Held, that a subsequent purchaser of such judgment for a small consideration could not set the levy up against complainant's rights as a prior right of redemption.—Barnum v. Phenix, 60 Mich. 388.

¶ 409. Where a judgment had been assigned and was afterward paid to the attorneys of the judgment creditor, who had knowledge of its assignment, they cannot set up as a defense to an action of trespass on the case for its amount, that a right of action on the case is not assignable since no assignment was made after such right of action accrued.—Reynolds v. Cavanagh, 139 Mich. 387.

X. REVIVAL.

§ 125. In general.

Release of imprisoned judgment debtor as revival of judgment, see post ¶ 415.

Scire facias, see Scire Facias.

Revivor of actions and suits, see Abatement §§ 19, 20; Equity §§ 63, 233 et seq.

Suggestion of death nunc pro tunc, see also Abatement ¶ 83.

Taking out execution before reviving suit, see Abatement ¶ 88.

Effect of revivor of partition decree to adjust accounting, see also Abatement ¶ 106.

Revivor nunc pro tunc to cure issuance of levy before revival, see also Executions ¶ 300.

¶ 410. Defendants were defaulted May 14, 1897. On June 13, 1910, plaintiff without notice to defendants obtained judgment against defendants on the strength of the former default. Held, that the judgment had been outlawed and could not be renewed without result and service of process.—Hoeft v. Kock, 171 Mich. 564.

§ 126. Nunc pro tunc revival.

¶ 411. Omission to revive suit before taking out an execution after plaintiff's death may be cured by an order nunc pro tunc.—Jenness v. Lapeer Circuit Judge, 42 Mich. 469.

XI. PAYMENT, DISCHARGE AND SET-OFFS.

§ 127. In general; sufficiency of satisfaction or tender.

Equitable relief from satisfied or discharged judgment, see ante § 83.

Effect as against assignee of judgment of discharge after assignment, see ante ¶ 404.

Acceptance of smaller sum than face as settlement by attorney, see Attorneys § 24.

Effect of arrest on capias as satisfaction of the debt, see also Creditors' Suits ¶ 78.
Payment of judgment by indemnitee as condition to recovery against indemnitor, see Indemnity § 5.
Discharge of bond conditioned on payment of decree in foreclosure proceedings, see Indemnity § 9.
General law as to payment, see Payment.
Provisions as to acknowledging payment and satisfaction, see Jud. Act, chap. XXII, § 19; Comp. L. 1915, § 12808.

¶ 412. A tender for the purpose of canceling a judgment should include damages as well as costs, and a tender of the damages with the clerk's receipts for the costs is not sufficient.—Thurber v. Jewett, 3 Mich. 295.

¶ 413. The attorney of a judgment defendant paid the judgment with his own means, on the plaintiff's attorney agreeing that if he was not reimbursed by the defendant he should return the satisfaction and have his money repaid him, he neglected, however, to take an assignment of the judgment for his protection. Plaintiff supposed the judgment had been satisfied. Held, that the payment must, as far as plaintiff was concerned, be considered as one by defendant, and sufficient to cancel the judgment.—Rogers v. Welte, 61 Mich. 258.

¶ 414. A chancery decree directed the payment of a certain sum of money to complainants, or their solicitor, within a stated time. Defendant failed to pay or tender the amount to complainants, and refused to pay it to their solicitor, although complainants gave the solicitor written authority to receive the money, which he showed to defendant, and demanded payment. On the last day fixed for payment, defendant deposited with the register in chancery the amount claimed to be due, and notified complainants of such deposit, the validity of which they refused to recognize. Defendant thereupon filed a petition praying the court to adjudge the decree paid and discharged. Held, that an order finding that defendant had substantially performed all of the requirements of the decree, and declaring it satisfied and discharged of record, cannot be sustained.—Lewis v. Kean, 102 Mich. 605.

§ 128. Arrest of debtor or levy of execution as satisfaction.

Enforcement of judgment by final process, see post § 136.

¶ 415. The imprisonment of a defendant on a body execution issued on a judgment in a civil suit is a satisfaction of the debt, and his discharge by reason of plaintiff's failure on demand to pay the expenses of his board and keeping will not revive the judgment.—Strawsine v. Salsbury, 75 Mich. 542.

¶ 416. A judgment is not satisfied by the arrest of the defendant on a body execution, where he is subsequently discharged from imprisonment by reason of the invalidity of the writ because issued in violation of § 10412, Comp. L. 1897, § 13126, How. St., 2nd Ed., more than ninety days after the return of a property execution.—In re Lauer's Estate, 184 Mich. 497.

¶ 417. The levy of an execution upon sufficient personal property to pay the demand is prima facie a satisfaction of the judgment.—Spafford v. Beach, 2 D. 150; and see Henry v. Gregory, 29 Mich. 68.

¶ 418. The levy of an execution upon sufficient personal property to pay the demand is not conclusive evidence of satisfaction of the judgment.—Farmers' & Mechanics' Bank of Michigan v. Kingsley, 2 D. 379.

¶ 419. A levy on personal property sufficient to satisfy the execution will not operate as a satisfaction of the judgment where the property is left in charge of the execution debtor, and by some act for which he is responsible, or in which he acquiesces, it is placed beyond the power of the officer, or when the debtor converts it to his own use, or where he has not been actually divested of the property.—Lustfield v. Ball, 103 Mich. 17.

¶ 420. A levy on real estate of the debtor is not a prima facie satisfaction of the judgment.—Spafford v. Beach, 2 D. 150; Thurber v. Jewett, 3 Mich. 295; Ackerman v. Pfent, 145 Mich. 710.

¶ 421. One cannot claim that a judgment is satisfied by a levy which he has himself unlawfully defeated.—Nelson v. Ferris, 30 Mich. 497.

¶ 422. Where separate judgments are obtained against two or more joint trespassers, the suing out of execution on one of them is an election by the plaintiff to enforce that judgment; and no action will afterwards lie on the others.—Boardman v. Acer, 13 Mich. 77.

§ 129. Satisfaction of judgment of restitution or in specie.

¶ 423. Judgment of restitution is not satisfied by lessee's abandoning the land pending his appeal thereon.—Hanaw v. Bailey, 83 Mich. 24.

§ 130. Effect of payment, discharge or satisfaction.

Discharge of judgment by new agreement as bar to creditors' suit, see Creditors' Suits ¶ 11.
Voluntary payment of judgment as bar to objections to defect in execution thereon, see Executions ¶ 296.
Liability of garnishee paying plaintiff under void judgment, see Garnishment § 119.
Liability of garnishee respecting money paid on invalid judgment subsequently vacated, see Garnishment ¶ 352.

Right of party paying judgment to contribution from other judgment defendants, see Indemnity, § 13 et seq.
Provisions as to ordering decrees discharged, see Jud. Act, chap. XXII, § 20; Comp L. 1915, § 12809.

¶ 424. Voluntary payment of a judgment waives all objections to it, and there can be no relief.—Hoag v. Breman, 8 Mich. 160.

¶ 425. On a showing of payment in full to plaintiff's attorney of a judgment, and of his authority to receive the same, a perpetual stay of proceedings is justifiable.—Whitney v. McConnell, 30 Mich. 421.

¶ 426. Discontinuance of a writ of error, or payment or settlement of a judgment, not vacating it, leaves its judicial force as res adjudicata unimpaired.—Cummerford v. Paulus, 66 Mich. 648.

§ 131. Setting aside satisfaction.

¶ 427. A. and B. being sued as makers of a note, A. employed an attorney and conducted the defense without help from B., taking a successful appeal and obtaining judgment for costs. B., who was insolvent, collusively receipted to plaintiff for the costs in the name of both defendants. Held, that the satisfaction should be set aside and a retaxation ordered in A.'s favor, and to protect the interests of A.'s attorney, to whom A. had turned over the bill of costs.—Potter v. Hunt, 68 Mich. 242.

§ 132. Set-off of judgments.

Set-off against assignee of judgment, see ante ¶ 403.
Set-offs and recoupment in the action, see Set-off.
Set-off of executions, see Executions § 106.
Power of other court to entertain bill to offset judgments, see Courts § 74.
Averments as to amount in controversy in bill to offset judgments, see also Equity § 84.

¶ 428. A set-off against a judgment cannot be made in equity of demands which might have been proved in reduction of plaintiff's claim in the former suit but for laches.—McGraw v. Pettibone, 10 Mich. 530.

¶ 429. Whether, since the adoption of Comp. L. 1871, § 6125, How. St., § 7710, governing the set-off of executions, there is any propriety in resorting to equity for the set-off of judgments, in the absence of special reasons, quære; at any rate, equity can give the moving party no greater advantages than the statute does.—Wells v. Elsam, 40 Mich. 218.

¶ 430. A judgment assigned by a client to his attorney, in payment for the latter's services, cannot be subjected to the set-off of a judgment recovered against the client, so far as it does not exceed the attorney's proper claims.—Wells v. Elsam, 40 Mich. 218; Kinney v. Tabor, 62 Mich. 517.

¶ 430a. The satisfaction of a judgment may be wholly or partly produced by setting off a judgment against the judgment creditor in favor of the judgment debtor; and the judgments so sought to be set off against each other need not have been rendered in the same court.—Robinson v. Kunkleman, 117 Mich. 193.

¶ 431. A bill to compel the offset of judgments was dismissed, where one was a joint and the other a sole judgment, and that recovered by defendant had been lawfully assigned to a third person for a valuable consideration before there was any final judgment against which it could be set off.—Ledyard v. Phillips, 58 Mich. 204.

¶ 432. Where, under How. St., § 7709, the sheriff has allowed a set-off of an execution against a larger one in his hands, and has received in money the balance of the latter, with the consent of both parties, and has returned the latter satisfied, it was error on a motion to set aside such return on the ground that the larger judgment had been previously assigned, and that consent to the set-off was given by mistake. A bill or other procedure is necessary in such case.—Lyon v. Smith, 66 Mich. 676.

¶ 433. Where a judgment allowed to be taken for the full amount of a claim without deduction for payments has been assigned, a judgment subsequently obtained against the assignor in a suit to recover such payments cannot be set off against it in an action thereon by the assignee.—Huntoon v. Russell, 41 Mich. 316.

¶ 434. If a defendant allows judgment to be taken for the full amount of a claim against him without setting up payments he has made thereon, he cannot set up such payments in an action afterwards brought by an assignee of the judgment, nor can he set off against such judgment a subsequent judgment obtained by him in a suit to recover back such payments from the assignor.—Huntoon v. Russell, 41 Mich. 316.

§ 133. Recovery of money paid on judgment afterwards reversed or vacated.

Effect of opening or vacating judgment, see also ante § 68.
Provision for order of restitution of money paid under judgment afterward reversed, see Jud. Act, chap. XXII, § 7; Comp. L. 1915, § 12797.

¶ 435. Since in respect to judgments of the circuit court there is no statute corresponding to Comp. L. 1897, § 951, providing for an order of restitution of money paid on a justice's judgment afterward reversed or vacated, where a litigant has been compelled to pay costs by means of process issued upon a void judgment, his only rem-

edy is to bring an independent action for such amount.—Swantek v. Jarmozski, 174 Mich. 698.

XII. ACTIONS AND PROCEEDINGS TO ENFORCE.

§ 134. In general.

Bills to compel offset of judgments, see ante § 132.
Rights of assignee of judgment, see ante § 124.
Payment and discharge of judgments, see ante § 127.
Right of special bail to notice of judgment, see Civil Arrest ¶ 192.
Disobedience of judgment or order as contempt, see Contempt §§ 9-11.
Availability of execution as bar to contempt for enforcement of judgment, see Contempt §§ 22, 23.
Mode of enforcement of judgment against corporation after return of execution unsatisfied, see Corporations § 196.
Action for costs, see Costs § 151.
Enforcement by fraudulent debtor proceedings or capias ad satisfaciendum, see Civil Arrest, II, III.
Averment as to judgment to support arrest of fraudulent debtor, see Civil Arrest § 30.
Proceedings at law in nature of creditors' bill to subject assets to payment of judgment, see Creditors' Suits, I, D.
Sufficiency of attachment judgment or judgment in rem to support creditors' bill, see Creditors' Suits § 11.
Writ of possession in ejectment, see Ejectment § 59.
Parties entitled to have enforcement of terms of decrees, see Equity § 228.
Actions and suits to enforce judgments against fraudulent conveyances, see Fraudulent Conveyances, V.
Rights of creditor under void judgment in suit to set aside fraudulent transfers, see Fraudulent Conveyances § 103.
Judgments on which garnishment will lie, see Garnishment § 7.
Kinds of judgments on which garnishment lies, see Garnishment § 7.
Judgment as garnishable debt, see Garnishment § 37.
Stay of proceedings upon judgment, see Stay of Proceedings.

¶ 436. A judgment rendered in favor of A. by mistake for B. cannot be sued on by B. even if the mistake be proved.—Gilbert v. Hanford, 13 Mich. 40.

¶ 437. Henry V. Libhart is not entitled to recover in an action upon a judgment in favor of H. V. Libhart, without any allegation or proof of his identity with the party in whose favor the judgment was rendered. —Bennett v. Libhart, 27 Mich. 489.

§ 135. Enforcement of federal decisions in state courts.

¶ 438. Where a federal court has rendered judgment against a township upon bonds issued by the latter the state courts will compel an apportionment, between such township and a new one set off therefrom, of the liability under such judgment, although such courts would not in the first instance have rendered judgment upon the bonds, because of the unconstitutionality of the statute that authorized them.—Township of Grant v. Township of Reno, 107 Mich. 409.

§ 136. Possessory and execution or other final process.

Levy of execution or arrest of debtor as payment or discharge, see ante § 128.
General law as to executions, see Executions.
Execution on justices' judgments, see Justices of the Peace, IV, H.
Enforcement of costs by execution, see Costs § 147.
One sale under writs issued under diverse judgments, see Executions § 66.
Inclusion of contract damages in judgment by consent as preventing capias to enforce it, see Civil Arrest ¶ 121a.
Writs of scire facias, see Scire Facias.

¶ 439. One in possession under a forged deed can claim no rights, and, notwithstanding improvements, ejectment need not be resorted to for possession after a decree against him; a writ of restitution is enough. —Crawford v. Hoeft, 58 Mich. 1.

§ 137. Action at law on decree or judgment.

Amendment nunc pro tunc of default order in action on judgment, see ante ¶ 145.
Actions on foreign judgments, see Foreign Judgments, III.
Question of fact as to settlement by attorney with authority, see also Attorneys ¶ 72.
Defense that plaintiff holds by illegal assignment to bring suit as attorney, see also Assignments ¶ 103.
Codebtors as parties on creditors' bills, see Creditors' Suits § 24.
Action at law on alimony decrees, see Divorce § 183.
Judgment against deceased res adjudicata upon the estate in an action upon the judgment, see Former Adjudication ¶ 392.
Necessity of enrollment of decree before issuance of process or procedure to enforce it, see 1916 C. C. Rule 55, § 1.

¶ 440. An action at law does not lie for damages resulting from the neglect to obey a decree requiring the specific performance of a contract, where the decree itself was unwarranted, as where it has been charged on an ex parte application and without notice to the defendant.—Berry v. Innes, 46 Mich. 518.

¶ 440a. An action of debt lies on a judgment recovered before a justice of the peace immediately on its rendition, notwithstanding execution upon it has been stayed pursuant to the statute.—McDonald v. Butler, 3 Mich. 558.

¶ 440b. A justice's judgment is not necessarily invalidated by an excessive allowance of costs, and such judgment may be sued over again for the damages only.—Whelpley v. Nash, 46 Mich. 25.

¶ 440c. A justice's judgment, though joint in form, is not in law a joint obligation binding both defendants alike if only one was served, and it does not merge the debt so as to preclude suing both over again. The one who was not served is not personally bound, and cannot be until he is sued on the original obligation. The judgment, therefore, may be sued as an individual obligation against the one who was served, and the case may be discontinued as to the other.—Holcomb v. Tift, 54 Mich. 647.

§ 138. ——Pleading.

Variance as to date of judgment in suit thereon, see also Equity ¶ 649.

¶ 441. Where the parties in interest to a decree remain unchanged, and no new rights have arisen, a defendant interested in having the decree executed should proceed by petition. But where a third person has acquired an interest in the decree, a bill is necessary to bring him before the court.—Griggs v. D. & M. Ry. Co., 10 Mich. 117.

¶ 442. A judgment must be declared on specially, and cannot be sued on the common counts.—Gooding v. Hingston, 20 Mich. 439.

¶ 443. Though by statute assumpsit may be brought, a judgment must be declared on specially and with accuracy. The count on an account stated will not lie thereon.—Gooding v. Hingston, 20 Mich. 439.

¶ 444. Declarations on justices' judgments require no further allegations as to jurisdiction than would be necessary in declaring on judgments of courts of record.—Goodsell v. Leonard, 23 Mich. 374.

¶ 445. Failure to allege in a declaration upon a judgment, the name of the plaintiff, the date of rendition of judgment and that it is in force, is ground for demurrer, which is waived by filing the general issue.—Smith v. Cowles, 123 Mich. 4.

¶ 446. The failure to identify in a special count the judgment upon which an action is brought, is not aided by a notice given under the common counts.—Smith v. Cowles, 123 Mich. 4.

§ 139. ——Presumptions, burden of proof and evidence.

Proof in garnishment of judgment against principal debtor, see ante ¶ 114.

Judgment roll or record, see ante ¶ 39 et seq.

Mode of proving judgments, see Evidence §§ 545, 546.

Provisions as to admission in evidence of certified copies of judgment record, Jud. Act, chap. XVII, § 29; Comp. L. 1915, § 12517.

¶ 447. In an action upon a justice's judgment stated in the docket entry to have been entered on confession without process, the files are competent evidence to show the insufficient character of the writing which was treated as a confession.—Dodge v. Bird, 19 Mich. 518.

¶ 448. Parol evidence was held admissible, in an action on a judgment, to show what facts were presented to and passed upon by the court which rendered it; so held where the plea gave notice that there had been an agreement between the parties and the court that the judgment should not operate as a merger or estoppel.—Merchants' Bank of Canada v. Schulenburg, 48 Mich. 102.

¶ 448a. Where a justice's docket recites that plaintiff declared "orally in assumpsit on the common counts and specially in writing," it cannot, in an action on the judgment, be assumed that, in declaring specially, he added a count upon a cause of action not cognizable by the justice, or that, even if he did, the judgment was rendered upon the bad count.—Schlatterer v. Nickodemus, 50 Mich. 315.

¶ 448b. Under the proper entitling of a cause with the names of the parties, an award of judgment was entered as follows: "It is therefore considered that the said P. do recover of the said D. the sum," etc. Debt being brought on this judgment it was held that the entry did not show with sufficient certainty in whose favor and against whom the judgment was rendered, and that therefore a transcript thereof offered in evidence was inadmissible.—Rood v. Bloomfield School Dist. No. 7, 1 D. 502.

¶ 449. In a proceeding to enforce a decree rendered several years previously, it was held that defendant should have been permitted to introduce proof that through change in conditions the provisions of the decree had become inequitable.—Pinel v. Pinel, 178 Mich. 596.

¶ 450. The fact that the judgment was received in evidence by consent does not preclude the defendant from disputing the right to recover on it; proof of the judgment was only one of the steps necessary to make out a case.—Bennett v. Libhart, 27 Mich. 489.

¶ 450a. In an action on a judgment for the surplus left from proceeds of mortgaged land conveyed to the mortgagee and sold by him under agreement to pay the mortgage debt and account for the surplus, where it stood established by the judgment sued on that the conveyance was a mortgage, it is immaterial that the property was obtained

by an exchange with the mortgagee or how it was paid for.—Hunt v. Middlesworth, 44 Mich. 448.

¶ 450b. On exchanging real estate one of the parties gave notes secured by a mortgage upon that which he received, but afterwards, being unable to pay them, reconveyed the property on an oral agreement that the other party should sell it, satisfy the mortgage from the proceeds, and pay him the surplus. The latter sold the property, but did not pay over the surplus, and the former recovered judgment for it in another state, on which judgment he afterwards brought suit in this state. Held, that the plaintiff's right to recover in the former suit was based on the fact that the reconveyance was meant only as a mortgage; and hence that defendant's offer in the latter suit to show how the property was paid for when first conveyed was rendered immaterial by the judgment; and that in the later suit the defendant's offer of the reconveyance to show that he was entitled to wheat growing on the land, and to the rent of the premises to the date of their sale, the plaintiff having kept possession, was properly rejected, it having been adjudged that the conveyance was only a mortgage, and that the mortgagee had received the full amount of his debt, and since the matter might have been litigated in the first suit.—Hunt v. Middlesworth, 44 Mich. 448.

JUDICIAL; JUDICIARY.

Cross-References.

Judicial; Judiciary—
- See generally Courts; Judges.
- Jurisdiction, see Courts, V; Justices of the Peace, III; Indictment, III.
- Departments of the government and relation of the judiciary to other departments, see Constitutional Law, II.
- Legislative or administrative and judicial questions and policy of noninterference, see Constitutional Law, II, A; Injunctions, II, D; Mandamus, III; Eminent Domain, I, V, VIII, IX; Municipal Corporations, VIII.
- Judicial admissions and confessions (in open court), see Indictment, V, XI; Trial, V.
- Judicial adoption proceedings, see Adoption of Children § 1.
- Judicial control or supervision of trustees and of officers of corporations, see Associations §§ 6, 10; Corporations, XVII, H, XXI, XXIII, XXIV, F; Municipal Corporations, VII, VIII, XVI, A; Trusts, VI, B, XII; Religious Societies, VI; Injunctions, II; Mandamus, III.
- Judicial construction of writings, see Contracts, VI; Deeds, III; Wills, VI; Statutes, V.

Judicial Conveyance—
- Effect of decree for conveyance, see Equity § 227.
- Judicial decisions and records, see Judgments; Records; Evidence, VIII, C (documentary proof); Indictment, VIII, B, § 287; Former Adjudication (estoppel and bar of judgments).
- Judicial discretion and review thereof, see specific topics treating of the proceeding wherein discretion is exercised, and see Appeal, XII, D; Certiorari § 54.
- Judicial error, and doctrine of nonprejudicial error, see Harmless Error; Indictment, XV; and as to review, see Appeal; Certiorari Saving Questions; Indictment, XIV, XVI.

Judicial Notice—
- See Evidence, I; Indictment, VIII, A.
- Judicial opinions as precedents or estoppels controlling later decisions, see Courts, IV; Former Adjudication.
- Judicial power, see Courts, V; Judges, II; Justices of the Peace, II.
- Judicial proceedings, see specific topics treating of the various actions, suits and proceedings.
- Judicial process, see Process; Attachment; Executions; Garnishment; Civil Arrest; Arrest; Injunctions; Mandamus; Habeas Corpus; Certoriari.
- Judicial sales, see Judicial Sales; Executions, VII; Foreclosures, III, E; Estates of Decedents, VII.
- Judicial separation, see Divorce; Husband and Wife, VII.
- Judicial settlements and accountings, see Accounting Suits; Estates of Decedents, XII; Guardianship, V; Partnership, VII; Trusts, XI.
- Judicial supervision and review of elections, see Elections, IX.
- Judicial trusts and receiverships, see Trusts, XII; Receivers.

JUDICIAL SALES.

TREATS of sales of private property involuntarily under judicial order or process.

Analysis.

I. General nature and requisites.

§ 1. Nature and kinds and occasions.

II. Procedure, sale and deed.

§ 2. In general.
§ 3. Right to bid and bidding.
§ 4. Defects and setting aside sale.
§ 5. The deed or writing.

III. Title and rights passed.

§ 6. In general.
§ 7. Liability for wrongful sale.

[Note. The plan has been to treat involuntary sales under statutory process in topics treating of the process, e. g., Executions, and those incident to particular suits to topics treating of such suits, e. g., Foreclosure. In Judicial Sales nothing but very general matters were kept.]

For statutes affecting judicial sales, see references in the specific topics treating of the particular kinds of judicial sales.

I. GENERAL NATURE AND REQUISITES.

§ 1. Nature and kinds and occasions.

Attachment sales, see Attachment, XII.
Execution sales, see Executions, VII.
Foreclosure sales, see Foreclosure, II, C, III, E.
Sale of decedent's lands to pay debts, see Estates of Decedents, VII.
Partition sales, see Partition, IV.
Tax sales, see Taxes, XI, XII.
Sales by trustee in bankruptcy, see Bankruptcy §§ 4-7.
Sale of corporate assets by receiver, see Corporations § 243.
Sale to enforce alimony decree, see Divorce § 188.
Statutory sale of life estate for preservation as denial of due process, see Constitutional Law § 148.

II. PROCEDURE, SALE AND DEED.

§ 2. In general.

Sale on partition of all parcels in one county, see Partition, IV, C.
Order for sale as beyond scope of bill taken pro confesso, see Defaults ¶ 73.
Injunction to prevent unauthorized sale, see Injunctions § 67.

¶ 1. Chancery Rule 80, in forbidding proceedings to enforce a decree before its enrollment, does not refer to orders of the court, but to proceedings in execution of the decree itself, as by sale; advertising and other preliminaries are allowed in advance of enrollment.—Taylor v. Gladwin, 40 Mich. 232.

¶ 2. Under a decree authorizing a sale of lands by a commissioner "according to the course and practice" of the court "in such convenient and reasonable parcels" as in his opinion would be most conducive to the interest of all parties, a sale upon a notice which fails to give any description of the lands, and by putting up and striking off numerous and distinct bodies upon one offer and bid, is unwarranted and illegal.—Griswold v. Fuller, 33 Mich. 268.

¶ 3. A decree directed that all the assets of a mining company should be sold at public vendue for cash to the highest bidder, and made reference to a master to ascertain the assets, and directed him after the confirmation of his report to make the sale after giving the usual notice. Held, that where the orders made ample provision for the rights of all creditors, it was not necessary to delay the sale until every claim arising after the commencement of the suit had been passed to final judgment.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

¶ 4. Whether, where the probate judge refused an administrator's petition to sell real estate to pay debts, but authorized a mortgage, that court afterwards, upon the administrator's failure to effect a mortgage, could, after continuances without a new petition and notice, act upon the prayer it had before denied, and grant a license to sell, quære; the court being equally divided.—Cahill v. Bassett, 66 Mich. 407, affirming decision below that it was valid.

¶ 5. Whether a notice of an administrator's sale of lands that is defective because for too short a time of publication can be cured by adjournment of the sale and further publications with an underwritten notice of adjournment, quære: the court being equally divided.—Cahill v. Bassett, 66 Mich. 407.

¶ 6. A judicial sale of separate tracts or parcels of land as one contrary to statute, is voidable only and not void, and cannot be attacked collaterally.—Brown v. O'Donnell, 123 Mich. 100.

¶ 7. The fact that an executor before the sale secured an agreement to bid does not bear against the good faith of the purchasers. Such an agreement would not prevent higher bids.—Norman v. Olney, 64 Mich. 553.

¶ 8. A master having charge of a sale under a decree in chancery of property of large value at the end of a prolonged litigation is not bound at the last moment to postpone the sale in response to a dispatch from a stranger. Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

§ 3. Right to bid and bidding.

Invalidity of agreement to suppress competition in bidding, see Contracts § 87.

¶ 9. At a sale made by a special master under a decree in chancery either party may bid without leave given by the court.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

§ 4. Defects and setting aside sale.

See generally the specific topics treating of the various sales.

Fraud or inadequacy of price affecting validity of execution sale, see Executions § 92.

Void execution sale of toll road franchises, see also Corporations § 199.

Fraudulent concealment of value and deception of bidders at corporate mortgage foreclosure sale by officers, see Corporations § 89, ¶ 318.

Matters barred or estopped by decree, see Former Adjudication.

Collateral attack on judgment to impeach sale, see Judgments, VII.

Manner in which foreclosure sale may be attacked, see Foreclosure § 156.

¶ 10. A court of chancery has discretion as to the manner and conditions of a sale under its decree, and as to ordering or refusing a resale.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

¶ 11. The court will not for any light or technical reason disturb a sale consummated at the end of seven years of litigation.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

¶ 12. A sale under a decree in chancery will not be set aside for mere inadequacy of price unless so great as to shock the conscience.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

¶ 13. A sale will not necessarily be set aside because made at a time of severe financial depression, especially at the instance of a party who by strenuous resistance has long delayed such sale.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

¶ 14. General equity rule 83 (U. S. courts) does not refer to a report by a master of a mere ministerial matter like a sale, and the sale will be confirmed upon application unless cause is shown against it within eight days from service of an order nisi.—Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

§ 5. The deed or writing.

General rule for construing involuntary deeds, see Deeds § 25.

Official deed as documentary evidence, see Evidence § 539.

III. TITLE AND RIGHTS PASSED.

§ 6. In general.

See generally the specific topics treating of the various kinds of sales and proceedings.

Titles at execution sales, see Executions, VII, C.

Title and rights under guardianship sale, see Guardianship §§ 46-49.

Rights of purchaser of property subject to lis pendens, see Lis Pendens.

Causing judicial sale as fraud on infants, see Fraud § 69.

Invalidity of sale by guardian which is fiction to carry into execution voidable contract made by his insane ward, see Guardianship § 50, ¶ 192.

Purchase of interest by judge, see Judges ¶ 9.

Period for adverse possession under judicial deed, see Adverse Possession § 34.

Effect of sale to break adverse possession, see Adverse Possession § 35.

Commissioner's deed as color of title, see Adverse Possession ¶ 138.

Effect of judicial sale of lands subject to dower right, paramountcy of dower, see Dower § 23.

Jurisdiction of suits to enforce rights of purchaser at bankruptcy sales, see Courts § 97.

Jurisdiction to affect sale made in foreign state under decree of its courts, see also Courts ¶ 142.

Writ of assistance to purchaser, see Assistance, Writ of.

Lien of attorney as affecting fund arising from sale, see Attorneys § 47.

Clearing and quieting title under or affected by judicial sale, see Quieting Title.

¶ 15. Parties purchasing title under judicial sales get only that which can be lawfully sold.—Walsh v. Varney, 38 Mich. 73.

¶ 15a. Every one is bound to satisfy himself of the authority under which a judicial sale is made and buys at his peril.—Frost v. Atwood, 73 Mich. 67.

¶ 16. The purchaser at sales under decrees and judgments is not concerned with anything except the judgment, levy and sale. All other questions are between the parties to the judgment and the officer.—Crane v. Hardy, 1 Mich. 56.

¶ 16a. Where a sale of land belonging to an infant was made without authority of court, the mere fact that she received one hundred dollars of the proceeds after she was twenty-one years old, and that considerable time elapsed after she became of full age without action on her part, does not

constitute legal ground for holding that she is estopped to object to a confirmation of the sale made by the person claiming to act in capacity of next friend.—In re Flynn's Estate, 171 Mich. 136.

§ 7. Liability for wrongful sale.

§ 17. Where an officer of court has authority to make a sale, e. g., a receiver or assignee in bankruptcy, he is liable in trover if he actually makes a sale, and subsequently refuses to deliver the property sold.—Ives v. Tregent, 29 Mich. 390.

JUMP SETTLEMENT to JURISDICTION.

Cross-References.

Jump Settlement—
Mutual cancellation of claims, see Accord.
Junior or "Jr."—
As part of name, see Names.
Junior and Senior Liens—
See Liens, and references collected there.
Junk Dealers—
Regulation under the police power, see Constitutional Law § 107.
Municipal regulative powers, see Municipal Corporations, IX.
Jurat—
Of affidavits, see Affidavits § 3; and see specific topics treating of proceedings required to be verified by affidavits, e. g., Equity §§ 66, 67; Indictment § 12; Process, II, D (proof of service).
Jurisdiction—
See Courts, V.
Of divorce, essential facts, see Divorce, I.

JURY.

TREATS of the right and propriety of trial by jury according to the common law in courts of record, and of the eligibility, qualifications, selection, and exemptions of jurors and the formation and impaneling of the jury. It excludes juries before justices of the peace (see Justices of the Peace, IV, F) and in condemnation proceedings (see Eminent Domain, V, C; Highways, II, B; Drains, II, A), and it also excludes formation and submission of issues to a jury in chancery (see Equity, VIII, B). For the practice in jury trials, see Trial; Instructions; Directing Verdict; Indictment, IX (criminal trials).

Analysis.

I. Right to jury trial and sufficiency of jury.

§ 1. Constitutional right in general.
§ 2. Number of jurors.
§ 3. ——Effect of ineligibility of one or more jurors.
§ 4. Right to jury of vicinage and what constitutes.
§ 5. In chancery proceedings.
§ 6. In proceedings not according to common law forms; special proceedings.
§ 7. ——Contempt proceedings.
§ 8. On retrial of referred case.
§ 9. On appeal from probate.
§ 10. Demand and waiver in criminal cases.
§ 11. Demand and waiver in civil cases.
§ 12. ——Payment or tender of jury fees.

II. Eligibility, general qualifications and exemptions from jury service.

§ 13. In general; constitutional and statutory provisions.
§ 14. Assessment and payment of taxes as qualifications.
§ 15. Citizenship, alienage or disfranchisement.
§ 16. Residence or domicile of juror.
§ 17. Members of former panel.
§ 18. Exemptions from jury service.
§ 19. Age of juror.
§ 20. Presumptions as to qualifications.

III. Disqualifications respecting the cause.

§ 21. Prejudice, bias or interest.
§ 22. ——Prejudice against defendant's business or occupation.

§ 23. ——Relationship to parties or attorneys.
§ 24. ——Employer, employee or associate of party.
§ 25. ——Membership in lodge or association.
§ 26. ——Special interest in outcome of suit.
§ 27. ——Taxpayers in action involving county or city.
§ 28. Opinion as to merits of civil case.
§ 29. Reading or discussion of case or similar cases.
§ 30. Opinion as to subject matter or issues in criminal cases.
§ 31. ——Impressions or views on liquor question or liquor laws.
§ 32. Opinion or belief that crime was committed by someone.
§ 33. Opinion as to cause of alleged victim's death.
§ 34. Opinions and impressions as to guilt or innocence of accused.
§ 35. ——Based on rumors and hearsay.
§ 36. ——Formed from reading newspapers.
§ 37. Unwillingness to be bound by rules of proof.
§ 38. Previous service as juror.
§ 39. Juror previously excused in prosecution for like crime.

IV. Jury lists, summoning, attendance, and discharge of veniremen.

§ 40. In general; preparation of lists.
§ 41. Source from which list made.
§ 42. Validity and sufficiency of lists.
§ 43. ——Number of names.
§ 44. Return, filing and keeping of lists.
§ 45. Drawing jury.
§ 46. ——Officer or person to perform duty.
§ 47. ——Method and conduct of drawing.
§ 48. Summoning jury; venire facias.
§ 49. Drawing and summoning additional jurors to complete panel.
§ 50. ——Number to be drawn.
§ 51. ——Method of drawing and summoning.
§ 52. Discharging veniremen or excusing him from service.
§ 53. Effect of returning incompetent persons.
§ 54. Effect of summoning person not on list.
§ 55. Objections for irregularities in drawing or summoning.
§ 56. Presumptions as to regularity.

V. Selecting jury and challenges; swearing in.

§ 57. Challenge to the array and grounds for same.
§ 58. Challenge of venireman.
§ 59. ——Time to make.
§ 60. Peremptory challenges and number allowable.
§ 61. ——Joint trials and trials with several counts.
§ 62. ——Time for challenge.
§ 63. ——Manner and sufficiency of stating challenge.
§ 64. Trial of challenges.
§ 65. Examination of jurors.
§ 66. Burden and sufficiency of proofs on challenge.
§ 67. Scope and conduct of examination in general.
§ 68. ——Questions directed towards matter of bias or prejudice.
§ 69. ——Questions directed towards opinions or impressions of juror.
§ 70. Ruling upon challenge.
§ 71. Waiver or cure of objections to juror.

§ 72. ——Failure to exercise or exhaust peremptory challenges.
§ 73. Swearing jury.

VI. Special and struck juries.

§ 74. In general.

VII. Compensation and sustenance and privileges.

§ 75. In general; statutory provisions.
§ 76. Amount of compensation.
§ 77. Privilege from process or arrest.

I. RIGHT TO JURY TRIAL AND SUFFICIENCY OF JURY.

Jury in justices' courts, see Justices of the Peace.
Jury trials for crime before justices and procedure to obtain jury, see Indictment § 652.
Grand jury, calling, composition, functions, and powers, see Grand Jury.
Jury in municipal courts, see Municipal Corporations.
Instructions to juries, see Instructions; Indictment, IX, E.
Custody, conduct and deliberations of jury, see Trial, VII; Indictment, IX, F.
Discharging jury in criminal cases for inability to agree or other cause frustrating verdict, see Indictment § 467.
Taking case from jury by directed verdict or by compulsory nonsuit, see Directing Verdict; Discontinuance, III.
Sending issues from supreme court in mandamus down to circuit for jury trial, see Mandamus § 153.
Argument to jury, see Argument of Counsel; Indictment, IX, C.
Province of court and jury, see Trial, VI; Indictment, IX, D.
Verdicts and findings, see Verdicts.
Conclusiveness of verdict against testimony of jurors or others as to doings in jury room, see Verdicts, VI.
Incompetency of witness to testify in violation of secrecy of jury or grand jury proceedings, see Witnesses, II, V.
View by jury, see Trial, II.
Crime of embracery, see Crimes § 50.

§ 1. Constitutional right in general.

Number of jurors, see post § 2.
Right to jury of vicinage, see post § 4.
Jury in chancery proceedings, see post § 5.
Jury in special or summary proceedings, see post § 6.
Right to waive jury trial, see post §§ 10-12.
Necessity of demanding jury, see post §§ 10, 11.
Right to jury trial in suit to annul marriage, see Marriage, IV.
Constitutional qualifications of jurors, see post § 13 and Constitutional Law § 209.
Validity of laws affecting the right to trial by jury, see Constitutional Law § 192.
Validity of laws affecting jury trials for crime, see Constitutional Law §§ 209, 210.
Constitutional right to trial by jury, see Const. art. II, § 13.
Power of court to order the cause to be tried by jury, see Jud. Act, chap. XVIII, § 12; Comp. L. 1915, § 12584.

¶ 1. The constitutional provision that "the right of trial by jury shall remain" means the right as it had become known to the previous jurisprudence of the state.—Swart v. Kimball, 43 Mich. 443.

¶ 2. All the safeguards ordinarily attaching to jury trials are implied in the use of the term "jury" in the constitutional provisions on this subject.—Paul v. City of Detroit, 32 Mich. 108; People v. Mangold, 71 Mich. 335.

¶ 3. The remedy provided by the fraudulent debtors' act is not a criminal proceeding; and therefore the statute is not void for requiring it to be carried on before a judicial officer without a jury.—Johnson v. Maxon, 23 Mich. 129.

¶ 4. Litigants are entitled to have a jury constituted in substantial conformity with the law as established; and violations of the positive provisions enacted to secure the right of trial by jury cannot be regarded as harmless irregularities.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287.

¶ 5. Cases holding that the legislature may not impair the right of trial by jury have no application to an engagement between a mutual benefit association and a member that the decision of a specially constituted committee or tribunal upon a death claim shall be final.—Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161.

§ 2. Number of jurors.

See also post ¶ 241.
Number of jurors to be drawn from lists, see post § 50.
Number of names on jury lists, see post § 43.
Constitutional number of jurors, see Constitutional Law § 209.
Number of jurors in jury before justice in trial for crime, see Indictment § 652.

¶ 6. The constitutional number of jurors is twelve, except in courts that are not courts of record (Const. art. VI, § 28). In a court of record a conviction by less than twelve jurors, where twelve were demanded, must be quashed.—People v. Luby, 56 Mich. 551.

¶ 7. The Wayne County Juvenile Court Act, No. 684, Local Acts 1907, is unconstitutional in so far as it attempts to provide for the trial by a jury of six of offenses committed against children.—Robison v. Wayne Circuit Judges, 151 Mich. 315.

§ 3 ——Effect of ineligibility of one or more jurors.

Disqualification of juror as ground for new trial, see Indictment § 476; New Trial, II, F.

¶ 8. If one of the panel is an alien, and the prisoner is not aware of that fact until after verdict, it is a mistrial.—Hill v. People, 16 Mich. 351.

§ 4. Right to jury of vicinage and what constitutes.

Right under constitution to jury of vicinage, see Constitutional Law § 210.

¶ 9. On organizing a new county out of territory belonging to an existing county it is competent for the legislature to provide for the retention by the circuit court for the old county of a pending suit in ejectment for land embraced in the new.—Spalding v. Kelly, 66 Mich. 693.

¶ 10. Act No. 225, Pub. Acts 1901, authorizing the joining as defendants of nonresidents of the county in which the action is brought, is not in violation of section 27, of art. VI of the Constitution, guaranteeing a trial by a jury of the vicinage.—Halladay v. Detroit United Ry., 155 Mich. 436.

¶ 11. Act No. 82, Laws 1873, enables the receiver of an assessment insurance company to bring suit against members in the court appointing him, and to serve them with process anywhere in the state. Held, the act is not unconstitutional as robbing a member of trial by jury in his home county.—Nichol v. Newman, 160 Mich. 582.

¶ 12. The constitutional provisions (art. VI, §§ 27, 28) in regard to the right of trial by jury are not infringed by a change of venue in a criminal case on the application of the people for cause shown.—People v. Peterson, 93 Mich. 27; People v. Fuhrmann, 103 Mich. 593.

§ 5. In chancery proceedings.

Issues to jury in divorce, see Divorce § 85.
Trial of issues by jury in equity proceedings, see Equity, VIII, B.
also Equity ¶ 689.
Constitutional mode of trial in equity, see Reference of issues to jury in injunction suits, see Injunctions § 114.
Provisions as to jury trials in chancery, see Jud. Act, chap. XVIII, § 21; Comp. L. 1915, § 12593.

¶ 13. The tax law of 1893 (Pub. Acts 1893, No. 206) is not unconstitutional, as depriving a landowner of the right of trial by jury in an action of ejectment, in providing for a writ of assistance on a decree of chancery for the sale of lands for delinquent taxes.—Ball v. Ridge Copper Co., 118 Mich. 7; Youngs v. Peters, 118 Mich. 45.

¶ 14. Under the rule of Ball v. Ridge Copper Co., 118 Mich. 7, the Tax Law of 1893 (Pub. Acts 1893, No. 206), authorizing the issuance of a writ of assistance is not void as denying trial by jury.—Hooker v. Bond, 118 Mich. 255.

¶ 15. In a proceeding to enjoin continuing trespass with damages, the court has power to call a jury and take its advice as to damages.—Hall v. Nester, 122 Mich. 141.

§ 6. In proceedings not according to common-law forms; special proceedings.

Jury in fraudulent debtor proceedings, see ante ¶ 3.
On assessment of damages after default, see also Damages ¶ 1601.
In forcible entry, see Forcible Entry § 29.
Condemnation jury, see Eminent Domain § 76.
Right to jury in condemnation proceedings for drains, see Drains § 37.
Jury in condemnation proceedings as common-law jury in respect to nonimpeachability of award, see Eminent Domain § 120.
Jury for laying out private road, see Highways § 416.

¶ 16. The respondent in disbarment proceedings is not entitled to a jury trial.—In re Shepard, 109 Mich. 631.

¶ 17. An action of debt before a justice of the peace to recover a penalty under the prohibitory Liquor Law of 1853, § 5, was not a criminal prosecution within the meaning of Const. art. VI, § 28; so defendant was not entitled to a jury without paying the fees therefor.—People v. Hoffman, 3 Mich. 248.

§ 7. ——Contempt proceedings.

General law of contempt, see Contempt.

¶ 18. The respondent in a proceeding to punish for contempt of court is not entitled to a jury trial.—In re Chadwick, 109 Mich. 588.

§ 8. On retrial of referred case.

On retrial after remand, see Appeal § 552, ¶ 2361.

¶ 19. A previous reference and trial thereon had before a referee under a stipulation

will not cut off the right to a jury trial where a new trial has been ordered on reversal by the supreme court.—Hopkins v. Sanford, 41 Mich. 243.

§ 9. On appeal from probate.

Impropriety of submitting matters within discretion of probate judge, see also Estates of Decedents ¶ 1074.

Practice in submitting questions, see Probate Courts, III.

Provisions as to jury on appeals from probate, see Jud. Act, chap. LXV, § 11; Comp. L. 1915, § 14155.

¶ 20. When the trial of an appeal in probate matter involves questions of fact, a party is entitled, under statute, to a jury if he insists upon it.—Grovier v. Hall, 23 Mich. 7; Norton v. Sherman, 58 Mich. 549; Wisner v. Mabley's Estate, 70 Mich. 271.

¶ 21. Upon an appeal from the probate to the circuit court in a case where unintentional omission from a will is claimed, a party is entitled to have all questions of fact tried by a jury.—In re Stebbin's Estate, 94 Mich. 304.

¶ 22. Disputed questions of fact on appeal from decisions of the probate court must be tried by jury if either party requests.—Nowland v. Rice's Estate, 138 Mich. 146.

¶ 22a. Under How. St. §§ 6314, 6315, specific issues should be left to jury on appeal from order granting guardianship of incompetent person.—Storick's Case, 64 Mich. 685.

¶ 22b. If the jury, called on appeal from a probate order, disagrees, the court should call another jury on request of either party.—Grovier v. Hall, 23 Mich. 7.

§ 10. Demand and waiver in criminal cases.

In civil cases, see post § 11.

Waiver of objections to drawing of jurors, see post § 55.

Waiver and cure of objections to juror, see post § 71.

Waiver of jury in trial for crime before justice, see Indictment § 652.

¶ 23. The right of one charged with crime to be tried by a jury is imperative, and cannot be waived.—People v. Jackson, 8 Mich. 110.

¶ 24. A person accused of crime cannot waive any essential of the right of trial by jury.—Swart v. Kimball, 43 Mich. 443.

¶ 25. A person charged in the recorder's court of Detroit with an offense against the general laws of the state cannot waive his right to a trial by jury, notwithstanding a charter provision requiring jury trial unless such right "be, with consent of the court, waived."—People v. Smith, 9 Mich. 193.

¶ 26. It is incompetent for one on trial for crime in a court of record to waive his constitutional right of a trial by twelve duly qualified jurors.—Hill v. People, 16 Mich. 351.

¶ 27. A respondent in a proceeding under § 19, Act No. 238, Pub. Acts 1905, § 15406, How. St., 2nd Ed., to determine his sanity, is not deprived of any constitutional right by the failure of the court to submit the question to a jury, where his counsel in open court decline to demand a jury trial.—People v. Hall, 185 Mich. 54. (Stone, Bird, Moore, Ostrander, Steere and Kuhn, JJ., concurring in result only.)

¶ 28. The constitutional provision preserving the right of trial by jury does not, in criminal cases triable before a justice of the peace, preclude a trial by a justice without a jury if defendant expressly so elects. But it seems that it does not authorize any waiver of a jury to be implied from the defendant's silence or his mere failure to demand a jury, notwithstanding the authority given to the justice by Comp. L. 1871, § 5530, How. St. § 7097, to proceed to try the issue and determine the case "if no jury be demanded."—Ward v. People, 30 Mich. 116.

¶ 29. A person accused of crime has no constitutional right that requires the court to dispense with the aid of a jury in the trial of questions of fact.—City of Grand Rapids v. Bateman, 93 Mich. 135.

¶ 30. Under How. St. § 6485, providing for the trial before a jury of all actions of tort "and all other actions the subject matters whereof are, in the opinion of the court, peculiarly proper for the consideration of a jury," the defendant in a prosecution before the superior court of Grand Rapids for violating a city ordinance cannot waive a jury and insist on a trial by the court.—City of Grand Rapids v. Bateman, 93 Mich. 135.

¶ 31. Where the statute gives the accused his choice of jury trial or trial by the justice without jury, the right is substantial, and the court cannot deprive him of it by ordering a jury after he has waived trial thereby.—People v. Steele, 94 Mich. 437.

§ 11. Demand and waiver in civil cases.

Waiver and cure of objections to juror, see post § 71.

Demand for jury after special appearance as rendering it a general one, see Appearance § 7, ¶ 19.

¶ 32. Comp. L. 1857, § 3635, How St. § 6783, does not prevent a trial by the court without a jury if neither party demands one.—American Baptist Missionary Union v. Peck, 9 Mich. 445.

¶ 33. Constitutional provision, art. VI, § 27, does not, by implication forbid a jury trial where the demand is not made in due season.—Van Sickle v. Kellogg, 19 Mich. 49.

¶ 34. The right to a jury trial is not, even in a civil case, waived by failing to demand it, where no method of demand is prescribed, or where the conditions make the constitutional provision inapplicable or impracticable.—Odell v. Reynolds, 40 Mich. 21.

¶ 35. The right to trial by jury is waived in civil cases by neglecting to demand it, and if the judge orders one for his own satisfaction it does not concern the parties. But where neither party has demanded a jury, the assignment of the case for a particular day in term is a plain intimation that no jury will be called.—People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31.

¶ 36. Under Const. art. VI, § 27, providing that the right of trial by jury "shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law," it is competent for the court to assess damages after interlocutory judgment without calling a jury, if none is demanded.—O'Flynn v. Holmes, 8 Mich. 95.

¶ 37. The right to a jury trial is voluntarily waived where, according to the bill of exceptions, defendant's counsel, being engaged in a trial in another court, asks to have the case set down for trial by court at a later day, which is done, and trial is had by the court accordingly without objection from defendant, and where there is no record of any application by him to have the trial adjourned.—Hudson v. Roos, 72 Mich. 363.

¶ 38. Where a cause is placed on the circuit court nonjury calendar for the September term, and is adjourned from time to time until it is tried on December 9th, a party is not entitled to have the case tried by jury from the fact that he had the case noticed for trial at the December term with a demand for a jury trial.—In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

¶ 39. The constitutional provision in regard to waiver of jury in cases where one is not demanded relates to the ordinary trial by jury in civil actions, and is not applicable to condemnation proceedings.—Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 12.

§ 12. ——Payment or tender of jury fees.

Compensation of jurymen, see post § 75.

Payment and taxation of jury fees, see Jud. Act, chap. XVIII, § 22; Comp. L. 1915, § 12594.

¶ 40. Payment of the jury fee at the time the demand is made necessary to make the demand valid.—Odell v. Reynolds, 40 Mich. 21.

II. ELIGIBILITY, GENERAL QUALIFICATIONS AND EXEMPTIONS FROM JURY SERVICE.

§ 13. In general; constitutional and statutory provisions.

Presumptions as to qualifications, see post § 20.

Persons to be placed on jury lists, see also post § 41.

Constitutional qualifications of jurors, see Constitutional Law § 209.

Qualifications of jurors in street opening proceedings, see Highways § 78.

Provisions as to qualifications of jurors in upper peninsula, see Comp. L. 1915, § 14598.

Provisions as to period for which jurors to serve, see Jud. Act, chap. II, § 128; Comp. L. 1915, § 12197.

¶ 41. In Michigan the qualifications of jurors are expressly prescribed by statute, and may be changed from time to time.—People v. Collins, 166 Mich. 4.

§ 14. Assessment and payment of taxes as qualification.

Selecting names for jury lists from assessment rolls, see post § 41.

¶ 42. The fact that a juror summoned as a talesman was not named on any of the assessment rolls of the county either for the year in which the trial took place or for any preceding year did not disqualify him from jury duty.—Stewart v. People, 23 Mich. 63.

¶ 43. It is good ground of challenge for cause that the name of a juror chosen from the regular panel does not appear upon the assessment roll of his township or ward, as required by How. St. §§ 7554, 7555.—Schlacker v. Ashland Iron Min. Co., 89 Mich. 253.

¶ 44. It is a ground for challenge that a juror is not on the assessment rolls of the county and that he was not a taxpayer in the county (How. St. §§ 7554, 7555).—People v. Thacker, 108 Mich. 652.

¶ 45. The discharge of a talesman on the ground of not being a taxpayer is error in the absence of showing that he failed to possess the necessary qualifications of an elector.—Reed v. Peacock, 123 Mich. 244.

§ 15. Citizenship, alienage or disfranchisement.

Mistrial resulting from presence of alien on panel, see ante ¶ 8.

Discharge of alien juror, see also post ¶¶ 192, 193.

Rights and disabilities of aliens generally, see Aliens.

Eligibility of electors, see Elections, III.

Provisions as to right of alien to jury of part aliens or strangers, see Jud. Act, chap. XVIII, § 23; Comp. L. 1915, § 12595.

¶ 46. An alien, who is not an elector, is not a competent juror.—Hill v. People, 16 Mich. 351.

¶ 47. An alien can be a juror if he can vote (How. St. § 7555).—People v. Rosevear, 56 Mich. 158.

¶ 48. A juror, like an elector, may be a foreigner not yet naturalized, but who has declared his intention to become a citizen; the simple fact of alienage does not disqualify him, and nothing will be presumed against his right to act (Const. art. VII, § 1).—People v. Scott, 56 Mich. 154.

¶ 49. Under Laws 1893, Act No. 204, § 5, which provides that the persons whose names shall be returned by the board of jury commissioners shall have the qualifications of "electors" in the town or ward in which they reside and for which they are returned by said board, a person so drawn who is an elector, though not a full citizen, is eligible to sit as a juror.—People v. Considine, 105 Mich. 149.

¶ 50. Where a talesman has resided in Michigan for the period prior to November 8, 1894, specified in section 1, art. III of the Michigan Constitution, and has declared his intention of becoming a citizen of the United States at the time specified in said section, thereby becoming an elector, he is duly qualified to serve as a juror.—People v. Collins, 166 Mich. 4.

¶ 51. The disqualification of a juror to sit in a civil case, by reason of noncitizenship, cannot be taken advantage of even though his incompetency was not discovered until after judgment.—Neal v. Neal, 181 Mich. 114.

§ 16. Residence or domicile of juror.

Necessity that juror be a citizen, see ante § 15.

Domicile or residence of juror, see Domicile.

¶ 52. Where a regularly drawn juror swears that his wife and children, who are in another city, are residing there only temporarily in order to educate their children, and that he has never intended to change his residence, he should be regarded as qualified, although he voted in such other city a year before the trial.—People v. Johnson, 81 Mich. 573.

¶ 53. An elector of a township who removes to another township in the same county less than ten days prior to being summoned as a juror under an order made pursuant to How. St. § 7580, directing the sheriff to summon a certain number of persons from among the neighboring citizens, having the qualifications of jurors, to complete the panel, does not cease to be an elector so as to disqualify him from serving as such juror.—People v. Wright, 89 Mich. 70.

§ 17. Members of former panel.

Disqualification of juror who has previously served, see post § 38.

¶ 54. A juror who has already sat upon one trial during the same term is not challengeable under Laws 1869, p. 106, § 3, authorizing the challenge of those who have served upon the regular panel within the year. The service intended is for a whole term and not merely one case.—Burden v. People, 26 Mich. 162.

¶ 55. Whether a talesman who has sat upon one case during the term may be challenged for that cause if called again during the same term, quære. But it is not error to reject him.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

¶ 56. How. St. § 7584a, in providing that it shall be a ground for challenge if a juror has already served in the same court within a year, excludes one who has served as talesman in a street-opening case.—Williams v. City of Grand Rapids, 53 Mich. 271.

¶ 57. That a juror has served as a juror upon the regular panel in the same court within a year previous to the challenge is good ground of challenge by express provision of How. St. § 7584.—People v. Thacker, 108 Mich. 652.

§ 18. Exemptions from jury service.

Discharging or excusing venireman from service, see post § 52.

Persons exempt from jury service, see Jud. Act, chap. II, § 138; Comp. L. 1915, § 12207.

¶ 58. The exemption of justices of the peace from jury duty is a privilege personal to the jurors, and not the subject of challenge for cause.—People v. Lange, 90 Mich. 454.

§ 19. Age of juror.

Effect of placing exempt jurors on lists, see post § 42.

Excusing aged juror from service, see also post § 52.

Effect of instructing jury officers not to return names of persons over sixty years of age, see post ¶ 126.

¶ 59. The presence upon jury of talesman over sixty years of age is not ground for challenge to the array, but will sustain a challenge for cause, as the only persons qualified for talesmen are those who are not exempt from jury duty (How. St. § 7555).—People v. Baumann, 52 Mich. 584.

¶ 60. A juror is not subject to a challenge for cause because he is over sixty years of age, and therefore exempt from jury duty under How. St. § 7571; since the right to claim such exemption is a personal privilege of the juror.—People v. Rawn, 90 Mich. 377.

Correcting dictum in People v. Baumann, 52 Mich. 584.

¶ 61. It is not error for the court to discharge on a challenge for cause persons returned as jurors who are over sixty years of age, and therefore by statute (How. St. § 7555) improperly returned and also by statute (How. St. § 7571) exempt, particularly where the discharged jurors had expressed a desire to be excused.—McGrail v. City of Kalamazoo, 94 Mich. 52.

§ 20. Presumptions as to qualifications.

Burden of proof on examination of jurors, see post § 66.

Presumptions on appeal or error, see Appeal § 362; Indictment § 617.

¶ 62. The record in error showed that talesmen were called and sworn on a jury, but did not show that they had the requisite qualification of jurors. It was held—no challenge appearing to have been taken on that ground—that they must be presumed to have been properly qualified.—The Milwaukie v. Hale, 1 D. 306.

¶ 63. The competency of a juror will be presumed in civil cases, in the absence of proof to the contrary.—Neal v. Neal, 181 Mich. 114.

III. DISQUALIFICATIONS RESPECTING THE CAUSE.

Presumptions and burden of proof as to qualifications, see post § 66.

Validity of stipulation to remove disqualification of juror in condemnation proceedings, see Eminent Domain ¶ 276.

Juror as interpreter of witness's testimony, see Examination of Witnesses § 19, ¶ 84.

§ 21. Prejudice, bias or interest.

Challenges for cause, see post § 58.

Examination of juror to ascertain bias, prejudice or interest, see post § 68.

Waiver and cure of objections to juror, see post § 71.

Disqualification of electors, taxpayers or inhabitants of municipal corporation involved in the litigation, see Jud. Act, chap. XVIII, §§ 26, 27; Comp. L. 1915, §§ 12598, 12599.

¶ 64. It is within the discretion of a court to sustain a challenge for cause where the juror is shown to have been seen talking with the agent of the adverse party and the agent suspended the conversation on the appearance of opposing counsel.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 65. An examination of a juror disclosing acquaintance with a party to an action, and slight business relation with such party, as well as reluctance to act as juror, does not disqualify the person from acting when he states that he can and will give a verdict in accordance with the evidence.—Brennan v. O'Brien, 121 Mich. 491.

§ 22. ——Prejudice against defendant's business or occupation.

¶ 66. One who entertains such a prejudice against a liquor seller that he cannot give his testimony the same credit that he would to that of a person not engaged in the business of selling liquors is not a competent juror in an action against a liquor seller for damages from an injury caused by an intoxicated man.—Brockway v. Patterson, 72 Mich. 122.

§ 23. ——Relationship to parties or attorneys.

¶ 67. A nephew of one of the parties is an incompetent juror at the common law.—Hasceig v. Tripp, 20 Mich. 216.

¶ 68. A juror in a criminal prosecution is not rendered incompetent by the fact that he is an own cousin of the prosecuting attorney within the second degree of consanguinity.—People v. Waller, 70 Mich. 237.

§ 24. ——Employer, employee or associate of party.

¶ 69. It is not error to reject as juror one who is in the employ of one of the parties.—Goodrich v. Burdick, 26 Mich. 39.

¶ 70. A juror who is an employee of the defendant is disqualified to sit.—Pearce v. Quincy Min. Co., 149 Mich. 112.

¶ 71. An employee of a corporation which owns stock in and actively controls and manages another corporation is disqualified to sit as a juror in a case in which the latter corporation is a party.—Peklenk v. Isle Royale Copper Co., 187 Mich. 644.

§ 25. ——Membership in lodge or association.

¶ 72. Membership of a juror in a lodge of Odd Fellows other than that of which the plaintiff in a suit, who sues as assignee of the lodge, is a member, is not ground for challenge.—Reed v. Peacock, 123 Mich. 244.

§ 26. ——Special interest in outcome of suit.

¶ 73. In an action against a mutual fire insurance company, members thereof who will be assessed for the loss if the company loses the case, are incompetent to sit as jurors.—Martin v. Farmers' Mut. Fire-Ins. Co. of Calhoun Co., 139 Mich. 148.

¶ 74 If, in a street-opening case, a juror is specially interested he is disqualified, and may be challenged for cause.—Kundinger v. City of Saginaw, 59 Mich. 355.

§ 27. ——Taxpayers in action involving county or city.

Freeholder qualification of condemnation jurors, see Eminent Domain § 79.

Making inhabitants competent as jurors where county is party, denial of impartial jury, see Constitutional Law § 192.

¶ 75. Jurors are not incompetent at common law because they are taxpayers of a city which is a party to the proceeding.—City of Detroit v. Detroit Ry., 134 Mich. 11.

§ 28. Opinion as to merits of civil case.

Challenges for cause, see post § 58.

¶ 76. In determining a juror's qualifications the sources of his information as to the merits of the case are important.—Rice v. Rice, 104 Mich. 371.

¶ 77. A juror in a civil case testified on his voir dire that he had known both parties intimately for a long time; that he had talked with many different persons about the case, but had not discussed its merits; that the persons talked with had expressed an opinion to him, and he had also expressed an opinion based upon what he had heard; that he had formed a sort of an opinion, which it would take some evidence to remove, if what he had heard was true, but that it was not so fixed that he would not be governed by the evidence. On cross-examination he testified that he did not know as he had formed any opinion upon the merits; that he might have formed some impression; that he presumed he could not try the case as impartially between the parties as if he had not heard of it and formed said impression. It did not appear that the juror had conversed with either of the parties or their friends, or with any one having knowledge of the facts. Held, that the juror was not legally disqualified.—Rice v. Rice, 104 Mich. 371.

¶ 78. In an action against a village for injuries sustained by reason of a defective sidewalk, a juror testified, upon his voir dire, that, while plaintiff had told him that she had been injured upon the walk, he knew nothing about the circumstances, had formed no opinion, was not prejudiced in her favor, and could try the case impartially; whereupon he was accepted as a juror. Verdict having passed for plaintiff, defendant's counsel moved for a new trial, and, in support of his motion, submitted affidavits showing that, when advised as to the cause of the injury, such juror had asked plaintiff why she did not sue the village, to which plaintiff replied that she had brought suit, although she had deferred action for some time on the ground that the village had promised to settle. Held, that there was no error in denying the motion.—Will v. Village of Mendon, 108 Mich. 251.

§ 29. Reading or discussion of case or similar cases.

¶ 79. Jurors are not rendered incompetent by reading during a trial for negligent injuries newspaper items giving the amount of the verdict in a former trial of the same cause.—Sherwood v. Chicago & W. M. R. Co., 88 Mich. 108.

§ 30. Opinion as to subject-matter or issues in cases.

¶ 80. A person who has formed and holds an opinion that mill-dams generally in that part of the country are nuisances, and that all he is acquainted with are such, is not a competent juror for the trial of an indictment for nuisance in keeping up a mill-dam, though he states that he is not much acquainted with the dam in question, and has not formed or expressed any opinion in regard to it.—Crippen v. People, 8 Mich. 117.

§ 31. ——Impressions or views on liquor question or liquor laws.

Examining juror as to views on liquor laws or liquor question, see post § 68.

¶ 81. In an action for selling liquor to a minor a juror who "is not exactly in favor of enforcing the law," though he thinks "they should go according to law if he was a minor," and who confesses a prejudice against the law, though he thinks he can render a verdict according to the law and the evidence, is challengeable for cause.—Theisen v. Johns, 72 Mich. 285.

¶ 82. In an action for selling liquor to a minor a juror who believes that "a minor is as well able to buy a glass of beer or whisky as a man of forty," and who confesses that he is not in favor of enforcing the law, is not a proper juror, although upon inquiry by the court he states that he thinks he can render a verdict in accordance with the law and the evidence.—Theisen v. Johns, 72 Mich. 285.

¶ 83. Where, in a prosecution for keeping open saloon on Sunday, a juror's examination on his voir dire shows that he has a prejudice against liquor selling and therefore to some extent against respondent on account of his business, a challenge for cause should be allowed.—People v. Wheeler, 96 Mich. 1.

¶ 84. Upon a trial for violating the local option law, a juror is not disqualified who, when examined, says that he voted for such law, or that he favors such law and the enforcement of it, or that he is opposed to the saloon business, or that he believes in prohibition, or that he has conscientious scruples against the saloon business.—People v. Keefer, 97 Mich. 15.

¶ 85. A juror in a prosecution for violating the local option liquor law is not disqualified who states that he understands the local option law to be in force, or that he knows a local option election was held, and that he knows the result of such election was to supersede the general statute respecting the sale of intoxicants.—People v. Keefer, 97 Mich. 15.

¶ 86. In a suit under Comp. Laws 1897, § 5398, to recover damages for the illegal sale of liquor to plaintiff's husband, it is not

error for the court to excuse for cause a venireman where it appears upon his voir dire that he has been previously engaged in the saloon business and is opposed to some provisions of the liquor laws.—Pearson v. Schoenburg, 167 Mich. 255.

§ 32. Opinion or belief that crime was committed by someone.

Opinions as to guilt or innocence of accused, see post § 34 et seq.

¶ 87. A juror's belief that the crime with which the prisoner is charged has been committed by someone is not ground for a challenge for cause.—Stewart v. People, 23 Mich. 63.

§ 33. Opinion as to cause of alleged victim's death.

¶ 88. A juror in a murder case who testifies that he has a positive opinion as to whether deceased had been murdered, but has formed none as to the guilt of the accused and has no bias, and believes that he can render an impartial verdict according to the evidence, is not disqualified.—Cargen v. People, 39 Mich. 549.

¶ 89. Upon a prosecution for murder by poisoning it appeared from the examination of a juror that he had talked with a member of the coroner's jury, who had told him the facts as he understood them; that he had talked with many other persons, and had been told that poison had been found in the stomach of the deceased, and had believed what they told him to be true, and that it would require evidence to remove the opinion formed from such statements. Held, that the juror should have been excused for cause though he expressed a belief that he could decide on the evidence alone.—People v. Thacker, 108 Mich. 652.

¶ 90. The language used in this case to the effect that a juror who believed poison was found in the stomach of a person for whose murder respondent was on trial could not be said to be in a condition to "act fairly," etc., is not a correct statement of the law, although the ruling in the case is correct.—People v. Foglesong, 116 Mich. 556.

¶ 91. Where, in a prosecution for murder by poisoning, a juror testifies on his voir dire that from what he heard it is his impression, which it might take evidence to remove, that deceased died from the effect of poison, that he had no impression as to respondent's guilt or innocence and that he has no such fixed opinion as to the death from poisoning that he cannot give respondent a fair and impartial trial, a challenge for cause is properly overruled.—People v. Foglesong, 116 Mich. 556.

§ 34. Opinions and impressions as to guilt or innocence of accused.

Belief or opinions respecting the corpus delicti, see ante § 32.

Challenges for cause, see post § 58.

Examining talesman to ascertain impressions as to guilt of accused, see post § 69.

¶ 92. The law does not require a juror to be entirely unimpressed with any opinion as to the guilt or innocence of the prisoner, on trial, but simply that he shall not have an opinion of such a fixed and definite character as to leave a bias on his mind which will preclude his giving due weight to the presumption of innocence.—Holt v. People, 13 Mich. 224.

¶ 93. A juror who is so impressed with the guilt of the accused as to need evidence to overcome his impressions is not impartial; and it is useless to ask him whether he can return a just and impartial verdict. —Stephens v. People, 38 Mich. 739.

¶ 94. A juror's opinion as to the guilt or innocence of the accused must not be such as will prevent his giving due weight to the presumption of innocence.—Stephens v. People, 38 Mich. 739.

¶ 95. The opinion entertained by a juror which disqualifies him is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and by which in the juror's mind the accused stands condemned already.—People v. Barker, 60 Mich. 277.

¶ 96. Where a juror challenged for opinion shows by his answer that he has no definite recollections there is no apparent ground for holding him disqualified.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 97. A juror who testifies that he has "an opinion favorable to the guilt of the accused" which "requires evidence to remove" is partial and incompetent.—People v. Shufelt, 61 Mich. 237.

¶ 98. A juror has no impressions that will disqualify him if he says he could neither acquit nor convict without knowing more of the case.—People v. Gage, 62 Mich. 271.

§ 35. ——Based on rumors and hearsay.

¶ 99. The statement of one called as a juror that he has formed a partial opinion as to the guilt or innocence of the prisoner, from rumors heard in the streets, but not a positive opinion, does not establish his incompetency.—Holt v. People, 13 Mich. 224.

¶ 100. A juror who has no fixed or positive belief, but who would have an opinion if rumors that he has heard are true, is not incompetent.—People v. Shufelt, 61 Mich. 237.

¶ 101. Where, after a jury is sworn, the case is continued for some weeks, and the jury allowed to separate, and on their re-

assembling the respondent is permitted to challenge jurors for cause, a challenge to a juror who admits that he has heard some talk about the case upon both sides, which he could not narrate, having heard so many stories, but that he had heard people talking about the public sentiment about the case, in which conversations he took no part, and did not think he had been influenced thereby, should be allowed.—People v. Evans, 72 Mich. 367.

¶ 102. In a prosecution for illegal sale of liquor and keeping a saloon, a juror should be excluded who, upon his examination, says that he knows respondent, that he supposes he is running a saloon, that he understands from what he has heard that he has been running it since May 1, and that he supposes from what he has heard that he sells intoxicating liquors there.—People v. Keefer, 97 Mich. 15.

¶ 103. A juror is not disqualified because he has formed an opinion as to the guilt of the accused, where it appears that such opinion is based upon hearsay, and is not fixed or positive, and he swears that he can render a fair and impartial verdict according to the evidence.—People v. O'Neill, 107 Mich. 556.

¶ 104. A juror is not disqualified by reason of the fact that he did not disclose on his examination that on the day following a murder he called on an errand of his own at the house where occurred an assault by the deceased on the respondent preceding the killing, where the fact of the killing was discussed, but not the details, without the juror knowing that the respondent had been accused thereof, and without his expressing an opinion as to the former's guilt or innocence.—People v. Ponsford, 181 Mich. 659.

§ 36. ——Formed from reading newspapers.

¶ 105. A juror who believes that he can render an impartial verdict according to the evidence is not disqualified by having read a newspaper item from which he has formed an opinion which, though not of a fixed character, it would take evidence to remove.—Ulrich v. People, 39 Mich. 245.

¶ 106. One is not disqualified from serving as a juror in a criminal case simply because he has heard and read about the case, and has formed an impression based upon what he has heard and read, if the impression is not of that fixed character which repels the presumption of innocence. —People v. Thacker, 108 Mich. 652.

¶ 107. A challenge for cause in a criminal proceeding, based upon the fact that the juror has read something about the case, is properly overruled where he states that he does not remember what he has read, that he is not prejudiced against the accused, and that he can render a fair and impartial verdict.—People v. Summers, 115 Mich. 537.

¶ 108. A juror is not disqualified from serving where he testifies that he has an opinion as to the guilt of the accused, formed from the reading of newspapers, but that the impression was not of such a fixed character that he could not give the respondent the benefit of the presumption of innocence and render an impartial verdict based upon the evidence in the case.—People v. Quimby, 134 Mich. 625.

§ 37. Unwillingness to be bound by rules of proof.

Examining jurors as to their willingness to follow rules of proof, see post § 67.

¶ 109. A juror who states that if the evidence were about equally balanced he would render a verdict of guilty, is incompetent. —People v. O'Neill, 107 Mich. 556.

§ 38. Previous service as juror.

See also post ¶ 145.

Eligibility of member of former panel, see ante § 17.

Assessment of damages against defaulting defendant by same jury which tries case against other defendants, see Defaults § 21.

Disqualification of persons who have already served, see Jud. Act, chap. II, § 148; Comp. L. 1915, § 12217.

Provisions disqualifying persons who have served as jurors within the year, see Jud. Act, chap. XVIII, § 42; Comp. L. 1915, § 12614.

¶ 110. Where a jury in condemnation proceedings disagree, and are discharged, the members of the panel are disqualified to sit as jurors in new proceedings to condemn the same land for the purposes mentioned in the first petition.—Hester v. Chambers, 84 Mich. 562.

¶ 111. Jurors who have sat in one case for resisting an officer are disqualified from sitting in a case of assault with intent to do great bodily harm less than murder against another respondent involving the same state of facts.—People v. Troy, 96 Mich. 530.

¶ 112. In a prosecution for perjury alleged to have been committed by accused in testifying in his own behalf in a prosecution for bribery of which charge he was acquitted, jurors are not disqualified to sit because they have acted as jurors in another bribery case connected with the same matter in which a conviction was had, on the ground that they may have a fixed opinion that there was a corrupt plan to commit bribery, since the acquittal was conclusive that accused had no connection with such plan if there was one.—People v. Albers, 137 Mich. 678.

¶ 113. The fact that the issue in one case relates to the bribery of E, and in the other to the bribery of M, both based on the same

conspiracy and depending upon the same witnesses and the same testimony, does not render jurors who sat in one case competent to sit in the other.—People v. Mol, 137 Mich. 692.

¶ 114. Under Const. art. VI, § 28, giving accused the right to trial by an impartial jury, jurors who have sat in a prior case involving the same conspiracy, charging the same offense and depending upon the same witnesses and the same testimony the only difference being in the person of the accused, are not competent to sit, since they cannot be said to be "impartial" after having rendered a verdict of guilty on the same evidence in the prior case.—People v. Mol, 137 Mich. 692.

¶ 115. It is not error to refuse to sustain a challenge for cause made against jurors who state that they have no fixed opinion, and no bias or prejudice against the accused, in an assault case although they acted in another case where another person was charged with keeping a house of ill fame, and the accused was an inmate of the house. —People v. Williams, 118 Mich. 692.

§ 39. Juror previously excused in prosecution for like crime.

¶ 116. It is not good ground for a challenge for cause that the juror has already been peremptorily challenged upon the trial of another prisoner charged with the same crime; it cannot be assumed that it will prejudice him in a different case.—Cargen v. People, 39 Mich. 549.

IV. JURY LISTS, SUMMONING, ATTENDANCE, AND DISCHARGE OF VENIREMEN.

Penalty for failure of juror to attend, see Jud. Act, chap. II, § 146; Comp. L. 1915, § 12215; Jud. Act, chap. XX, § 6; Comp. L. 1915, § 12742.

§ 40. In general; preparation of lists.

Ordering return of lists, see post § 44.
Drawing jury, see post § 45.
Provisions as to jury commissioners, see Jud. Act, chap. II, §§ 150-159; Comp. L. 1915, §§ 12219-12228.
Selection of lists by jury commissioners, see Jud. Act, chap. II, §§ 151-153; Comp. L. 1915, §§ 12220-12222.
Order for new lists of jurors, see Jud. Act, chap. II, § 145; Comp. L. 1915, § 12214.
Provisions as to making lists, see Jud. Act, chap. II, §§ 120-125; Comp. L. 1915, §§ 12189-12194.
Lists of jurors in cities under commission form, see Jud. Act, chap. II, § 125; Comp. L. 1915, § 12194.
Provisions as to preparing jury lists in upper peninsula, see Comp. L. 1915, §§ 14596-14600.

¶ 117. How. St. § 7554 did not repeal the provision in the charter of East Saginaw (Local Acts 1869, p. 432) requiring the city assessor to prepare the jury list from that city, and, if it did, the repealed provision was re-enacted by Local Laws 1885, p. 365, § 5.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287.

¶ 118. How. St. § 7554, directing that the supervisor and township clerk of each township, and in cities the supervisor or assessors as the case may be, and alderman of each ward or assessment district, shall make a list of persons to serve as petit jurors, does not, it seems, apply to a city by whose charter the assessor is a city officer and assesses all the property of the city, but does apply to cities incorporated under the general law, in which the assessor is a ward officer acting only within the limits of his ward.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287.

¶ 119. Under the charter of Alpena (Laws 1871, Act No. 249) which constitutes as officers a comptroller, who is ex officio assessor, one supervisor in each ward and two aldermen in each ward, and How. St. § 7554, providing the "supervisor or assessors, as the case may be, and aldermen" shall make the jury list, it should be made up by the Alpena supervisors and aldermen without the comptroller.—People v. Fuhrmann, 103 Mich. 593.

¶ 120. The officer who makes the jury list must be disinterested, consequently when there is serious doubt of an officer's fairness he should not be employed to choose jurors. —People v. Felker, 61 Mich. 114.

¶ 121. Act No. 58, Pub. Acts 1905, relating to jury commissioners, provides for a board consisting of three persons. A question having arisen as to who were the legally appointed jury commissioners for a certain county, the five men claiming said office met and selected a jury list. Three of these were legally entitled to the office. Defendant was convicted by a jury selected from said list. Held, the list was made up in violation of section 7 of said Act and the conviction must be reversed.—People v. Tonnelier, 167 Mich. 638.

§ 41. Source from which list made.

General qualifications, eligibility and exemptions of jurymen, see ante § 13 et seq.
Provisions as to persons to be selected for jury lists, see Jud. Act, chap. II, §§ 121, 122; Comp. L. 1915, §§ 12190, 12222.
Listing of persons who served during previous year to be avoided, see Jud. Act, chap. II, § 123; Comp. L. 1915, § 1292.

¶ 122. The list of names from which a petit jury was drawn was selected from the assessment rolls of 1892, instead of 1893, as required by the statute, and a challenge to the array was interposed on that ground. It appeared that a majority of the names

selected were names of persons admittedly eligible. Held, that that was sufficient and the challenge not sustainable; that if the result was that a sufficient number of qualified jurors did not attend upon the court, How. St. §§ 7575, 7576, 7578 and 7580, point out the procedure in cases where from any cause this happens.—Niles v. Schoolcraft Circuit Judge, 102 Mich. 328.

¶ 123. The fact that jury lists do not show that the names were taken from the proper assessment roll is not ground for challenge to the array, where it does not appear that any of such jurors were persons who were not assessed on the roll.—Smaltz v. Boyce, 109 Mich. 382.

¶ 124. The fact that the names of the jurors were not selected from the assessment rolls for the year in which the jury was drawn is not ground for a challenge to the array where such rolls were not completed at the time of the drawing.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

§ 42. Validity and sufficiency of lists.

Validity of list improperly certified, see post ¶ 131.

Disqualification of person making jury list, see Jud. Act, chap. II, § 120; Comp. L. 1915, § 12189.

¶ 125. An excess of jurors returned does not invalidate the list.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287.

¶ 126. A jury list is not rendered invalid by the fact that the county clerk instructed the returning officers not to return the names of persons over sixty years of age, since by How. St. § 7571, such persons are exempt from jury duty, and since section 7555, forbids the listing of persons so exempt. Whether even an erroneous instruction by the clerk would support a challenge to the array, quære.—Smaltz v. Boyce, 109 Mich. 382.

§ 43. ——Number of names.

Effect of excess of jurors on lists, see ante § 42.

Number of jurors to be drawn, see post § 50.

Number of names to be placed on lists, see Jud. Act, chap. II, §§ 122, 153; Comp. L. 1915, §§ 12191, 12222.

Number of names to be selected in counties of upper peninsula, see Comp. L. 1915, § 14598.

¶ 127. How. St. § 7556 provides that the jury lists "shall contain not less than one for every 100 inhabitants of such township or ward, computing according to the last preceding census, and having regard to the population of the county, so that the whole number of jurors selected in the county shall amount to at least 100, and not exceeding 400, one-half of whom shall be designated as petit jurors, and one-half as grand jurors." Held, that where the population of a county exceeds 40,000, as shown by such census, the ratio of population to the juror must be increased; that an excess of jurors returned is ground of challenge to the array, but does not wholly invalidate the list, which may be corrected by striking off all names listed below the statutory number first appearing.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287.

¶ 128. Where a challenge to the array is interposed on the ground that an excessive number of jurors has been returned from certain townships, it is not error for the court to order the clerk to reduce the excessive lists by striking therefrom all names below the number appearing thereon to which said townships are respectively entitled.—People v. Fuhrmann, 103 Mich. 593.

§ 44. Return, filing and keeping of list.

Challenge to array based on insufficiency of affidavit accompanying lists, see post ¶ 137.

Provisions as to filing lists by county clerk, see Jud. Act, chap. II, § 127; Comp. L. 1915, § 12196.

Making and filing duplicate lists, see Jud. Act, chap. II, § 124; Comp. L. 1915, § 12193.

Duty of clerk to destroy old names upon receipt of new lists, see Jud. Act, chap. II, § 129; Comp L. 1915, § 12198.

Signing and filing jury lists in upper peninsula, see Comp. L. 1915, § 14600.

¶ 129. A challenge to the array cannot be based on the officer's neglect to return jury lists from certain townships in the county.—People v. Coffman, 59 Mich. 1.

¶ 130. Under Act No. 58, Pub. Acts 1905, relating to jury commissioners for Berrien County, it is not necessary that the jury list after it is made up should be kept secret.—People v. Tonnelier, 167 Mich. 638.

¶ 131. A jury list for a given ward is not void merely because it is certified by the supervisor alone.—Smaltz v. Boyce, 109 Mich. 382.

¶ 132. It is not ground for challenge to the array that the jury list from a given ward was returned by the supervisor and one alderman, where it does not appear that they did not constitute a majority of those charged with the duty of making the return.—Smaltz v. Boyce, 109 Mich. 382.

¶ 133. It is no ground of challenge to the array that the jury lists were not returned until after the time designated by law.—Thomas v. People, 39 Mich. 309.

¶ 134. Under Pub. Acts 1893, No. 201, authorizing the circuit judge to direct the return of new jury lists when the current lists are declared illegal for any reason, it is competent for the circuit judge to make such determination on his own motion, and

to order the return of new lists.—Smaltz v. Boyce, 109 Mich. 382.

¶ 135. An order of court recited that, by reason of the neglect of the supervisors and aldermen of the several wards of the city of Alpena, no names of persons qualified to serve as jurors had been legally returned from said city; that there was a large number of civil and criminal cases for trial by jury; and directed that said officers forthwith make return of such lists. Held, that said officers not having, prior to that time, returned the proper lists, the duty to do so was a continuing one, and it was immaterial whether they made the return voluntarily, upon request or upon the order of the court.—People v. Fuhrmann, 103 Mich. 593.

¶ 136. The fact that an order for the return of jury lists directs the lists to be made by the aldermen and "supervisors," instead of aldermen and "assessing officers," of wards in cities, is not ground for challenge to the array, where those words mean the same and it does not appear that any of the supervisors who returned the lists were not assessing officers.—Smaltz v. Boyce, 109 Mich. 382.

§ 45. Drawing jury.

Persons authorized to prepare jury lists, see ante § 40.

Drawing jurors to complete panel, see post § 49.

Challenge to array for irregularities in drawing jury, see also post § 57.

Provisions as to drawing jurors, see Jud. Act, chap. II, §§ 130-142; Comp. L. 1915, §§ 12199-12211.

Drawing jurors in counties having population of two hundred thousand or more, see Jud. Act, chap. II, § 148; Comp. L. 1915, § 12217.

¶ 137. This court was equally divided on the question whether a challenge to the array in the superior court of Detroit was properly overruled where interposed on the ground (1) that the judge was not present when the names of the jurors were deposited in the jury box and those of former jurors removed; (2) that he did not determine the number to be drawn for the term, but that twenty-four were drawn, and he was not present at the drawing; (3) that they were drawn by the sheriff and the minute was kept by the clerk; (4) that the affidavit accompanying the list of 300 jurors filed in the clerk's office did not show in detail the proceedings taken to select the list, but only alleged that, as affiant verily believes, it was done in accordance with the statute.—Gott v. Brigham, 45 Mich. 424.

§ 46. ——Officer or person to perform duty.

Officer or person to prepare lists, see ante § 40.

Officer or person to return lists, see ante § 44.

¶ 138. Under How. St. § 7567, it is the duty of the clerk to draw the names of the jurors from the box, and it is cause for challenge to the array that the sheriff drew the names.—People v. Labadie, 66 Mich. 702.

¶ 139. A sheriff is not disqualified from acting upon a commission for drawing talesmen in a criminal case because his name is indorsed on the information as a witness for the people.—People v. Summers, 115 Mich. 537.

¶ 140. A jury drawn in the circuit court of Wayne County by a member of the board of jury commissioners, although in the presence of the county clerk, was illegal and subject to challenge, as not being in compliance with Pub. Acts 1903, No. 31, § 3, which requires the county clerk of such county to impanel the jury for such court.—Fornia v. Wayne Circuit Judge, 140 Mich. 631.

§ 47. ——Method and conduct of drawing.

Method of drawing additional jurors, see post § 51.

By and in whose presence drawing to be made, see Jud. Act, chap. II, §§ 132, 134; Comp. L. 1915, §§ 12201, 12203.

Method and conduct of drawing, see Jud. Act, chap. II, § 135; Comp. L. 1915, § 12204.

¶ 141. Comp. L. 1871, § 6020, How. St. § 7600, provides that when a jury has been sworn to try an issue the ballots containing their names shall be kept apart from the other ballots until the jury is discharged. Held, that it is not necessary to wait until the jury is discharged and the ballots returned to the slip-box before proceeding to draw another jury from the slip-box for the trial of the next case, whether criminal or civil.—People v. Craig, 48 Mich. 502.

¶ 142. Where two persons have been indicted jointly and have demanded separate trials, and one has been tried and the jury discharged, it seems that the clerk of the court is not bound to return the names of the jurors to the slip-box before drawing a jury for the trial of the other.—People v. Craig, 48 Mich. 502.

¶ 143. Under Jury Act of 1877 (Act No. 125) How. St. requiring the names of jurors to be drawn in turn from separate parcels containing the names from each precinct in the county, § 7567, a jury drawn three weeks before trial for a particular case of homicide is illegal if taken from only part of the townships in the county, and those not adjoining the county seat, nor including the locality of the offense.—People v. Hall, 48 Mich. 482.

¶ 144. A challenge to the array cannot be based on the omission of the county clerk, on drawing a jury, to return the names

drawn to the proper packages for each township, until the whole list for all the townships is exhausted (How. St. §§ 7554, 7555, 7567, 7575).—People v. Coffman, 59 Mich. 1.

¶ 145. Notwithstanding the provisions of How. St. §§ 7567, 7575, that a jury shall be obtained from the whole body of the county and that the names of those first placed in the box shall be exhausted before returning to the boxes the names of those previously drawn, it is not good ground for a challenge to the array that the clerk returned the names of those from one township drawn for a previous term which were afterwards drawn for the next term in the following year. Should either party desire, he might challenge the twice-drawn jurors on the ground that they had served as jurors within the previous year.—Wise v. Otter Creek Lumber Co., 86 Mich. 40.

¶ 146. That the jury commissioners failed to draw the number of names of persons for jury service from one township, required by statute, is not a cause for a challenge to the array, where two of the panel chosen come from such township, and the objecting party did not use any of his peremptory challenges.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 146a. A jury panel will be quashed where the manner of selection of the veniremen is illegal because in certain townships and in a city but one of the two officers, charged by law with making up the jury lists, acted in that capacity.—People v. Quick, How. N. P. 66.

§ 48. Summoning jury; venire facias.

Summoning jurors from bystanders, see post ¶ 166.
Summoning additional jurors, see post § 51.
Effect upon the array of returning incompetent persons or persons not on list, see post §§ 53, 54.
Irregularities in summoning jury as ground for challenge to array, see also post § 57.
Summoning jurors from bystanders, Jud. Act, chap. XVIII, § 35; Comp. L. 1915, § 12607.
Summoning persons drawn, see Jud. Act, chap. II, § 136; Comp. L. 1915, § 12205.
Term of jurors drawn in counties having population of two hundred thousand or more, see Jud. Act, chap. II, § 148; Comp. L. 1915, § 12217.

¶ 147. Pub. Acts 1893, Act No. 204, § 12, creating a board of jury commissioners for courts of record in Wayne County and providing that after the drawing of jurors the clerk shall make out a venire facias and deliver it to the sheriff, applies to the Detroit Recorder's Court as well as to the Wayne Circuit Court; and the provisions are mandatory and any earlier laws which may have authorized a venire facias from the Recorder's Court to the superintendent of police, were expressly repealed by section 27.—Dickson v. Judge of Recorder's Court of Detroit, 136 Mich. 479.

¶ 148. An order made by the county judge, under laws of 1848, p. 237, for summoning a jury to try a cause before the circuit judge, more than three days before the day assigned for the trial, was held sufficient.—People v. Doe, 1 Mich. 451.

¶ 149. A jury may be drawn by a deputy sheriff notwithstanding a statutory declaration that it shall be done by the sheriff.—Sturgis v. Mt. Clemens Sugar Co., 184 Mich. 456.

¶ 150 The provisions of Pub. Acts 1893, Act 204, § 12, creating a board of jury commissioners for courts of record in Wayne County and providing that after the drawing of jurors the clerk shall make out a venire facias and deliver it to the sheriff, apply to the Recorder's Court as well as the Wayne Circuit Court and are mandatory; and therefore no consideration could be given to the argument that it would be more economical to have the jurors summoned by some other official.—Dickson v. Judge of Recorder's Court of Detroit, 136 Mich. 479.

¶ 151. A conviction by jurors properly drawn and impaneled will not be disturbed because the jurors were not summoned by the proper officer.—People v. Williams, 24 Mich. 156.

¶ 152. That a sheriff or undersheriff has actively assisted the prosecution in preparing a criminal case for trial does not, in the absence of a showing of interest or disqualification other than such official acts, disqualify him from summoning talesmen for the trial of the case.—People v. Ponsford, 181 Mich. 659.

¶ 153. Where respondent is informed against for selling intoxicating liquors without having paid the tax required by law, it is proper for the trial court to permit the sheriff to summon talesmen to complete the jury, although the sheriff's name is indorsed on the information as a witness for the People.—People v. Lalonde, 171 Mich. 286.

¶ 154. In the absence of the sheriff the undersheriff is the proper officer to summons talesmen for the trial of a criminal action.—People v. Ponsford, 181 Mich. 659.

§ 49. Drawing and summoning additional jurors to complete panel.

Ordering return of new jury lists, see ante § 44.
Drawing panel, see also ante § 45.
Irregularities in drawing and summoning as ground for challenge to array, see also post § 57.
Ordering additional jurors, see Jud. Act, chap. II, §§ 143-146; Comp. L. 1915, §§ 12212-12215.

¶ 155. The court has power under Laws 1893, Act No. 204, § 18, in its discretion and on its own motion, in case there shall not be jurors enough present to form a panel in any case, to direct talesmen to be forthwith drawn from the jury box and summoned to attend such court; and the fact that its attention has been called by the prosecuting attorney to such deficiency of jurors, either orally or otherwise, will not nullify the action so taken.—People v. Considine, 105 Mich. 149.

¶ 156. How. St. § 7578, providing for the drawing of jurors and that the court may direct from which townships the jurors shall be drawn, is not limited to cases where a jury has been regularly drawn and not summoned or where jurors have failed to appear, but applies to all cases where, for any cause, a jury is to be drawn during term.—People v. Reigel, 120 Mich. 78.

¶ 157. If some ineligible names are drawn and included in the list of jurors, and a sufficient number of qualified ones do not attend in consequence, the proper objection is to move to make up the deficiency in the manner directed by How. St. § 7575 et seq. —Niles v. Schoolcraft Circuit Judge, 102 Mich. 328.

¶ 158. On the day preceding the trial of a criminal case, the court ordered the summoning of additional jurors under Laws 1893, Act No. 204, § 18, and, after the drawing, further directed that the names so drawn be withheld from the public and from counsel for both parties. Upon the trial counsel for respondent excepted to the orders so entered, but interposed no challenge to the array, nor was the voir dire examination restricted in any way. Held, that the practice pursued was not commendable, but whether ground for reversal was not decided because there were other grounds necessitating it.—People v. Considine, 105 Mich. 149.

¶ 159. Where the jurors summoned to complete the panel actually attended it was held that misrecitals in the copy of the order upon which the sheriff made his return were immaterial, as was also the manner of service, and that respondent could not object on the ground of defects in the mode of notifying the jurors.—People v. Jones, 24 Mich. 215.

¶ 160. Under Jury Act of 1877, Act No. 125, How. St. § 7578, the jurors should be drawn from the vicinity of the place where the court is held; and the order for the drawing should purport to be made for the purpose of getting jurors near the county seat, and upon the judge's motion and for the general purposes of the term, and not for any particular case.—People v. Hall, 48 Mich. 482.

¶ 161. An order of court directing that a jury be "drawn and summoned in pursuance of the statute" for the general purposes of the term means that the jury be drawn from the county at large as authorized by How. St. § 7578, and is legal; it need not specify the townships or supervisor districts, since it was not drawn from the vicinage.—People v. Coughlin, 67 Mich. 466.

§ 50. ——Number to be drawn.

Number of names to be placed on jury list, see ante § 43.

¶ 162. An order under How. St. § 7578, directing petit jurors to be drawn and summoned for the general purposes of the term, may properly direct more than twenty-four to be drawn.—People v. Coughlin, 67 Mich. 466.

¶ 163. Where the court ordered fifty additional jurors (instead of twenty-four, as provided by statute), some of whom sat on defendant's trial with full knowledge, on his part, of all the facts, and without objection from him, it was held that the irregularity was waived.—Bronson v. People, 32 Mich. 34.

§ 51. ——Method of drawing and summoning.

¶ 164. The provisions of Comp. L. 1897, § 344, are not the only method of completing the panel of jurors; such section not being mandatory.—People v. Wheeler, 142 Mich. 212.

¶ 165. Jurors drawn under Comp. L. 1857, § 4374, because a sufficient number did not appear who were summoned, were drawn not merely for a particular case, but for the term, or balance of the term, and it was competent for the court to direct them to be drawn from the jury box or to be selected by the sheriff, and to order them to be summoned to attend forthwith, or at a subsequent or adjourned day of the term.—People v. Jones, 24 Mich. 215.

¶ 166. Under Act No. 194, Pub. Acts of 1911, it is within the discretion of the court to cause names to be drawn from the regular lists to fill the panel, in case one of the litigants objects to completing the panel by summoning talesmen from the room, even though he does not object until he ascertains the identity of a talesman summoned. —Green v. Muskegon Traction & Lighting Co., 171 Mich. 18.

¶ 167. The court having ordered a jury to be drawn and summoned from the body of the county for the general purposes of the term, as provided by How. St. § 7578, the respondent in a criminal case challenged the array because two townships, including the vicinage of the crime, were not represented. It not appearing that the officers who drew the jury had arbitrarily left the townships out, or that the lists of those

townships had not already been exhausted, the challenge was held bad.—People v. Coughlin, 67 Mich. 466.

¶ 168. In a criminal case, the regular panel of jurors was exhausted and the court with the consent of the respondent directed that there be drawn from the petit jurors the required number from townships agreed upon in the regular way for drawing jurors for the term, held that the course was a proper one and a challenge to the array was properly overruled.—People v. Wheeler, 144 Mich. 212.

¶ 169. The provisions of Comp. L. 1897, §§ 340, 341, How. St., 2nd Ed., §§ 12898, 12899, authorizing the circuit judge, whenever, in his opinion, more than 24 jurors will be necessary for an approaching term, to make an order that such number as he deems necessary be summoned and drawn, as provided by law, not exceeding 24, which order must be served and filed with the county clerk at least 20 days before the commencement of the term, confer no authority to designate any portion of the county from which the jurors shall be drawn, or to otherwise restrict the regularly prescribed manner of drawing and summoning.—People v. Gage, 188 Mich. 635.

¶ 170. The provision in Comp. L. 1897, § 342, How. St., 2nd Ed., § 12900, permitting the trial court to direct that petit jurors be drawn and summoned from near the county seat for convenience and dispatch of business, after it is ascertained at a particular term that a sufficient number of qualified jurors were not drawn or summoned or failed to appear, is not applicable to an order made by the circuit judge prior to the commencement of a term directing that additional petit jurors in a criminal case of unusual interest be drawn and summoned from the several lists excepting the county seat of which the accused was a resident, and other adjacent territory.—People v. Gage, 188 Mich. 635.

§ 52. Discharging venireman or excusing him from service.

Eligibility and exemptions from jury service, see ante II.

Error in discharging juror in absence of showing of disqualification, see also ante ¶ 45.

Upon challenge for cause, see post § 58.

Power of court to reject juror on his own motion, see post § 58.

Upon peremptory challenge, see post § 60.

Excluding juror who failed to attend after adjournment, see post ¶ 191.

Provisions as to excusing from jury service, see Jud. Act, chap. II, § 139; Comp. L. 1915, § 12208.

¶ 171. A juror may be excused at any time before he has been sworn, for any reason personal to himself which seems sufficient to the judge. So held where the excuse was that he was to be a witness in the next case on call.—People v. Carrier, 46 Mich. 442.

¶ 172. The court's action in excusing a juror because he is above sixty years of age is not prejudicial to a party where there remains on the regular panel a sufficient number of jurors to try the case, and where it does not appear that the party had any objections to the jurors who actually sat, or that his peremptory challenges were exhausted.—Luebe v. Thorpe, 94 Mich. 268.

¶ 173. For the circuit judge to excuse, in the absence of respondent's counsel, an unsworn juror, on the ground that if he had to serve his business would suffer, is not error.—People v. Thacker, 108 Mich. 652.

§ 53. Effect of returning incompetent persons.

Summoning jury, see ante § 48.

¶ 174. The incompetency of some of the jurors returned by the sheriff does not affect the array if those sworn were competent.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

§ 54. Effect of summoning person not on list.

Summoning jury, see ante § 54.

¶ 175. The name N. J. Gran was on the jury list, and was called in making up the jury, being duly answered to. Gustave Gran was summoned, and he answered and sat on the jury. He was conceded to be eligible, and no injury to plaintiff in error resulted from his presence. Held, a mere irregularity, not ground for a reversal of the judgment.—Hall v. City of Cadillac, 114 Mich. 99.

§ 55. Objections for irregularities in drawing or summoning.

Irregularity in ordering excess number of additional jurors, see ante ¶ 163.

Waiver of jury, see ante §§ 10-12.

¶ 176. In a criminal case it is the defendant's duty to raise objection to any irregularity in the summoning and impaneling of the jury before the trial, and if he omits to do so, or to take exception, if overruled, he will be deemed to have waived the irregularity.—Bronson v. People, 32 Mich. 34.

§ 56. Presumptions as to regularity.

¶ 177. Unless the contrary is shown it will be presumed that officers charged with the drawing and summoning of jurors have correctly performed their duty.—People v. Coughlin, 67 Mich. 466.

V. SELECTING JURY AND CHALLENGES; SWEARING IN.

Record recital of impaneling of the jury, see Judgments ¶ 116.

Constitutionality of modes of selection in criminal cases, see Constitutional Law § 209.

Harmless error in forming jury and ruling on challenges, see Indictment § 539.
Cautionary instructions to veniremen, see Instructions § 79.
Necessity of completion of jury to make jeopardy attach, see Crimes § 23.
Discharge of jury as bar to further prosecution, see Crimes § 25.
Discharge of jury after failure to agree or because of ground disclosed during trial, see Indictment § 467; Trial, VIII.
Provisions as to impaneling jury, see Jud. Act, chap. XVIII, §§ 28-40; Comp. L. 1915, §§ 12600-12608.
Provisions as to discharging jury on Sunday, see Jud. Act, chap. IV, § 12; Comp. L. 1915, § 12259.

§ 57. Challenge to the array and grounds for same.

Preparation and sufficiency of jury lists, see ante § 40 et seq.
Insufficiency of affidavit accompanying jury lists as ground, see ante ¶ 137.
Presence on panel of aged juryman as ground for challenge to array, see also ante § 19.
Method and conduct of drawing and summoning jurors, see ante §§ 45-51.
Irregularities in return of jury lists as ground, see also ante § 44.
Failure to return lists from certain counties, see ante ¶ 129.
Excessive number of jurors on lists, see also ante ¶ 128.
Irregularities in drawing jury as ground, see also ante § 47.
Jury drawn by one not authorized to perform the duty, see ante § 46.
Irregularities in drawing and summoning additional jurors, see ante § 51.
Incompetency of some of jurors returned, see ante § 53.
Challenge for cause, see post § 58.
Peremptory challenges, see post § 60.
Interest of sheriff who summoned jury as ground for challenge to panel or array, see Jud. Act, chap. XVIII, § 25; Comp. L. 1915, § 12597.
Interest of clerk who drew jury as ground for challenge to panel or array, see Jud. Act, chap. XVIII, § 24; Comp. L. 1915, § 12596.

¶ 178. A challenge to the array must be in writing.—People v. Doe, 1 Mich. 451; Ryder v. People, 38 Mich. 269.

¶ 179. It is well settled that a challenge to an array must be in writing.—People v. Tubbs, 147 Mich. 1.

¶ 180. An objection to the validity of the panel will not be considered if not raised in the challenge to the array.—Robinson v. Mulder, 81 Mich. 75.

¶ 181. It seems that a challenge to the array will lie on the action of jury commissioners wherever at common law it would lie to the action of the sheriff or his subordinates in selecting or summoning the jury.—People v. Harding, 53 Mich. 48.

¶ 182. A challenge to the array of jurors will not be sustained where the record shows that the statutory requirements were complied with in drawing them.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 183. In a prosecution for murder, that the required number of jurors from one township was short, that those from others was in excess, and that from others the return was not signed, is no ground for a challenge to the array, the jurors being subject to challenge for cause.—People v. MacGregor, 178 Mich. 436.

¶ 184. A challenge to the array of jurors upon the ground that the venire was issued before the signature of the sheriff was obtained to the proceedings selecting said jury, contrary to Pub. Acts 1893, No. 213, as amended by Pub. Acts 1895, No. 46, which statute applies expressly to St. Clair County, is waived where purposely withheld until the jury is sworn, it appearing that the jurors were qualified and regularly summoned.—People v. McArron, 121 Mich. 1.

¶ 185. A party who in a former case at the same term challenged the array is estopped from claiming in another case that the court erred in discharging all the jurors, as the objection went to all of them.—Robinson v. Mulder, 81 Mich. 75.

§ 58. Challenge of veniremen.

General qualifications, eligibility and exemptions of jurors, see ante II.
Matters disqualifying jurors, see ante III.
Challenge to the array, see ante § 57.
Distinction between challenges for favor and those for cause, see also post ¶ 214.
Mode of trying challenges, see post § 64.
Examination of jurors upon challenge, see post §§ 65-70.
Presumptions and burden of proof on challenge, see post § 66.
Rulings upon challenge, see post § 70.
Waiver and cure of objections, see post § 71.

¶ 186. Since, under the statute providing for peremptory challenges of jurors, the distinction between challenges for principal cause and to the favor is practically abolished, all challenges are for cause.—Holt v. People, 13 Mich. 224; Stephens v. People, 38 Mich. 739; Bliss v. Caille Bros. Co., 149 Mich. 601.

¶ 187. The right of challenge for cause exists in all cases where the jury is a common-law one, and it cannot be taken away by statute, or abrogated by a statute's omission to provide for it.—Kundinger v. City of Saginaw, 59 Mich. 355.

¶ 188. A court may reject a juror in its discretion, on a ground which would not be

strictly sufficient to sustain a challenge for cause. Where a jury was finally obtained to which neither party objected, the fact that the court set aside two jurors without any challenge, because from their examinations they did not seem to be entirely impartial, and excused a third because he was deaf and did not sufficiently understand English, was not a ground of error.—Atlas Min. Co. v. Johnston, 23 Mich. 36.

¶ 189. Courts should protect the rights of parties in selecting jurors, and may properly exclude any incompetent or drunken person, even against objection.—Torrent v. Yager, 52 Mich. 506.

¶ 190. The circuit judge is invested with a certain degree of discretion in selecting jurors for a panel. Such discretion is to be exercised in seeing that proper and competent men are selected; and so long as the case of the parties is not prejudiced by the exercise of such discretion, they cannot complain.—People v. Barker, 60 Mich. 277.

¶ 191. A juror who had been selected, the panel, however, not having been completed, failed to appear in court after an adjournment, and was found in a room of a hotel playing pool. Held, that such reckless disregard of his duty showed that he was unfit to serve, and that the court was justified in excluding him from the panel.—People v. Barker, 60 Mich. 277.

¶ 192. After the jury had been completed and sworn, but before any further proceedings, it was discovered that one of the members of the panel was an alien. Held, that it was proper for the court to order him to stand aside and be discharged and another juror to be drawn in his stead, allowing respondent in the meantime to challenge the remaining eleven either for cause or peremptorily if he wished to do so.—People v. Barker, 60 Mich. 277.

¶ 193. The fact that a party has exhausted all his peremptory challenges does not make it error for the judge to excuse of his own motion a juror already examined who is not sufficiently acquainted with the English language to qualify him to sit.—O'Neil v. Lake Superior Iron Co., 67 Mich. 560.

¶ 194. The trial judge has no right to reject upon his own motion and against protest a qualified juror with whom the parties are satisfied, unless for sufficient cause, which should be made to appear on the record.—Welch v. Tribune Publishing Co., 83 Mich. 661.

¶¶ 195, 196. A trial judge may exercise his discretion to excuse a juror for cause at any time before the introduction of evidence.—Quay v. Duluth, S. S. & A. Ry. Co., 153 Mich. 567.

§ 59. ——Time to make.

Court's power to excuse juror for cause before evidence introduced, see also ante § 58.

Time to exercise peremptory challenges, see post § 62.

¶ 197. Challenges for cause can be made by either side until the jury is sworn.—Scripps v. Reilly, 38 Mich. 10.

§ 60. Peremptory challenges and number allowable.

Failure to exercise peremptory as affecting waiver of objections to juror, see post § 72.

Provisions as to number of peremptory challenges, see Jud. Act, chap. XVIII, § 40; Comp. L. 1915, § 12812.

¶ 198. Comp. L. 1857, § 4400, How. St. § 7607, allowing peremptory challenges in "civil cases," does not apply to special proceedings not in the ordinary course of law, and which are regulated entirely by particular statute. Challenges for cause are necessary in all inquiries by jury, but peremptory challenges in other than criminal proceedings are confined to cases where the statutes have directly provided for them.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459.

§ 61. ——Joint trials and trials with several counts.

General law as to joint trials in criminal cases, see Indictment § 326.

¶ 199. The number of peremptory challenges to which an accused person is entitled depends upon the statute relating to the crime with which he is charged.—People v. Comstock, 55 Mich. 405.

¶ 200. Where counts for different offenses are joined respondent has a right to the full number of challenges to which he is entitled on each count.—People v. Sweeney, 55 Mich. 586.

¶ 201. Each defendant who pleads separately by different counsel is separately entitled to the two peremptory challenges allowed by statute. Comp. L. 1871, § 6027 (see How. St. § 7607).—Stroh v. Hinchman, 37 Mich. 490.

¶ 202. Where persons jointly charged with a misdemeanor are tried together each is entitled to the same number of peremptory challenges he would have had if separately tried (How. St. § 7607).—People v. Welmer, 110 Mich. 248.

¶ 203. Two respondents were jointly tried for larceny under Comp. L. 1897, § 11595, and were entitled each to demand a separate trial. Held, each respondent was entitled to his five separate peremptory challenges, and, in the absence of an express waiver,

his right thereto was not lost by the fact that he failed to demand a separate trial. —People v. Caruso, 170 Mich. 137.

¶ 204. Under section 10238, Comp. L. 1897, How. St., 2nd Ed., § 12944, joint defendants are each entitled to four peremptory challenges in an action in which their interests are several.—Levyn v. Koppin, 183 Mich. 232.

¶ 205. Defendants who separately plead the general issue by different counsel are each entitled to four peremptory challenges, where they may have different and distinct defenses to an action.—Yonkus v. McKay, 186 Mich. 203.

¶ 206. In an action to contest the probate of a will, brought by several contestants, who filed the same objections and appeared in the probate court by the same counsel, signed the same claim of appeal and one bond filed for all, held that there was no error in refusing separate peremptory challenges.—In re Walsh's Estate, 196 Mich. 42.

¶ 207. Where parties impleaded together appear by the same counsel, and after their right of peremptory challenge is exhausted other counsel take charge of the case for part of them, the latter have no further right of challenge.—Fraser v. Jennison, 42 Mich. 206.

§ 62. ——Time for challenge.

Time to interpose challenge for cause, see ante § 59.

¶ 208. The right to the peremptory challenge of a juror examined on his voir dire is not lost because not exercised until the rest of the panel had been examined. It may be exercised at any time before the juror is sworn.—Hunter v. Parsons, 22 Mich. 96.

¶ 209. The statutory right of challenging peremptorily may be exercised so long as the jury is not sworn, and notwithstanding the previous declaration of the party exercising it that he is satisfied with the jury. —Jhons v. People, 25 Mich. 499; People v. Carrier, 46 Mich. 442; Hamper's Appeal, 51 Mich. 71.

¶ 210. A peremptory challenge is not allowable in a criminal case after the jury has been sworn.—People v. Dolan, 51 Mich. 610; Thorp v. Deming, 78 Mich. 124.

¶ 211. After the parties have announced themselves satisfied with the jury, and they are sworn, neither party can peremptorily challenge a juror against the objection of the opposite party.—Ayers v. Hubbard, 88 Mich. 155.

§ 63. ——Manner and sufficiency of stating challenge.

Manner of raising objections to the array, see ante § 57.

¶ 212. No reason need be assigned for peremptorily challenging a juror.—People v. Eggleston, 186 Mich. 510.

§ 64. Trial of challenges.

Presumptions as to qualifications of juror, see ante § 20.

Grounds of challenge for cause, see ante § 58.

Necessity of assigning cause of challenge, see Jud. Act, chap. XVIII, § 40; Comp. L. 1915, § 12612.

¶ 213. Where a juror is challenged for favor, the usual mode of trying his impartiality is by triers appointed for the purpose, on the demand of the challenging party. If the challenging party, when asked by the court how he will have the challenge tried, refuses to indicate the mode of trial, it may be tried by the court, by administering an oath to the juror, and propounding questions to him.—People v. Doe, 1 Mich. 451.

¶ 214. The distinction between challenges for favor and challenges for cause is practically abolished by Comp. L. 1857, § 4400, How. St. § 7607, all challenges being now for cause, and to be tried in the same manner.—Holt v. People, 13 Mich. 224.

§ 65. Examination of jurors.

Questioning juror as to sources of information concerning merits of case, see also ante ¶ 76.

Arrest of trial to investigate qualifications of juror, see Indictment § 332, ¶ 1533.

¶ 215. The judge may examine jurors on the part of the prosecution if he chooses, but defendant's counsel are entitled to re-examine them.—Stephens v. People, 38 Mich. 739.

¶ 216. A refusal to allow the defendant's attorney to examine the jury on his appearance after the plaintiff's case was in and after the trial had been delayed while an effort was made to find him, held not error. —Kincade v. Peck, 193 Mich. 207.

¶ 217. On the impaneling of a jury it is irregular for counsel to put questions to the juror called, without first interposing any challenge.—Crippen v. People, 8 Mich. 117.

¶ 218. Error cannot be assigned upon the action of the court in allowing a juror to be sworn to try the case over the objection of counsel as to the juror's competency, where the objecting party examined the juror without challenging him and without putting him under oath.—Crippen v. People, 8 Mich. 117.

§ 66. Burden and sufficiency of proofs on challenge.

Presumptions as to qualifications of juror, see ante § 20.

Sufficiency of showing of bias, prejudice or interest, see also ante § 21 et seq.

Disqualifying opinions, see ante §§ 30-36.

¶ 219. A person called as a juror is presumed to be qualified and impartial; and the party challenging assumes the burden of proving the contrary. He does not relieve himself of that burden until he has made out a prima facie case, or, in criminal cases, such a case as leaves the partiality of the juror in reasonable doubt.—Holt v. People, 13 Mich. 224.

¶ 220. In a criminal case if the examination of a juror upon challenge leaves a reasonable doubt of his impartiality, the prisoner should have the benefit of the doubt, and the juror be excluded.—Holt v. People, 13 Mich. 224.

§ 67. Scope and conduct of examination in general.

¶ 221. Much latitude is allowed in the examination of a juror on his voir dire.—Snyder v. Mathison, 196 Mich. 378.

¶ 222. The trial judge may limit, reasonably, the extent of the voir dire examination of jurors.—Ford v. Cheever, 113 Mich. 440.

¶ 223. In an action for damages for personal injuries alleged to have been caused by the explosion of adulterated kerosene, it is within the discretion of the trial court to permit counsel for plaintiff to ask jurors on the voir dire whether they would consider it negligent to extinguish a lighted lamp by blowing across and down the chimney, as an aid to counsel in exercising his peremptory challenges.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 224. In a criminal prosecution, a question to a juror on his voir dire whether he would consider the presumption of innocence as evidence in favor of the accused, held properly sustained.—People v. Cutler, 197 Mich. 6.

¶ 225. It is error to exclude a question to a juror on his voir dire as to how he would give his verdict if the evidence was equally balanced between the people and accused.—People v. Keefer, 97 Mich. 15.

¶ 226. A conviction for a violation of the liquor law will not be reversed because the trial court required respondent's counsel so to modify a question asked of a juror on his voir dire as not to suggest that he would have a desire to give his verdict one way or the other if the evidence should be even, but to ask him merely whether he would have such a desire, or which way he would find under such circumstances.—People v. Caldwell, 107 Mich. 374.

¶ 227. A question asked a juror on voir dire as to which way he would be inclined to lean were the testimony equally balanced, was properly excluded in a criminal case, where counsel refused to add, at the direction of the court, the words, "if either way."—People v. Wheeler, 185 Mich. 164.

Nature and extent of inquiry as to liability or indemnity insurance in proceedings to qualify jurors in actions for personal injury or death, see note, 13 N. C. C. A. 834-875.

§ 68. ——Questions directed towards matter of bias or prejudice.

Bias, prejudice or interest disqualifying juror, see ante § 21.

Applicability of judicial notice to eke out meaning of question directed towards matter of bias, see Evidence ¶ 83.

¶ 228. Prejudice disqualifies a juror, and a party entitled to peremptory challenges should be allowed to ask any reasonable questions that will tend to disclose it; as, e. g., which way the juror would be inclined if the evidence were evenly balanced.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 229. In order to ascertain a juror's bias, if any, he may be asked which party he would favor if the testimony were evenly balanced.—Township of Otsego Lake v. Kirsten, 72 Mich. 1; People v. Keefer, 97 Mich. 15.

¶ 230. Under a plea of the statute of limitations, defendant's counsel has a right, as a means of determining whether or not to exercise the right of peremptory challenge, to question jurors with reference to their prejudices against such a defense.—Towl v. Bradley, 108 Mich. 409.

¶ 231. In an action for damags for selling liquor to a minor a juror may be asked on his voir dire whether he is in favor of the stringent prohibitory laws, and has any prejudice against the sale of liquor; and if he has such prejudice, may be challenged for cause.—Theisen v. Johns, 72 Mich. 285.

¶ 232. In a prosecution for disorderly conduct, on voir dire after a juror has stated that he did not like men who get drunk and disorderly and fight, it is improper in attempting to summarize to ask him "you do, then, have some prejudice against a man who drinks."—People v. Radley, 127 Mich. 627.

¶ 233. Defendant in examining a juror for the purpose of peremptory challenge asked whether his mind would be affected in the matter if he should learn that a certain person was in the case and whether his sympathy would be aroused by the plaintiff on the stand so as to make him unable to give defendant a fair show. The court excluded the questions after becoming impatient at the many inquiries already made of the jurors by defendant. It did not appear that any question which bore upon the bias or prejudice of the juror had theretofore been excluded. Held, while the question should have perhaps been allowed, the record did not indicate such abuse of the

trial court's discretion as to call for a reversal.—Gornetsky v. Gornetsky, 174 Mich. 492.

Questions as to connection with casualty or insurance company in examination of jurors in negligence action, see note, 2 N. C. C. A. 706-720.

§ 69. ——Questions directed towards opinions or impressions of juror.

¶ 234. An affirmative answer by a talesman to a direct question on his voir dire examination as to whether he believed defendant guilty, held not prejudicial where but one juror heard the answer and he expressly stated that it did not bias his judgment.—People v. MacGregor, 178 Mich. 486.

¶ 235. The complaining witness and some of the jurors were the same in a criminal case immediately preceding that of defendant as in defendant's trial for larceny. The trial court refused to permit one of said jurors on his voir dire examination to state whether he had an opinion as to the credibility of said complaining witness. The record did not show further restrictions upon defendant in examining the jurors. Held, the trial court was not shown to have abused his discretion with respect to such examination.—People v. Wright, 170 Mich. 154.

¶ 236. A juror who on his voir dire denies having said that he believed respondent guilty may be shown by other witnesses to have made such statements, and if the court, after hearing the evidence, entertains any doubt on the subject, a challenge for cause should be sustained.—People v. Evans, 72 Mich. 367.

§ 70. Ruling upon challenge.

Discretion of court in ruling upon challenge for cause, see also ante ¶ 64.

Presumption as to harm from exclusion or acceptance of juror, see Appeal § 357.

Showing of error for purposes of appeal, see Appeal § 179.

Necessity of showing error in accepting or rejecting juror and exhaustion of peremptory challenges in criminal cases, see Indictment § 595.

Error in decision as to impartiality as matter reviewable in supreme court, see Indictment ¶ 2801.

¶ 237. There is no practical difference in criminal cases between a challenge for principal cause and a challenge for favor; and a judge in ruling upon a challenge should make his ruling cover both grounds.—Stephens v. People, 38 Mich. 739.

§ 71. Waiver or cure of objections to juror.

Waiver of jury, see ante §§ 10, 11.

Irregularity in ordering excess number of additional jurors to complete panel, see ante ¶ 163.

General qualifications, eligibility and exemptions, see ante II.

Grounds disqualifying jurors, see ante III.

¶ 238. By going to trial without challenge a party waives any objection to the want of proper qualification of jurors, as well as to the sufficiency of the oath administered to the jury.—The Milwaukie v. Hale, 1 D. 306.

¶ 239. Where one of the jurors had sat on a former trial of the same cause, and this fact was known to the counsel of one of the parties before the verdict was rendered, and he omitted to object until afterwards, it was held that he was bound by the verdict.—Bourke v. James, 4 Mich. 336.

¶ 240. Where a party is informed during the progress of the trial that a juror is disqualified, but he omits to object until after verdict, on the ground that evidence of the disqualification is not sooner accessible, he will be held bound by the verdict.—Sleight v. Henning, 12 Mich. 371.

¶ 241. Failure to challenge a venireman who is ineligible to become a juror does not waive the objection, upon the subsequent discovery of the ineligibility, since it was not known and also because the right of challenge presupposes the presence of twelve eligible men in the box.—Hill v. People, 16 Mich. 351.

¶ 242. In civil causes the proper time to make the necessary inquiries into the qualifications of jurors is before the trial, and not afterwards, and if not made then the objection will be deemed to have been waived.—Johr v. People, 26 Mich. 427.

¶ 243. Where the record shows that both parties have announced themselves contented with the jury, the previous rejection of a challenged talesman against objection will not be considered. Whether this rule will apply where a juror is admitted against a challenge for cause, quære.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

¶ 244. A party who aids in striking the panel, and who declares himself satisfied with it, cannot afterwards object that one of the jurors, to whom he made no objection, was not a freeholder as required by the statute.—Clark v. Drain Com'r, 50 Mich. 618.

¶ 245. The impaneling and final acceptance of a jury by a court is a judicial determination that the jurors are competent; and if any objection to the qualifications of a juror is known to a party before such determination, it cannot be raised afterward unless on exception to the overruling of a challenge.—People v. Scott, 56 Mich. 154.

¶ 246. In an action against a mutual insurance company plaintiff challenged a juror for cause because he was a member of the company, which challenge was denied and plaintiff excepted and thereupon exercised a peremptory challenge. One other

peremptory challenge was used, but no further challenge for cause was made though four other members of defendant company were on the jury. Held, that plaintiff did not waive the objection to these jurors by his failure to challenge them for cause or to exercise his two remaining peremptory challenges.—Martin v. Farmers' Mut. Fire-Ins. Co. of Calhoun Co., 139 Mich. 148.

¶ 247. If a party or his counsel interposes a challenge for favor, or raises any other preliminary question involving an inquiry into the qualifications of a juror, and then neglects or refuses to move the trial for examination thereof, he thereby waives such challenge or question.—People v. Doe, 1 Mich. 451.

¶ 248. Where a juror on being examined as to his residence stated that he had come to the place to get work and had not got any yet, his answer suggested that he was not qualified; but if no objection was then made, or further examination had, it would be too late after the trial.—People v. Lange, 56 Mich. 550.

¶ 249. Error cannot be predicated on the overruling of a question put to a juror on his voir dire, where he was subsequently excused for physical disability.—People v. Wheeler, 185 Mich. 164.

§ 72. ——Failure to exercise or exhaust peremptory challenges.

See also ante ¶¶ 146, 172.

Peremptory challenges and exercise thereof, see ante § 60 et seq.

¶ 250. Overruling a challenge for cause and compelling the party to resort to a peremptory challenge does not prejudice him where he still has a right of peremptory challenge which he does not use.—Sullings v. Shakespeare, 46 Mich. 408; People v. Barker, 60 Mich. 277; People v. Aplin, 86 Mich. 393; People v. Fowler, 104 Mich. 449; People v. Wright, 170 Mich. 154.

¶ 251. The error of not excluding a juror properly challenged for cause is not cured by peremptorily challenging him, where it appears that the party so challenging exhausted his peremptory challenges; he may have been obliged to retain a juror whom he would otherwise have excused.—Theisen v. Johns, 72 Mich. 285.

¶ 252. Where a person jointly indicted with another, but tried separately, challenged the array on the ground that their names had been drawn from a box to which the names of the jurors who tried the other person had not been returned, though the jury had been discharged, it was held that the error, if any, was cured by the judge's offer to have a new jury drawn from a box containing the names of all the jurors, the challenged jury not having been sworn, or the prisoner put in jeopardy.—People v. Craig, 48 Mich. 502.

¶ 253. A juror in a criminal case testified on his voir dire that he should hesitate slightly about convicting a person on circumstantial evidence; that he would like, before a respondent should be sent up, to hear positive proof against him, and that he would hate to find a man guilty on circumstantial evidence; that if the evidence was so conclusive and satisfactory to his mind, weighing it as he would any evidence that affected his own interests in doing business, as to preclude any other rational theory, he would convict, but that he was somewhat prejudiced against circumstantial evidence where it deprived a man of his liberty, and so far as it related to criminals. After a challenge for cause interposed by the people had been sustained, other jurors were for various reasons excused by the prosecuting attorney and by respondent's counsel, after which both announced themselves as satisfied with the jury. Held, that respondent was not prejudiced by the action of the court.—People v. Parsons, 105 Mich. 177.

§ 73. Swearing jury.

Necessity of interposing challenges prior to swearing of jury, see ante §§ 59, 62.

Waiver of objections based on sufficiency of oath to jury, see ante § 71.

Oaths of jurors in street opening proceedings, see Highways § 81.

Disposition of ballots containing names of jurors sworn, see ante § 47.

¶ 254. Where the record showed that the jury were "duly elected, tried and sworn," instead of that they were "sworn well and truly to try the issue," etc., it was held that the error, if any, must be regarded as clerical, and under R. S. 1838, pp. 461-62, might be amended after error brought.—The Milwaukie v. Hale, 1 D. 306.

¶ 255. A stipulation was made between the plaintiffs on a note and one of the defendants that the cause might be dismissed as to him, but he did not avail himself of it, and no order of discontinuance was entered. Only one of the other defendants pleaded. Held, that the technical irregularity of swearing the jury to try the issue between the plaintiffs and the defendants, when no issue had been joined with two of them, was a harmless blunder, and as no order was entered on the stipulation the party with whom it was made remained a defendant in form.—Buhl v. Trowbridge, 42 Mich. 44.

¶ 256. Where a jury was impaneled for the trial of joint offenders, but a separate trial was ordered, it is immaterial that the jurors were sworn before the order was entered, if sworn for the trial of one only.—People v. Cummins, 47 Mich. 334.

VI. SPECIAL AND STRUCK JURIES.

§ 74. In general.

Provisions as to special or struck juries, see Jud. Act, chap. XVIII, §§ 43-49; Comp. L. 1915, §§ 12615-12621.

¶ 257. When a jury of persons possessing a particular qualification is required, the proper course is for the order of the court to direct the summoning of such persons.—Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519.

VII. COMPENSATION AND SUSTENANCE AND PRIVILEGES.

§ 75. In general; statutory provisions.

Payment or tender of jury fees, see ante § 12.
Jury fee as taxable costs, see Costs § 63.
Fees of jurors as county charge, see Counties §§ 31-33.
Jurors' per diem as taxable costs in criminal cases, see Indictment § 508, ¶ 2408.
Per diem compensation and mileage of jurors, see Jud. Act, chap. II, § 147; Comp. L. 1915, § 12216.
Fees of struck jurors, see Jud. Act, chap. XVIII, § 49; Comp. L. 1915, § 12621.
Provisions as to payment of jury fees, see Jud. Act, chap. XVIII, § 22; Comp. L. 1915, § 12594.

¶ 258. Act No. 236, Pub. Acts 1907, providing that jurors may recover compensation from the county does not repeal Comp. L. 1897, § 3408, which provides that in condemnation proceedings instituted by a city jurors shall be paid by the city.—Rorabacher v. Nichols, 165 Mich. 127.

§ 76. Amount of compensation.

¶ 259. Under Comp. L. 1897, § 11229, providing that "each grand and petit juror, and each talesman, shall be entitled to receive two dollars for each day's attendance, and one dollar for each half-day, upon any term of the circuit court, or before any court of record, on the trial of a cause," a juror is entitled to pay for the time actually in attendance upon the court, and not for any period during which he is excused from such attendance.—Emmer v. Bostock, 130 Mich. 341.

§ 77. Privilege from process or arrest.

¶ 260. The privilege of a juror from civil arrest is a personal one, going, not to the validity of the process, but to that of the service, and it may therefore be waived.—Brower v. Tatro, 115 Mich. 368.

¶ 261. One in attendance upon court as a juror impaneled and drawn for the current term is privileged from arrest on a civil warrant issued out of justice's court.—Brower v. Tatro, 115 Mich. 368.

JUST COMPENSATION to JUSTICE.

Cross-References.

Just Compensation—
For property condemned to public use, see Eminent Domain; Highways, II, B.
Compensation as measure of damages for wrong, see Damages.
Justice—
Fairness and justice as predicate for equitable relief, see Equity, I-IV; Specific Performance, III.
Disregard of technical and harmless errors in interest of substantial justice, see Harmless Error; Indictment, XV.
Crimes against justice, see Crimes, II; Indictment.
Contempts of courts, see Contempt.
Justices—
As judicial officers, see Judges; Courts; Justices of the Peace; Municipal Courts, I.

JUSTICES OF THE PEACE.

TREATS of the office of justice of the peace and of jurisdiction and procedure before justices in civil cases and the review of their judgments in the circuit courts by appeal or certiorari. Criminal jurisdiction and practice is treated in Indictment and Prosecution, III, XVIII; Arrest; Searches and Seizures.

Analysis.

I. THE OFFICE, ELECTION, TERM AND COMPENSATION (§§ 1-5).
II. DUTIES, POWERS, LIABILITIES AND IMMUNITIES (§§ 6-9).
III. CIVIL JURISDICTION, TRANSFERS AND CHANGE OF VENUE (§§ 10-30).
IV. PROCEDURE IN CIVIL CASES (§§ 31-184).
V. APPEALS IN CIVIL CASES (§§ 185-249).
VI. CERTIORARI IN CIVIL CASES (§§ 250-278).
VII. CRIMINAL JURISDICTION AND PROCEDURE (§ 279).

I. The office, election, term and compensation.

§ 1. In general; nature of tribunal.
§ 2. De facto justices.

§ 3. Termination or loss of office.
§ 4. Fees and compensation.
§ 5. ——Reporting fees to prosecuting attorney.

II. Duties, powers, liabilities and immunities.

§ 6. In general; disqualifications to act.
§ 7. Substitutions and powers of substitutes.
§ 8. Liabilities and judicial immunities.
§ 9. ——Remedies and procedure to enforce.

III. Civil jurisdiction, transfers and change of venue.

§ 10. Jurisdiction in general; nature, source and extent.
§ 11. Jurisdictional amount.
§ 12. ——Test or criterion of amount.
§ 13. ——Aggregation or division of claims.
§ 14. ——Actions on penal bonds.
§ 15. ——Effect of proving or recovering more than claimed.
§ 16. Territorial jurisdiction and township for suit.
§ 17. Jurisdiction in replevin.
§ 18. Jurisdiction to enforce liens.
§ 19. Actions against executors and administrators.
§ 20. Actions affecting or involving title to real property.
§ 21. Actions for obstructing highways and public easements.
§ 22. Actions by and against private corporations or members.
§ 23. ——Attachment and garnishment.
§ 24. ——Foreign corporations.
§ 25. Actions by and against municipalities and public boards and officers.
§ 26. Loss and divestiture of jurisdiction.
§ 27. ——Effect of unauthorized continuance or adjournment.
§ 28. ——Effect of discontinuance.
§ 29. Transfer or change to other justice.
§ 30. Removal or certification to circuit and retransfer by circuit.

IV. Procedure in civil cases.

A. In General.

§ 31. Manner and form; technicalities.
§ 32. Place for holding court.

B. Process and Appearance.

§ 33. Summons.
§ 34. ——Long or short summons.
§ 35. ——Indorsement of deputed authority to serve.
§ 36. Officer or person to make service.
§ 37. Mode, time and place for service.
§ 38. ——Service upon foreign corporations.
§ 39. Return and proof of service.
§ 40. ——Construction, conclusiveness and effect of return.
§ 41. Alias summons.
§ 42. Alterations or amendments of process.
§ 43. Civil warrants for arrest.
§ 44. Appearances in general.
§ 45. ——Special appearance.

§ 46. Appearance by and authority of attorney.
§ 47. ——Extent of authority.
§ 48. Operation of appearance to reinstate cause.
§ 49. Hour for appearance on return or trial day.
§ 50. Defects in process or service, objections and waiver of same.
§ 51. ——Waiver by appearance and joinder of issues.
§ 52. ——Objections to warrant or arrest thereunder and waiver of objections.
§ 53. ——Objections to appearance by attorney.

C. ATTACHMENT, GARNISHMENT AND REPLEVIN.

§ 54. Attachment in general.
§ 55. ——Necessity and sufficiency of affidavit or showing.
§ 56. ——Bond or security.
§ 57. ——Service of writ and inventory.
§ 58. ——Time to serve.
§ 59. ——Mode and manner of service.
§ 60. ——Return and proof of service.
§ 61. ——Return of substituted service.
§ 62. ——Return of service upon joint debtors.
§ 63. Appearance in attachment cases.
§ 64. Defects, objections and amendments in attachment cases.
§ 65. Dissolution of attachment and release of lien.
§ 66. Judgment in attachment.
§ 67. Liability and actions on attachment bonds.
§ 68. Garnishment in general.
§ 69. ——Property and claims subject to garnishment.
§ 70. ——Summons, service and return.
§ 71. ——Disclosure by garnishee.
§ 72. ——Purpose and conclusiveness of disclosure.
§ 73. ——Examination of garnishee.
§ 74. ——Payment by and release or discharge of garnishee.
§ 75. Proceedings for and judgment on garnishment.
§ 76. ——Basis for judgment and sufficiency of showing.
§ 77. Replevin and affidavit for writ.
§ 78. ——Security or bond for replevin.
§ 79. ——Service and return of writ.
§ 80. ——Quashal, dismissal or nonsuit.
§ 81. ——Pleading.
§ 82. ——Pleas and objections to the jurisdiction.
§ 83. ——Judgment and enforcement of judgment.
§ 84. ——Liability and actions for restitution.
§ 85. ——Liability and actions on bonds.

D. PARTIES AND PLEADING.

§ 86. Parties and joinder.
§ 87. Pleadings in general.
§ 88. Declaration or statement of demand.
§ 89. ——Conformity to process.
§ 90. ——In actions on contracts; common and special counts.
§ 91. ——In actions on torts.
§ 92. ——Joinder and misjoinder of counts.
§ 93. ——Splitting causes and demands.
§ 94. Demurrer and objections for sufficiency.

§ 95. Pleas in abatement and to jurisdiction.
§ 96. Pleas and notices of defenses.
§ 97. ——Denials of execution of instruments.
§ 98. Pleading set-off and recoupment.
§ 99. Entry of pleas on docket.
§ 100. Objections to pleas and notices.
§ 101. Bill of particulars.
§ 102. Filing of instruments sued on.
§ 103. Interpretation and construction of pleadings.
§ 104. Issues and variance.
§ 105. ——Involving title to land.
§ 106. ——Admissions of claim of title.
§ 107. ——Admission of sworn account.
§ 108. Amendments.
§ 109. ——Amendments to insert names of defendant partners.
§ 110. ——Time for amendment.

E. CONTINUANCES, DISCONTINUANCES AND DISMISSALS.

§ 111. Continuance or adjournment; grounds, affidavit and showing.
§ 112. Adjournment to perfect attachment service.
§ 113. Postponement by consent.
§ 114. Period for which adjournment allowed.
§ 115. Waiver of objections to improper adjournment.
§ 116. Operation and effect of continuance or adjournment.
§ 117. Docketing and entering adjournment.
§ 118. Discontinuances.
§ 119. Dismissal or nonsuit.
§ 120. ——Setting aside or vacating dismissal.

F. TRIAL AND JUDGMENT.

§ 121. Calling and notice of trial.
§ 122. Juries; demand, allowance and waiver.
§ 123. ——Tender or payment of fees.
§ 124. ——Summoning, selection and challenges.
§ 125. ——Deliberations and conduct of jury.
§ 126. Burden of proof, presumptions and evidence.
§ 127. Offer and introduction, reception and order of proofs.
§ 128. Verdicts and findings.
§ 129. ——Construction, conclusiveness and effect.
§ 130. New trials.
§ 131. Judgment on trial of issues.
§ 132. ——Amount and terms.
§ 133. ——Upon joint obligations or demands.
§ 134. ——Time for rendition.
§ 135. Defaults and judgments thereon.
§ 136. Judgment on confession.
§ 137. ——Cognovit or admission of indebtedness.
§ 138. ——Against persons jointly liable.
§ 139. Dockets and entering and recording judgments.
§ 140. Requisites and sufficiency of docket entries.
§ 141. ——Jurisdictional recitals in general.
§ 142. ——Recitals as to appearance and defaults.
§ 143. ——Recitals as to continuances and adjournments.
§ 144. ——Recitals as to costs.
§ 145. ——Showing to sustain judgment on confession.

§ 146. ——Certainty, construction and interpretation.
§ 147. Modification and amendment of judgment or entry.
§ 148. Conclusiveness and effect of judgment and docket.
§ 149. ——Verity of docket; evidence to contradict, vary or explain.
§ 150. Collateral attack on judgment.
§ 151. ——Defects in notice, process or appearance.
§ 152. ——Failure to wait an hour for appearance.
§ 153. ——Objections in respect to continuances and adjournments.
§ 154. ——Amount or terms of the judgment.
§ 155. ——Errors in taxation of costs.
§ 156. Presumptions upon collateral attack.
§ 157. Payment, satisfaction or discharge of judgment.
§ 158. ——Entry of payment or discharge.

G. Costs and Fees.

§ 159. In general; parties liable or entitled.
§ 160. Amounts and items.
§ 161. ——Taxable fees and expenses.
§ 162. Determination of right and taxation of costs.
§ 163. Effect of allowance of excessive costs.
§ 164. Security for costs.

H. Executions and Transcript of Judgment.

§ 165. In general; right to and issuance of writ.
§ 166. ——Execution upon verdict.
§ 167. Contents and sufficiency of writ.
§ 168. Alias or renewed writs.
§ 169. Stay and security for stay.
§ 170. Levy of execution and release or abandonment of same.
§ 171. Execution sale.
§ 172. Return on execution.
§ 173. Docket entries as to execution.
§ 174. Defects, errors and irregularities in execution.
§ 175. Transcripts of judgments in general.
§ 176. ——Affidavit or execution and other prerequisites.
§ 177. ——Form and sufficiency of transcript.
§ 178. ——Signing and certifying.
§ 179. Entering and docketing transcript in circuit court.
§ 180. ——Affidavit of amount due.
§ 181. ——Time to file or docket.
§ 182. Operation and effect of transcript and proceedings thereon.
§ 183. ——Irregularities in transcript.
§ 184. ——Vacating or striking from files.

V. Appeals in civil cases.

A. Jurisdiction, Right and Grounds of Appeal.

§ 185. In general; decisions reviewable.
§ 186. Appealable amount involved.
§ 187. Right to appeal and waiver or estoppel.
§ 188. Propriety and scope of special appeal.
§ 189. Appellate jurisdiction and powers.

B. TAKING AND PERFECTING APPEAL.

§ 190. In general; parties to the appeal.
§ 191. Time to take and perfect.
§ 192. Stipulations extending time for appeal.
§ 193. Power of court to allow belated appeal.
§ 194. ——Necessity of excusing delay and sufficiency of showing.
§ 195. Application for leave and notice thereof.
§ 196. Affidavit for appeal.
§ 197. ——Supplying and amending affidavits for appeal.
§ 198. Bond, recognizance or undertaking.
§ 199. ——Supplying and amending bond.
§ 200. Payment of fees as condition to appeal.
§ 201. Return or record, contents and sufficiency.
§ 202. ——Objections and waiver.
§ 203. ——Amendment, completion or perfection.
§ 204. ——Statement in lieu of return.
§ 205. ——Fees for making return.
§ 206. Objections and exceptions below, and saving same for review.
§ 207. Assignments and specifications of errors.
§ 208. Effect of appeal, transfer and stay.
§ 209. ——In garnishment cases.

C. PROCEDURE AND REVIEW ON APPEAL.

§ 210. Change of venue and transfer of cause.
§ 211. Appearance and submission to jurisdiction.
§ 212. Parties.
§ 213. Pleadings; declaration.
§ 214. ——Plea or notice.
§ 215. ——Affidavits of nonexecution or special defense.
§ 216. Amendments.
§ 217. ——Of declaration.
§ 218. ——Of plea or notice, set-off or recoupment.
§ 219. ——Introducing new cause of action, issues or claims.
§ 220. ——In garnishment cases.
§ 221. ——In replevin cases.
§ 222. Dismissal, discontinuance or abandonment.
§ 223. ——Grounds and occasions and propriety.
§ 224. ——Effect of dismissal or discontinuance.
§ 225. ——Proceedings after discontinuance.
§ 226. ——Reinstating appeal.
§ 227. Calendaring cause and notice of trial.
§ 228. Objections available and issues on appeal.
§ 229. ——Waiver of special appeal by plea or trial to merits.
§ 230. ——Disregard for formal defects or nonprejudicial errors.
§ 231. Hearing and scope of review.
§ 232. ——Matters available on special appeal.
§ 233. ——Intendments and presumptions on record and return.
§ 234. ——Verity, conclusiveness and effect of return.
§ 235. ——Evidence in aid of jurisdictional showing.
§ 236. ——Evidence on merits.
§ 237. Instructions.
§ 238. Decision and judgment.
§ 239. ——Upon special appeal.
§ 240. ——On appeal in replevin.

§ 241. ——Judgment against sureties on appeal bond for costs.
§ 242. ——Conclusiveness and effect.
§ 243. Costs on appeal and inclusion in judgment.
§ 244. ——Parties entitled or liable.
§ 245. ——Discretion of judge.
§ 246. ——Amount and items.
§ 247. ——Costs upon dismissal or discontinuance.

D. Liabilities on Appeal Bonds.

§ 248. In general.
§ 249. Enforcement of bond and procedure thereon.

VI. Certiorari in civil cases.

§ 250. In general; nature and grounds.
§ 251. Appeal or certiorari as appropriate remedy.
§ 252. Judgments and proceedings reviewable.
§ 253. ——Effect of pendency of appeal.
§ 254. Propriety of common-law certiorari.
§ 255. Procedure for writ.
§ 256. Notice and affidavits and showing and allowance of writ.
§ 257. Bond or security.
§ 258. Form, sufficiency and service of writ.
§ 259. Return and contents thereof.
§ 260. ——Further or amended return.
§ 261. Waiver or cure of errors.
§ 262. Hearing and scope of review in general.
§ 263. ——Restriction to matters considered below.
§ 264. ——Restriction to matters specifically assigned and presented in return.
§ 265. ——Rulings on evidence and sufficiency thereof.
§ 266. Construction and effect of return.
§ 267. ——Conclusiveness of return; evidence to contradict, vary or explain.
§ 268. ——Presumptions and burden of proof.
§ 269. ——Conflict between return and affidavits of error.
§ 270. ——Conflict between return and docket entries.
§ 271. Judgment on certiorari.
§ 272. ——Inclusion of judgment against sureties.
§ 273. Grounds for reversal or quashal; technical and harmless errors.
§ 274. Conclusiveness and effect of judgment on certiorari.
§ 275. Rights and remedies of parties upon reversal.
§ 276. Costs on certiorari.
§ 277. Rehearings.
§ 278. Certiorari bonds and liability thereon.

VII. Criminal jurisdiction and procedure.

§ 279. In general.

Municipal courts inferior to circuit courts and not the same as justices of the peace though with similar jurisdiction and practice, see Municipal Courts.

I. THE OFFICE, ELECTION, TERM AND COMPENSATION.

General law of officers, see Officers.
General law of elections, see Elections.

Constitutional provision for justices of the peace, see Const. art. VII, §§ 15, 16.
Justice as constitutional office beyond legislative power to abolish, see Constitutional Law §§ 261, 262.
List of justices to be transmitted by county clerk, and notice by clerk to secretary of state of changes by death or otherwise in offices of justices, see Comp. L. 1915, § 2436.

§ 1. In general; nature of tribunal.

Justice a representative of state in exercise of judicial powers, see post § 16.

Different justices in the same city not members of same court, see post ¶ 15.

Duties, powers, liabilities and immunities, see post II.

Jurisdiction of justices, see post III.

¶ 1. Within its constitutional limits, a justice court is an ordinary court of justice. —Goodsell v. Leonard, 23 Mich. 374.

§ 2. De facto justices.

¶ 2. Local Acts 1887, No. 533, chap. 3, § 1 (charter of the city of Sault Ste. Marie) providing that the officers of the city should consist of the mayor and among others three justices of the peace to be elected by the voters of the whole city was amended by Local Acts 1901, No. 468, substituting one for three justices of the peace, and this later statute also contains certain provisions for the holding of court in certain emergencies by the probate judge or circuit court commissioner, on account of which the constitutionality of the amendatory act is attacked. A justice of the peace elected under the latter act is an officer de facto at least, and his right to hold the office is not open to collateral attack.—Thompson v. Couch, 144 Mich. 671.

¶ 2a. One who has been elected to the office of justice of the peace, and has entered upon the duties thereof, is an officer de facto, notwithstanding his failure to file his oath of office and bond within the time prescribed by law.—People v. Payment, 109 Mich. 553.

§ 3. Termination or loss of office.

Constitutional term and changing term, see Constitutional Law § 270.

Power to continue in office after territorial change vacating office, see Constitutional Law § 266.

¶ 3. That a justice placed by change of boundaries beyond his township loses his office, see People ex rel. Berry v. Geddes, 3 Mich. 70.

¶ 3a. Under Battle Creek Charter, Local Acts 1887, No. 428, §§ 4, 6, which provides for the election of justices of the peace, and for their qualification, within five days after receiving notice of their election, by taking the constitutional oath and giving security in the same manner as is required by law of justices of the peace of townships, but which fixes no time for their term of office to begin or end, the terms of office of such justices are controlled by How. St. § 719, which provides that the terms of justices of the peace shall commence on the 4th of July next succeeding their election.—Hulbert v. Henry, 105 Mich. 211.

¶ 3b. The provision of the Detroit justices' act that justices elected thereunder shall hold office "for four years" is not invalid as denying the constitutional right to hold over.—Messenger v. Teagan, 106 Mich. 654.

¶ 3c. A justice of the peace in a city cannot be legislated out of office before his term expires by an act reincorporating the city, and reducing the number of justices therein. —Gratopp v. VanEps, 113 Mich. 590.

§ 4. Fees and compensation.

Taxation of court fees as costs, see post § 161.

Payment of fees as condition to appeal, see post § 200.

Fees in criminal cases as county charge, see Counties § 33.

Claims against county for services, items and proofs, see Counties ¶ 198.

Refusal of auditor general to pay justice's bill against the state, see State of Michigan.

Provisions as to fees of justices, see Jud. Act, chap. LXXVII, § 1; Comp. L. 1915, § 14397.

¶ 4. Where the charter of a city provides that a justice of the peace therein shall receive a stated annual salary in full compensation for all services performed, a justice of the peace in such city is not entitled to fees for services in trying criminal cases. —Harrison v. Board Sup'rs Chippewa Co., 151 Mich. 91.

¶ 5. Where a justice of the peace performs an inquest under Comp. L. 1897, § 11828, he is subject to section 11240, prohibiting a justice from taking other or greater fees than those allowed by law.— Edwards v. Auditor General, 161 Mich. 639.

¶ 6. Where a justice of the peace performs an inquest under Comp. L. 1897, § 11828, his fees are those allowed by section 11223, for a coroner's inquest.—Edwards v. Auditor General, 161 Mich. 639.

¶ 7. An item of nine dollars in a bill of a justice of the peace for holding an inquest one day and four half-days is an illegal charge.—Edwards v. Auditor General, 161 Mich. 639.

§ 5. ——Reporting fees to prosecuting attorney.

¶ 8. Comp. L. 1897, § 1062, providing that a justice's statement of fees in his report to the prosecuting attorney shall give "an itemized statement of the officers' and court fees and how the same was disbursed, if paid to such justice" requires itemized statement of fees of officers whether such fees are paid by the party arrested or not, the absence of a comma after "fees" not justifying a construction that such fees must be itemized only where paid to the justice.—Hutchinson v. Board of Ionia Co. Sup'rs, 130 Mich. 62.

¶ 9. Failure of a justice of the peace to comply with Comp. L. 1897, § 1062, requiring itemized statement of fees in his report to the prosecuting attorney results in forfeiture of such fees.—Hutchinson v. Board of Ionia Co. Sup'rs, 130 Mich. 62.

II. DUTIES, POWERS, LIABILITIES AND IMMUNITIES.

§ 6. In general; disqualifications to act.

Nature of tribunal, see ante § 1.
Justices de facto, see ante § 2.
Duty to report fees to prosecuting attorney, see ante § 5.
Acts by special justices, see post § 7.
Nature and extent of justices, jurisdiction and rules controlling its exercise, see post § 10.
Justice as representative of state in exercise of judicial powers, see post § 16.
Transfer of case where justice disqualified, see post § 29.
Interest of justice as ground for plea in abatement, see post § 95.
Justices' powers statutory, see also post § 141.
Issuance of process, see post IV, B.
Power to take acknowledgements, and territorial limits of power, see Acknowledgments §§ 4, 5.
Power to issue warrants, examine prisoners and admit to bail, see Arrest, Commitment and Bail.
Power to punish for contempt, see Contempt § 19.
Power and authority to take depositions, see Depositions § 8.
Proof of execution of instrument witnessed by justice before whom suit on it is brought, see Evidence ¶ 2667.
Judicial notice in other courts of matters relating to justices, see Evidence § 20.
Waiver of plea to disqualification of justice by bias to try misdemeanor, see Indictment ¶ 2967.
Mandamus to compel action by justices, see also Mandamus.
Compelling attendance of witnesses, see Witnesses, I.
Provisions as to powers of justices, see Jud. Act, chap. LXVI, § 3; Comp. L. 1915, § 14168.
Provisions as to matters disqualifying justice, see Jud. Act, chap. LXVI, § 8; Comp. L. 1915, § 14173.
Provisions as to preserving filing and keeping books and papers, see Jud. Act, chap. LXXX, §§ 1-10; Comp. L. 1915, §§ 14449-14458.

¶ 10. Suit upon a promissory note cannot be brought before a justice to whom it has been indorsed for collection, as he thereby becomes the plaintiff's agent therefor.—West v. Wheeler, 49 Mich. 505.

¶ 11. A justice to whom a claim has been sent for collection with instructions that it is not to be sued until he has notified defendant that it will be sued if not paid is not, where he has not advised with the plaintiff (Comp. L. 1871, § 5372) disqualified from hearing the case, as an interested party, even though he is to be compensated whether suit is brought or not.—Moon v. Stevens, 53 Mich. 144.

¶ 12. A justice of the peace is not disqualified from trying an action of assumpsit because he had written defendant to the effect that he had the claim for collection, and had been instructed to inform him that suit would be brought if it was not paid.—Taggart v. Waters, 115 Mich. 638.

¶ 13. A prosecuting attorney who makes a complaint for a violation of the local option law in his county before a justice of the peace who is his brother-in-law is not a party to the suit, within the meaning of How. St. §§ 6822, 7245, which prohibit any judge or justice of the peace from hearing any case where he is related to either party in certain degrees by marriage or blood.—People v. Whitney, 105 Mich. 622.

¶ 14. A justice of the peace cannot be both magistrate and counsel in a cause.—Stensrud v. Delamater, 56 Mich. 144.

¶ 15. A justice of the peace in the city of Grand Rapids is not disqualified from acting as attorney in the circuit court in an appeal from the other justice, inasmuch as (Local Acts of 1893, No. 306, as amended) the two justices hold separate courts and have distinct records, and are not members of a single court.—Grady v. Sullivan, 112 Mich. 458.

§ 7. Substitutions and powers of substitutes.

¶ 16. A warrant issued by a township justice of the peace while serving in lieu of a city justice during the latter's absence and disability is not void on its face because of the fact of issuance after the city justice's return to the city, but before return to his office, no unreasonable time having elapsed after his actual return to the city.—People v. De Meaux, 194 Mich. 18.

¶ 17. The provision of the charter of the city of Lansing providing that in case of disability, etc., of a justice of the peace of the city, such justice may call in any justice of the peace of the township of Lansing to act in his stead, is not objectionable as allowing the justice to delegate his authority to another, since the justice of the township already had authority to act as a justice and the provision in effect simply enlarges his jurisdiction.—People v. De Meaux, 194 Mich. 18.

§ 8. Liabilities and judicial immunities.

Appearance as waiver of right of substitute to try cause, see post ¶ 218.
Charges imputing misconduct to the justice as constituting libel, see Libel and Slander ¶ 72.

Inferior court as trespasser in enforcing judgments beyond jurisdiction, see also Courts ¶ 306.
Liability for arrest under unconstitutional statute, see False Imprisonment § 14.
Exemption of justices of the peace from jury service, see Jury § 18.
Attachment and imprisonment of justices to compel return to appeal, see Jud. Act, chap. LXXVIII, § 16; Comp. L. 1915, § 14416.

¶ 18. A justice of the peace who, without authority, issued an execution against a surety, was held liable as a trespasser.—Shadbolt v. Bronson, 1 Mich. 85.

¶ 19. A magistrate who issues a warrant for arrest where he has no jurisdiction is liable.—Johnson v. Maxon, 23 Mich. 129.

¶ 20. A justice's action in passing upon an attorney's authority to appear where the opposite party is absent is judicial, and he is not personally liable for not requiring a showing under oath.—Morton v. Crane, 39 Mich. 526.

¶ 21. Payment by a garnishee defendant upon a particular demand is in the hands of a justice as payment on that demand only, and on no other; and the justice is not liable for the money received to one who holds a judgment against the same garnishee on another demand.—Dane v. Holmes, 41 Mich. 661.

¶ 22. A justice's docket entry that money paid into court is in satisfaction of a particular judgment cannot make him liable to the judgment creditor for the money, if it was actually meant to be applied upon a different judgment.—McDonald v. Lewis, 42 Mich. 135.

¶ 23. A justice of the peace who holds valid an ordinance that is unconstitutional, and who enforces thereunder the arrest and imprisonment of a violator of such ordinance, is not liable to an action.—Brooks v. Mangan, 86 Mich. 576.

¶ 24. A justice of the peace who, having jurisdiction, has issued a warrant of arrest, cannot be held liable to the person arrested upon the ground that his action was corrupt or malicious in motive; nor is he rendered civilly liable by his having included in a sentence compensation to the complaining witness, that being at most an error of judgment.—Curnow v. Kessler, 110 Mich. 10.

¶ 25. The inclusion in a sentence imposed by a justice of the peace of compensation to the complaining witness is an error of judgment at most, and does not render the justice liable to the accused in a civil action.—Curnow v. Kessler, 110 Mich. 10.

¶ 26. A justice of the peace acting under authority granted him by the city charter to try and punish offenders for violations of the city ordinances, is not liable to one tried and punished for vagrancy, though the warrant and complaint did not sufficiently state the offense.—Gardner v. Couch, 137 Mich. 358.

¶ 27. A justice of the peace is not responsible as a trespasser, for reaching an erroneous decision as to the sufficiency of a complaint in a matter over which he has jurisdiction, and hence is not liable, though a warrant is issued on an insufficient complaint.—Gardner v. Couch, 137 Mich. 358.

§ 9. ——Remedies and procedure to enforce.

Summary order to compel reception of criminal complaint, see Arrest § 12.

¶ 28. A justice of the peace who receives from a constable and applies upon a judgment depreciated bank bills is liable to the judgment creditor for so much money in an action for money had and received. The creditor is not confined to his remedy upon the bond of the justice.—Welch v. Frost, 1 Mich. 30.

¶ 29. A justice of the peace who receives from a constable and applies upon a judgment depreciated bank bills is liable to the judgment creditor for so much money in an action for money had and received, and he is equally liable though the bills were current when received, and become depreciated in the hands of the justice after he has tendered them to the creditor.—Heald v. Bennett, 1 D. 513.

¶ 30. A declaration against a justice and his sureties for money received by him as justice must set forth the grounds of the specific liability in a special count; and the general counts added thereto are surplusage.—Dane v. Holmes, 41 Mich. 661.

¶ 31. In an action against a justice of the peace for issuing an execution against a man's property it is not enough for him to show that he was such justice, and then rely upon the execution and the judgment, unless it appears that the necessary proceedings have been taken to give him jurisdiction of the parties and the cause, or rightfully to call his official powers into action.—Clark v. Axford, 5 Mich. 182.

III. CIVIL JURISDICTION, TRANSFERS AND CHANGE OF VENUE.

§ 10. Jurisdiction in general; nature, source and extent.

Matters disqualifying justice to act, see ante § 6.
Powers of special justices, see ante § 7.
Liability of justice for acts done without jurisdiction, see ante §§ 8, 9.
Territorial jurisdiction of justice, see post § 16.
Jurisdiction in replevin, see post § 17.
Jurisdiction in actions involving ways, easements or title to land, see post §§ 20, 21.

Jurisdiction to enforce liens, see post § 18.
Jurisdiction of actions against executors and administrators, see post § 19.
Jurisdiction to issue attachment, see also post § 54.
Jurisdiction in attachment and garnishment against corporations, see post § 23.
Power to subject to garnishment claims pending before another justice, see post § 69.
Pleas to the jurisdiction in replevin, see post § 82.
Jurisdiction of actions by and against municipalities and public officers, see post § 25.
Jurisdiction of actions on labor debts, see post ¶ 86.
Jurisdiction of actions by and against school districts, see post § 25.
Loss of jurisdiction, see post § 26.
Liberal construction of justices' proceedings, see also post § 31.
Process to obtain jurisdiction, see post IV, B.
Necessity and sufficiency of affidavit in replevin to confer jurisdiction, see post § 77.
Jurisdiction to issue civil warrants for arrest, see post § 43.
Jurisdiction to render judgment on confession, see also post §§ 136, 145.
Jurisdiction to render judgment by default, see post § 135.
Appearance as submission to jurisdiction, see post §§ 44, 45, 51.
Special appearance to object to jurisdiction, see post § 45.
Plea to the jurisdiction, see post § 95.
Motion to quash as method of raising jurisdictional question, see post ¶ 419.
Evidence to show want of jurisdiction, see post § 149.
Jurisdictional recitals in docket, see post § 141.
Power of justice after entry of judgment, see post § 147.
Jurisdiction and powers of circuit court on appeal from justice's court, see post § 189.
Special appeal to review jurisdictional questions, see post § 188.
Raising objections to jurisdiction for first time on appeal, see post § 206.
Sufficiency of assignments on appeal to raise question of justices' jurisdiction, see post § 207.
Constitutional jurisdiction, see Const. art. VII, § 16.
Legislation affecting constitutional existence and jurisdiction of justices, or extending their jurisdiction to encroach on other courts, see Constitutional Law, §§ 51-65.
Power of legislature to change jurisdiction under the constitution, see Constitutional Law, § 56.
Assumption of power to declare law unconstitutional, see Constitutional Law § 43, ¶ 207.
Prohibition against assumption of jurisdiction, see Prohibition.
Necessity and sufficiency of jurisdictional showing in record of inferior courts, see also Courts § 79.
Presumptions as to jurisdiction, see Courts § 80.
Disability to issue habeas corpus, see Habeas Corpus § 6.
Jurisdiction and judicial powers in forcible entry and summary proceedings, see Forcible Entry § 13.
Judgment against executor as inconclusive for want of jurisdiction of action, see Former Adjudication ¶ 24.
Evidence admissible to show excess of jurisdiction, see also False Imprisonment ¶ 129.
Provisions as to jurisdiction, see Jud. Act, chap. LXVI, §§ 1-9; Comp. L. 1915, §§ 14166-14174.

¶ 32. A justice's court, being one of inferior and limited jurisdiction, is confined strictly to the powers conferred upon it, and its proceedings must appear to be within those powers.—Wight v. Warner, 1 D. 384; Clark v. Holmes, 1 D. 390; Shadbolt v. Bronson, 1 Mich. 85.

¶ 33. Within the limits provided for by the state constitution, justices' courts are ordinary courts of justice, not within the rigid rules applying to courts of special and limited jurisdiction proceeding contrary to the course of the common law; and all courts take judicial notice of the extent of their jurisdiction and powers.—Goodsell v. Leonard, 23 Mich. 374.

¶ 34. Justices of the peace have constitutional jurisdiction in civil cases, and are necessary magistrates in cities, as well as outside of them; their criminal jurisdiction is given them by the general statutes, but is to some extent contemplated by the constitution, and in cities can only be restrained by the special municipal criminal jurisdiction.—Allor v. Wayne County Auditors, 48 Mich. 76.

¶ 35. The early cases to the effect that justices' courts are of limited and inferior jurisdiction, are confined strictly to the authority given them by statute, and should be held to the exact limits of jurisdiction prescribed by the statutes were decided when the constitution did not contain such provisions as art. VI, §§ 1 and 18, of the present constitution, and those cases do not now control.—Miller v. Smith, 115 Mich. 427.

§ 11. Jurisdictional amount.

In actions on penal bonds, see post § 14.
In replevin, see also post § 17.
Necessity of plea in abatement where sum in controversy excessive, see post ¶ 414.
Amendments in circuit court enlarging claim beyond justices' jurisdiction, see post § 219.
Excessive amount as ground for dismissal on appeal, see post § 223.
Judgment of circuit court on appeal limited to justices' jurisdictional amount, see post § 238.

Jurisdictional amount in circuit courts, see Courts §§ 47-49.
Provisions as to jurisdictional amount, see Jud. Act, chap. LXVI, § 1; Comp. L. 1915, § 14166.
Provisions as to amount in actions against school districts, see Jud. Act, chap. LXVI, § 2; Comp. L. 1915, § 14167.

¶ 36. R. S. 1846 gave to justices of the peace original, but not exclusive, jurisdiction in actions wherein the debt or amount demanded did not exceed $100.—Webb v. Mann, 3 Mich. 139.

¶ 37. Justices have no jurisdiction in actions founded on tort, where the damages exceed $100.—Wells v. Scott, 4 Mich. 347.

¶ 38. Justices have exclusive jurisdiction in civil matters where the debt or damages do not exceed $100.—Strong v. Daniels, 3 Mich. 466; Raymond v. Hinkson, 15 Mich. 118.

¶ 39. Assumpsit for breach of promise of marriage must be brought in justice's court if the damages claimed do not exceed $100.—Stortz v. Ingham Circuit Judge, 38 Mich. 243.

¶ 40. The statutory provision increasing to $500 the jurisdiction of Detroit justices of the peace, is authorized by Const. art. VI, § 18, which fixes that limit, and is not a denial of privileges and immunities of citizens because it does not apply to all the justices in the state.—Messenger v. Teagan, 106 Mich. 654.

¶ 41. How. St. § 6814 confers concurrent jurisdiction upon justices of the peace in all civil actions upon contracts where the debt or damages do not exceed $300; wherefore such justice has jurisdiction of an action for a breach of contract to deliver a telegraph message.—Carland v. Western Union Tel. Co., 118 Mich. 369.

§ 12. ——Test or criterion of amount.

In replevin, see also post §§ 17, 77.
General issue in replevin as admission of allegations as to jurisdictional amount, see post ¶¶ 352, 418.

¶ 42. Jurisdiction as to amount depends on the sum or damages claimed in the writ and declaration.—Strong v. Daniels, 3 Mich. 466.

¶ 43. Where the affidavit, writ and declaration in replevin set forth the value of the property as not exceeding $100, and defendant pleads the general issue, the fact that plaintiff's testimony on the trial shows the value to be greater does not oust the justice's jurisdiction.—Henderson v. Desborough, 28 Mich. 170.

¶ 44. The amount claimed in the ad damnum clause is what determines a justice's jurisdiction in assumpsit, and plaintiff may remit part of the amount proved, or abandon and omit to prove part of the amount embraced in his claim which exceeds $300.—Cilley v. Van Patten, 68 Mich. 80.

¶ 45. A justice's jurisdiction in garnishment does not depend on the amount due from the garnishee to the principal debtor, but upon the sum claimed to be due from the latter to the former.—Wetherwax v. Paine, 2 Mich. 555.

§ 13. ——Aggregation or division of claims.

Splitting causes and demands, see post § 93.
Combining claims to make up jurisdictional amount for circuit court, see Courts § 49.
Combining claims to make jurisdictional amount for garnishment in circuit court, see Garnishment § 8.

¶ 46. The debtor in two bills of goods may be sued upon both in one action; but if, by suing on each separately, the creditor may bring his actions in a justice's court he has this alternative in case he prefers to adopt it.—Stickel v. Steel, 41 Mich. 350.

§ 14. ——Actions on penal bonds.

Covenant on bonds, see post ¶ 131.
General laws as to bonds, see Bonds.

¶ 47. Debt lies in justice's court on a bond whereof the penalty is less than $300.—Gray v. Stafford, 52 Mich. 497.

¶ 48. Debt does not lie before a justice upon a bond conditioned otherwise than for the payment of money, and the penalty of which exceeds $300.—Bishop v. Freeman, 42 Mich. 533; Wayne Probate Judge v. Dean, 52 Mich. 387.

¶ 49. How. St., § 6820, permitting an action of covenant to be brought in justice's court where there shall be a bond with a penalty exceeding $150, is confined to bonds conditioned for the payment of a sum of money not exceeding $150, or for the payment of instalments of money not exceeding in the aggregate $150.—Bishop v. Freeman, 42 Mich. 533; Gray v. Stafford, 52 Mich. 497.

¶ 50. Assumpsit will lie in justice's court upon an ordinary money bond for any amount within its jurisdiction that may be necessary to indemnify for the breach thereof, whatever the penalty of the bond may be.—Durfee v. Dean, 52 Mich. 387.

¶ 51. Debt upon a probate bond whereof the penalty exceeds the jurisdictional limit of justices' courts cannot be brought therein.—Durfee v. Dean, 52 Mich. 387.

¶ 52. A bond not conditioned for the payment of any particular sum of money by the obligor, and containing no covenants, cannot be sued in justice's court if the penalty exceeds $300.—Bishop v. Freeman, 42 Mich. 533.

¶ 53. An action of covenant lies in a justice's court on a money bond no matter how large the penalty if given to secure the payment of $150 or less (Comp. L. 1871, § 5255; How. St., § 6820); but if the penalty does not exceed the sum of $300, an action of debt will lie in such court.—Gray v. Stafford, 52 Mich. 497.

¶ 54. An action of debt on a township treasurer's bond with a penalty of more than $300, cannot be brought in justice's court.—Township of Richland v. Cliff, 131 Mich. 628.

¶ 55. How. St., § 6988, which authorizes an action of assumpsit upon a constable's bond in favor of the party entitled to moneys collected by the constable on execution, and which he refuses to pay over, and a recovery in said suit of the amount of the execution, with interest from the time of the rendition of the judgment upon which the execution was issued, is not limited in its operation to bonds in a penalty not exceeding $300, of which a justice has jurisdiction, but confers jurisdiction upon justices of the peace up to the statutory limit, regardless of the amount of the penalty of the bond upon which the action is brought.—Montgomery v. Martin, 104 Mich. 390.

¶ 56. Assumpsit upon the statutory bond given for the protection of laborers and materialmen by one who has contracted to build a public building, is maintainable in justice's court by one whose claim is within the justice's jurisdiction, although the penalty of the bond is in excess of such jurisdiction.—People for use of Holmes v. Cotteral, 115 Mich. 43.

§ 15. ——Effect of proving or recovering more than claimed.

Loss or divestiture of jurisdiction, see post § 26.
Amount of judgment, see post § 132.
Provisions as to remission of excess over justices' jurisdiction, see Jud. Act, chap. LXXI, § 9; Comp. L. 1915, § 14280.

¶ 57. Where the affidavit and declaration in replevin allege the value as less than $100, testimony by plaintiff on appeal that the value is greater does not oust jurisdiction.—Dinnen v. Baxter, 18 Mich. 457.

¶ 58. Where the affidavit, writ and declaration set forth the value of the property as not exceeding $100, and defendant pleads the general issue, the fact that plaintiff's testimony on the trial shows the value to be greater does not oust the justice's jurisdiction.—Henderson v. Desborough, 28 Mich. 170.

¶ 59. Where, in a justice's court, plaintiff obtains a verdict for $100, in a case where double damages are allowed by statute, doubling such verdict does not oust jurisdiction.—Rosevelt v. Hanold, 65 Mich. 414.

§ 16. Territorial jurisdiction and township for suit.

Effect of changing boundaries of township, see ante ¶ 3.
Place for holding court, see post § 32.
Territorial limits of justices' process, see also post § 37.
To issue attachment, see also post § 54.
Nonresidence of parties as ground for collateral attack, see post § 150 et seq.
General law as to venue, see Venue.
Provisions as to place of bringing suit, see Jud. Act, chap. LXVI, §§ 10, 11; Comp. L. 1915, §§ 14175, 14176.

¶ 60. A justice in exercising his judicial powers represents the state rather than his township and accordingly Local Acts 1871, No. 449, authorizing a justice of Hamlin township residing in the village of Eaton Rapids to sit in that portion of the village which lies within Eaton Rapids township, is valid.—Faulks v. People, 39 Mich. 200.

¶ 61. Under How. St., § 6818 and Laws 1885, Act No. 118, giving jurisdiction to a justice in a city formed from "a township or townships next adjoining" that in which plaintiff or defendant resides, or one in a city lying in such a township, a justice of the peace of a city which lies within the limits of a township that corners with the township where defendant resides has jurisdiction of a suit against such defendant, though the city itself neither adjoins nor corners with such township.—Jebb v. Chicago & G. T. R. Co., 67 Mich. 160.

¶ 62. A justice has no jurisdiction of the person where neither of the parties, though resident in the state, lives in his county; but if any one of the parties on either side lives there, suit will lie in any township of the county where he resides and happens to be (How. St., § 6819).—Hall v. Shank, 57 Mich. 36.

¶ 63. Attachment proceedings to enforce a logger's lien cannot be brought in a township where neither of the parties resides and which does not adjoin a township where either of them resides; How. St., § 6818, which governs in this particular, not being enlarged by Pub. Acts 1887, No. 229, §§ 5 and 9 by giving justices jurisdiction of such proceedings "within their respective counties."—Burlingame v. Marble, 95 Mich. 5.

¶ 64. Under How. St., § 6819, providing that actions in justice's court may, where plaintiffs are all nonresidents of the county, or defendant is a nonresident of the county, "be brought before any justice of the township or city where such plaintiffs or defendants, or either of them, may be," it is not essential that either plaintiff or defendant, at the time of taking out the summons, be personally present in the township.—Weaver v. Rix, 109 Mich. 697.

¶ 65. A nonresident plaintiff need not bring his suit in the justice's court of the township of the defendant's residence or in an adjoining township, but may bring it in any township in the county where he has obtained personal service of summons on the defendant.—American Copying Co. v. Stern, 148 Mich. 281.

¶ 66. Comp. L. 1897, § 707, providing that every action in justice court shall be brought in the county where one of the plaintiffs reside and section 708 providing that if the plaintiffs be all nonresidents of the county or if the defendants be all nonresidents of the county, then action may be commenced in any township where they may be, do not apply where both the plaintiff and the defendant are nonresidents of the state; action may be commenced in any township.—Sleight v. Swanson, 127 Mich. 436.

§ 17. Jurisdiction in replevin.

Determination of jurisdictional amount, see also ante § 12.
Procedure in replevin, see post § 77 et seq.
Pleas and objections to the jurisdiction in replevin, see post § 82.
General issue as admission of justices' jurisdiction in replevin, see post ¶ 418.

¶ 67. Under R. S. 1838 justices had no jurisdiction of action of replevin.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302.

¶ 68. A justice has jurisdiction of an action of replevin against an administrator since the action of replevin comes within the exception to the statute. (How. St., §§ 6815, 5902.)—Singer Mfg. Co. v. Benjamin, 55 Mich. 330.

¶ 69. Justices of the peace have jurisdiction of the statutory action of replevin for beasts distrained, etc.—Pistorius v. Swarthout, 67 Mich. 186.

¶ 70. As replevin is not an action to recover "debt or damages," a statute conferring upon Detroit justices original jurisdiction in all civil actions wherein the debt or damages do not exceed $100, and concurrent jurisdiction in all such actions, except in certain specified cases, wherein the debt or damages do not exceed $500, the jurisdiction of such justices in replevin is left to be governed by the general statute (How. St., § 6856), which fixes the limit at $100.—Bostwick v. Wayne Circuit Judge, 115 Mich. 363.

¶ 71. It seems that the question of a justice's jurisdiction in replevin, as depending on value, is closed by the affidavit for the writ.—Henderson v. Desborough, 28 Mich. 170.

¶ 72. A justice's jurisdiction in replevin is limited to cases where the value of the property does not exceed $100; and the value as stated in the affidavit is presumptively the real value until otherwise shown in subsequent proceedings.—Carew v. Matthews, 41 Mich. 576.

¶ 73. An affidavit for replevin does not give a justice jurisdiction if it does not state that the value of the property sought does not exceed $100.—Sager v. Shutts, 53 Mich. 116.

¶ 74. The jurisdiction of a justice, in replevin, attaches according to the claim in the affidavit; and, having attached, continues to judgment, at least up to five hundred dollars.—Chilson v. Jennison, 60 Mich. 235.

¶ 75. A justice's jurisdiction in replevin does not depend upon the value in fact as it may ultimately appear, but upon the value alleged.—Burt v. Addison, 74 Mich. 730.

§ 18. Jurisdiction to enforce liens.

Township in which proceedings to be brought, see ante § 16.
Attachment to enforce log lien, see also post ¶ 1125.
Judgment in attachment to enforce log lien, see post § 66.
Territorial jurisdiction to issue attachment under log lien law, see post ¶ 232.
Costs in proceedings to enforce log liens, see post ¶¶ 688, 695.
General law as to liens, see Liens.

¶ 76. Though section 10764 of Comp. L. 1897 has no specific words giving justices' courts jurisdiction of such combined log lien actions, it being contained only in section 10762, yet justices' courts have jurisdiction.—Craig v. Brown, 171 Mich. 256.

§ 19. Actions against executors and administrators.

Jurisdiction of replevin against administrator, see ante ¶ 68.
Raising question of jurisdiction for first time on appeal, see post § 206.

¶ 77. Comp. L. 1871, § 5250, How. St., § 6815, prohibiting suit in justice's court against an executor or administrator as such, precludes suit in that tribunal upon the representative's liability for any charge against the estate, whether he is sued in his official or in his individual capacity.—Basom v. Taylor, 39 Mich. 682.

§ 20. Actions affecting or involving title to real property.

Actions for obstructing highways and public easements, see post § 21.
Transfer to circuit court where title involved, see post § 30.
Notice of defense of title, see post § 96.
Issues as to title to land, see post §§ 105, 106.
Pleading title for first time on appeal to circuit court, see post ¶ 989.
Absence of summons and return from court room on return day, see post ¶ 1119.

Power of municipal court where title to land is in dispute, see Municipal Courts § 9.
General law as to real property, see Real Property.
Provisions as to jurisdiction of real actions or actions respecting easements, see Jud. Act, chap. LXVI, § 4; Comp. L. 1915, § 14169.

¶ 78. No jurisdiction rests in a justice of the peace to try title to land.—Brooks v. Delrymple, 1 Mich. 145; Hart v. Hart, 48 Mich. 175; Gay v. Hults, 55 Mich. 327; Ostrom v. Potter, 71 Mich. 44; Le Blanc v. Kruger, 75 Mich. 561; Schlatterer v. Nickodemus, 50 Mich. 315; Orris v. Kempton, 105 Mich. 229; Ostrom v. Potter, 71 Mich. 44.

¶ 79. A justice has no jurisdiction to try a cause in which the title to land comes in question, unless plaintiff's title be admitted.—Stout v. Keyes, 2 D. 184; Brooks v. Delrymple, 1 Mich. 145; Gorham v. Withey, 52 Mich. 50.

¶ 80. Where no notice of title or other special defense has been given in an action of trespass quare clausum, the justice has jurisdiction.—Jacklin v. Soutier, 82 Mich. 648.

¶ 81. The title to lands is not open to settlement in a proceeding before a justice of the peace, and it is statutory that questions relating to farm bounds and highways can be dealt with in no way that may leave a doubt as to the meaning of the record.—Le Blanc v. Kruger, 75 Mich. 561.

¶ 82. An action will not lie before a justice for interrupting an easement.—Fowler v. Hyland, 48 Mich. 179.

§ 21. Actions for obstructing highways and public easements.

Actions respecting private ways and easements, see ante § 20.
Obstruction of highways generally, see Highways, XI.
Provisions as to jurisdiction of actions for disturbance of ways or easements, see Jud. Act, chap. LXVI, § 4; Comp. L. 1915, § 14169.

¶ 83. Trespass quare clausum, consisting in allowing logs to accumulate upon the premises of another in consequence of the closing up of a navigable stream upon which they were floating, is not an action for the legal obstruction of a public easement within the meaning of Comp. L. 1871, § 5250 (How. St., § 6815), and is cognizable by a justice.—Williamson v. Haskell, 50 Mich. 364.

¶ 84. The proviso in How. St., § 6815, that justices of the peace may have jurisdiction in actions for damages resulting from obstructions to highways, confers only a concurrent jurisdiction with the circuit court.—Knorr v. Macomb Circuit Judge, 78 Mich. 168.

¶ 85. Comp. L. 1897, § 704, providing that no justice of the peace shall have cognisance of real actions, does not apply to an action brought by a commissioner of highways, under Comp. L. 1897, § 4157, for the obstruction of a highway; but jurisdiction in such action is expressly conferred on justices by Comp. L. 1897, § 9799.—La Barre v. Bent, 154 Mich. 520.

§ 22. Actions by and against private corporations or members.

Jurisdiction of actions against public corporations, see post § 25.
Competency of officer of corporation to serve summons where corporation a party, see post ¶ 153.
Jurisdiction to render judgment on confession, see post ¶ 571.
Provisions as to jurisdiction of actions against corporations, see Jud. Act, chap. LXVI, § 5; Comp. L. 1915, § 14170.

¶ 86. Laws 1877, Act No. 118, § 35 (How. St., § 4110), provides that in actions on labor debts the clerk of the court shall indorse directions on the execution. Held to refer to the officer issuing the execution, and not to exclude the justices' courts in which the justice is his own clerk from jurisdiction of such actions.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 281.

§ 23. ——Attachment and garnishment.

Jurisdiction of garnishment of public corporations, see post § 25.
Sufficiency of affidavit for garnishment against a corporation, see post § 68.
Disclosure by garnished corporation, see post § 71.

¶ 87. Whether corporations were garnishable in justices' courts under Comp. L. 1871, § 5290, quære.—Hewitt v. Wagar Lumber Co., 38 Mich. 701.

¶ 88. Under the justices' act of 1855, justices had no jurisdiction to issue attachments against foreign corporations.—Brigham v. Eglinton, 7 Mich. 291.

§ 24. ——Foreign corporations.

Form of process to bring in foreign corporation, see post ¶¶ 146, 147.
Service of justice's process upon foreign corporations, see post § 38.
Service in attachment proceedings against foreign corporations, see post § 59.

¶ 89. The statute (How. St., §§ 8145, 8146) authorizing and regulating suits against foreign corporations does not apply to justices' courts.—Reath v. Western Union Telegraph Co., 89 Mich. 22.

¶ 90. Since Laws 1873, Act No. 155 (How. St., §§ 4362-4368) whatever may have been the case before, justices of the peace have no jurisdiction over foreign insurance companies.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

¶ 91. Under Comp. L. 1897, § 10442, governing actions against foreign corporations, a justice of the peace has jurisdiction to entertain an action against a foreign insurance company.—McLean v. Prudential Ins. Co., 130 Mich. 591.

§ 25. Actions by and against municipalities and public boards and officers.

Provisions as to jurisdiction of actions against municipal corporations, see Jud. Act, chap. LXVI, § 4; Comp. L. 1915, § 14169.

Provisions as to jurisdiction against school districts, see Jud. Act, chap. LXVI, § 2; Comp. L. 1915, § 14167.

Provisions as to actions by county, see Jud. Act, chap. LXVI, § 6; Comp. L. 1915, § 14171.

¶ 92. Justices have jurisdiction of suits brought by municipal corporations.—Hart v. Township of Port Huron, 46 Mich. 428; City of Eaton Rapids v. Houpt, 63 Mich. 371.

¶ 93. Under Comp. L. 1857, § 3700, justices have no jurisdiction of suits against municipal corporations.—Root v. Mayor, 3 Mich. 433; Gurney v. City of St. Clair, 11 Mich. 202.

¶ 94. As How. St., ch. 283, treated a commissioner of highways as a corporation, and as How. St., § 6861, excludes suits against municipal corporations from the jurisdiction of justices of the peace, it follows that prior to the highway act (Laws 1887, Act No. 312) a justice had no jurisdiction of a suit against a highway commissioner.—Commissioner of Highways of Township of Garfield v. Supervisor of Township of Springfield, 77 Mich. 228.

¶ 95. Justices of the peace have no jurisdiction of actions against municipalities (How. St., § 6861).—Mason v. City of Muskegon, 109 Mich. 456.

¶ 96. A township can sue in justice's court.—Hart v. Township of Port Huron, 46 Mich. 428.

¶ 97. A justice of the peace has no jurisdiction of an action against a township by a taxpayer to recover taxes paid under protest, since a township is a municipal corporation, of actions against which a justice of the peace has no jurisdiction.—Haines v. Township of Chase, How. N. P. 130.

¶ 98. Comp. L. 1871, § 6463, How. St., § 8055, does not allow garnishment before justices of municipal corporations, which includes school districts.—Marathon School Dist. No. 4 v. Gage, 39 Mich. 484.

¶ 99. The statute (Comp. L. 1871, § 3681, How. St., § 5107) which in some cases allows school districts to be sued in justices' courts, held not applicable to the Board of Education of Port Huron.—Seeley v. Port Huron Board of Education, 39 Mich. 486.

¶ 100. Whether the recorder of the city of Grand Haven has jurisdiction, under the charter of that city, as an ex officio justice of the peace, to try an action for the tuition of nonresident pupils, brought by a school district, no part of which is within the city, quære.—Thompson v. Crockery School District No. 7, 25 Mich. 483.

§ 26. Loss and divestiture of jurisdiction.

Effect of proving or recovering more than is claimed, see ante §§ 12, 15.

Upon transfer of cause to another justice, see post § 29.

Effect of defective bond in attachment to oust jurisdiction, see post § 64.

Effect of failure to render judgment within statutory period, see post § 134.

Effect of nonresident's failure to file security for costs, see post § 164.

Jurisdiction divested by filing transcript in circuit court, see post § 182.

Upon failure to serve inventory in attachment, see post ¶ 248.

¶ 101. When a defendant in a justice's court does not appear jurisdiction may be lost by the plaintiff failing to appear.—Charles Bakrow & Co. v. Totten, 146 Mich. 57.

¶ 102. Under Comp. L. 1897, § 782, which provides that where the title of land comes in question, the defendant may give notice thereof upon the return day or any adjourned day, and section 784 providing for a bond and for payment of fees, upon which the cause shall be transferred to the circuit court, a justice does not lose jurisdiction by the giving of notice before the return day, and the filing of a bond and deposit of an amount for costs which is insufficient to pay the costs accrued up to that time.—Hinchman v. Spaulding, 137 Mich. 655.

¶ 103. In an action on a note before a justice of the peace where neither plaintiff nor defendant appear within one hour after the time when the summons is returnable, under § 836, Comp. L. 1897, How. 2nd Ed., § 12284, it is the duty of the justice to enter a judgment of nonsuit and a judgment entered thereafter for plaintiff is void since the justice has lost jurisdiction.—Scott v. Brown, 175 Mich. 447.

¶ 104. A justice's jurisdiction is ousted where the attachment is dissolved because of a defective affidavit.—Borland v. Kingsbury, 65 Mich. 59; overruling Hills v. Moore, 40 Mich. 210.

§ 27. ——Effect of unauthorized continuance or adjournment.

Operation of appearance to reinstate cause, see post § 48.

Effect of failure of parties to appear after adjournment in replevin, see post ¶ 345.

Operation and effect of continuance or adjournment, see also post § 116.
Jurisdiction not lost by continuing case from day to day, see post ¶ 503.
Waiver of objections to improper adjournment, see post § 115.
Collateral attack for errors as to continuances and adjournments, see post § 153.

¶ 105. A justice of the peace has no authority, except under How. St., § 6903, which only allows an adjournment not exceeding six days, to adjourn a cause against defendant's objection without a showing under oath (How. St., § 6899); and such adjournment discontinues the suit.—Scullen v. George, 65 Mich. 215.

¶ 106. A justice loses jurisdiction of the subject-matter by adjourning the suit on his own motion where all the parties live outside the county and there are joint defendants, only part of whom have been personally served, and none of whom have appeared (How. St., § 6903).—Hall v. Shank, 57 Mich. 36.

¶ 107. An adjournment by a justice, on his own motion, in the absence and without the consent of the defendant, at any other time than on the return day of the writ, is a discontinuance of the cause.—Stadler v. Moors, 9 Mich. 264.

¶ 108. An adjournment of a cause in a justice's court for more than four days after the trial is completed, for the purpose of rendering judgment, deprives the justice of jurisdiction.—Brady v. Taber, 29 Mich. 199.

¶ 109. An unauthorized adjournment ousts a justice of jurisdiction.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344.

¶ 110. Under How. St., § 6903, providing that a justice of the peace may adjourn a cause, under certain circumstances, "at the time of the return" of process therein, an adjournment on the return day, without a return having been made, is unauthorized, and the subsequent proceedings are void.—Harbour v. Eldred, 107 Mich. 95.

¶ 111. Under Comp. L. 1897, § 1017, providing that a garnishee may deliver a fund claimed by a third party to the justice who shall serve notice on the claimant to appear and maintain his claim and that the justice shall adjourn the suit not less than ten nor more than thirty days, a justice loses jurisdiction of the cause by continuing it more than 30 days until the fund is due and not serving notice on the claimant until some days subsequent to that date.—Hagen v. Johnson, 126 Mich. 695.

¶ 112. A second adjournment in a justice's court in the absence of the defendant is ordinarily fatal to the court's jurisdiction, unless upon a motion supported by an oath.—Beam v. Reynolds, 144 Mich. 383.

¶ 113. Where the justice's return shows that a second adjournment was had, with defendant and counsel present and no objection was made thereto until after the plaintiff had gone, this must be considered as an adjournment by consent, and the justice did not lose jurisdiction because there had been no showing on oath under Comp. L. 1897, § 791.—Beam v. Reynolds, 144 Mich. 383.

¶ 114. A justice of the peace by adjourning proceedings for attachment for one day, contrary to the provisions of section 736, Comp. L. 1897, thereby loses jurisdiction.—Knack v. Berlin, 150 Mich. 550.

¶ 115. Where a justice postpones a case without requiring the showing on oath called for by statute, he is ousted of jurisdiction.—Adams & Ford Co. v. Cullen, 159 Mich. 669.

¶ 116. Where a justice of the peace grants two adjournments to a plaintiff over the objections of defendant, and without requiring plaintiff to make a showing of necessity as provided for under section 791, Comp. L. 1897, the justice thereby is ousted of jurisdiction of the case.—Chamberlain Medicine Co. v. Vander Veen, 165 Mich. 24.

¶ 117. Under § 791, Comp. L. 1897, where a justice of the peace postpones a trial for more than three months without a written stipulation signed by the parties or their attorneys he loses jurisdiction of the case.—Smith v. Kistler, 174 Mich. 367.

¶ 118. Where a justice of the peace has lost jurisdiction by continuing the case more than three months after return day without a written stipulation, a voluntary appearance of the defendants gives jurisdiction to render judgment, but where defendants do not appear and judgment is entered it is void.—Smith v. Kistler, 174 Mich. 367.

¶ 119. Where a justice adjourned a cause until 2 o'clock of a certain day, without stating whether it would be in the morning or afternoon, he did not lose jurisdiction, since no reasonable uncertainty as to the intention could be entertained.—Bernstein v. Thayer, 157 Mich. 625.

§ 28. ——Effect of discontinuance.

See also post § 118, ¶ 848.
Discontinuances in justice's court generally, see post § 118.

¶ 120. By discontinuing, the plaintiff deprives the justice of the peace of all jurisdiction in the case, since judgment of nonsuit must then be entered, and a new suit may thereafter be begun, although there is no formal entry of the nonsuit.—Burkart v. Blaumann, 142 Mich. 41.

§ 29. Transfer or change to other justice.

Matters disqualifying justice to act, see ante § 6.

Transfer to circuit court to try title, see post § 30.
Transfer of cause on appeal, see post § 210.
Raising on certiorari question of jurisdiction after transfer, see post § 263.
Provisions as to transfer of case, see Jud. Act, chap. LXVIII, §§ 6-9; Comp. L. 1915, §§ 14211-14214.

¶ 121. The provision in the justice's act (Comp. L. 1857, § 3776, How. St., § 6937) for the removal of a cause from before a justice who is a material witness applies only to suits at law, and has no application to a proceeding for the opening of a village street.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

¶ 122. As to transfer of replevin suit after abatement by justice's removal from the township, see Kidder v. Merryhew, 32 Mich. 470.

¶ 123. Until all the statutory conditions to the removal of a cause to another justice for trial have been complied with, e. g., payment or offer of payment of the fees for making the transcript, as well as the costs of suit, the justice before whom the cause was commenced retains jurisdiction.—Oakley v. Dunn, 63 Mich. 494.

§ 30. Removal or certification to circuit and retransfer by circuit.

Jurisdiction of justice to try title to land, see ante § 20.
Proceedings to remove cause as divesting justice's jurisdiction, see also ante ¶ 102.
Jurisdiction to try title to real property, see ante § 20.
Issues as to title to land, see post §§ 105, 106.
Provisions as to transfer of cause where title in issue, see Jud. Act, chap. LXIX, §§ 18-23; Comp L. 1915, § 14232-14237.

¶ 124. Where, in an action in justice's court for trespass to land, the declaration avoids claim of title, but plaintiff's evidence shows that the locus was in the public highway, plaintiff to sustain his action must show title to the adjoining land, and when he does so, if defendant does not admit it, the title to land is necessarily in issue, and How. St., § 6895 requires the justice to certify the cause to the circuit court.—Ostrom v. Potter, 71 Mich. 44.

¶ 124a. When the case has been certified to the circuit court because the evidence developed a question of title to land, the case stands in the circuit subject to the same rules as to proof and disproof as though originally begun there; and the failure to give notice below that title would come in issue does not stand as an admission of plaintiff's title excluding evidence on that issue in the circuit.—Rawson v. Finlay, 27 Mich. 268.

¶ 125. Where a declaration in trespass in justice's court seeks treble damages for the cutting down and carrying away, against the leave of plaintiff, the owner and occupant in possession thereof, of certain trees standing upon the plaintiff's land, and where, after the case has been certified to the circuit court for trial on a plea of title, the real point in controversy turns out to be whether plaintiff gave defendant permission to enter and cut, which is found in defendant's favor, the court properly certifies that the title to land does not come in question.—Dolahanty v. Lucey, 101 Mich. 113.

¶ 126. Plaintiff, to prove his cause of action, testified that he was the owner of the land described in the declaration, and had been in actual possession thereof for sixteen years; that said land abutted on a public highway; that the alleged trespass consisted in removing, from the half of said highway adjoining said land, a load of dirt, by direction of the highway commissioner. Held, that plaintiff was not in the actual possession of the land where the trespass was committed, it being part of a public highway, and that he could only recover by showing title to the adjoining land, and, having sought to make such proof of title, and defendant not admitting it, the case should have been certified to the circuit court.—Orris v. Kempton, 105 Mich. 229.

¶ 127. It is immaterial that a justice after receiving an affidavit for a transfer of the cause under How. St., § 6397, gave as a reason for refusing it that the plaintiff by affidavit denied the ground assigned for removal and the defendant offered no further evidence on the subject, where a further and sufficient reason appears by the justice's return on certiorari, to wit, that the costs and transcript fee were not tendered.—Oakley v. Dunn, 63 Mich. 494.

¶ 128. On receiving an affidavit for a transfer of the cause under How. St., § 6937, stating that the justice has advised with the plaintiff in respect to the subject-matter of the case, he has no authority to receive counter-affidavits denying the averred ground.—Oakley v. Dunn, 63 Mich. 494.

¶ 129. Though the defendant before a justice of the peace on presenting a proper affidavit for removal of the case may remain passive until the justice taxes the costs, which under How. St., § 6937, must be paid; yet if the justice omits to tax them request to do so should be made and fees tendered in order to put the justice in default and fix the error.—Oakley v. Dunn, 63 Mich. 494.

¶ 130. In an action begun in a justice's court, the defendant, by pleading the general issue and title to the land and thereupon causing the case to be certified to the circuit court, which has jurisdiction, waives any possible lack of jurisdiction by the justice.—La Barre v. Bent, 154 Mich. 520.

IV. PROCEDURE IN CIVIL CASES.

A. IN GENERAL.

Jurisdiction of justice of the peace, see ante III.
Township in which suit to be brought, see ante § 16.
Loss of jurisdiction by unauthorized continuance or adjournment, see ante § 27.
Proceedings in attachment, see post § 54 et seq.
Proceedings in garnishment, see post § 68 et seq.
Proceedings in replevin, see post § 77 et seq.
Parties and pleadings, see post § 86 et seq.
Process and appearance, see post IV, B.
Trial and judgment, see post IV, F.
Continuances and adjournments, see post §§ 111-117.
Dismissal, discontinuance and nonsuit, see post §§ 118-120.
Dockets and record of judgment, see post §§ 139-147.
Conclusiveness of judgment and collateral attack, see post § 148 et seq.
Payment and discharge of judgment, see post § 157.
Abatement of action by removal from township, see also Abatement ¶ 28.
Distraint proceedings, see Animals §§ 7-9, 11; Replevin.
Proceedings under fish and game laws, see Fish and Game § 9.
Proceedings for arrest of fraudulent debtors, see Civil Arrest, II.
Proceedings for removal of highway obstructions, see Highways § 187 et seq.

§ 31. Manner and form; technicalities.

Nature of jurisdiction exercised and construction of powers of justices, see also ante § 10.
Disregard of technical defects on appeal, see post § 230.
Technical errors as ground for reversal on certiorari, see post § 273.
Availability on certiorari of error as to form of action, see post ¶ 1217.
Provisions as to forms of action, see Jud. Act, chap. LXVI, § 12; Comp. L. 1915, § 14177.

¶ 131. How. St., § 6820, allowing covenant to be brought in justices' courts on the conditions of bonds, is confined to money bonds securing a sum or sums not exceeding $150; but where covenants exist in bonds, actions of covenant, in lieu of actions for the penalty, still lie (How. St., § 7746).—Bishop v. Freeman, 42 Mich. 533; Gray v. Stafford, 52 Mich. 497.

¶ 132. The proceedings of justices should be liberally viewed with respect to regularity and form.—Wight v. Warner, 1 D. 384.

¶ 133. Technicality and form are neither expected nor required in the proceedings of justice's courts.—Kinyon v. Fowler, 10 Mich. 16.

§ 32. Place for holding court.

Place for holding courts generally, see Courts, II.
Provisions as to place of holding court, see Jud. Act, chap. LXVI, §§ 1, 9; Comp. L. 1915, §§ 14166, 14174.

¶ 134. A justice is not required to hold courts always at one place; he may hold them sometimes in one place and sometimes in another, according to temporary convenience.—Faulks v. People, 39 Mich. 200.

¶ 135. A justice who lives in a village that lies in two townships may be authorized by statute to hold court in that part of the village that lies in the township he does not live in.—Faulks v. People, 39 Mich. 200.

¶ 136. Where a cause was called in a barroom and adjourned to an adjoining room in the same house for trial, the justice having no knowledge that spirituous liquors were sold there, and there being no proof of such sales, judgment was not invalidated by Sess. L. 1842, p. 135, § 4, How St., § 6821, forbidding holding such court in a barroom, etc.—Savier v. Chipman, 1 Mich. 116.

B. PROCESS AND APPEARANCE.

Process issued by special justice, see also ante § 7.
Civil warrants for arrest, see post § 43.
Process to acquire jurisdiction in attachment, see post § 54 et seq.
Writs of replevin, see post § 77 et seq.
Writs of execution, see post IV, H.
Collateral attack for defects in process, see post § 151.
General law as to process, see Process.
Provisions as to process and appearance, see Jud. Act, chap. LXVII, §§ 3-28; Comp. L. 1915, §§ 14180-14205.

§ 33. Summons.

Alias summons, see post § 41.
Amendments and alterations of process, see post § 42.
Defects in and objections to process, see post § 50.
Summons in garnishment, see post § 70.
Conformity of declaration to summons, see post § 89.
Appeal from dismissal for defect in summons, see post ¶ 777.
Proof as to time when summons delivered for service, see post ¶ 540.
Process to support judgment on confession, see also post § 137.
Judgment against joint defendant not served, see post ¶ 557.
Docket entries as to process, see post § 140 et seq.
Provisions as to manner of commencing suits, see Jud. Act, chap. LXVII, § 3; Comp. L. 1915, § 14180.

¶ 137. A justice's summons is not issued if merely delivered to the plaintiff and kept in his hands.—Howell v. Shepard, 48 Mich. 472.

¶ 138. A justice's summons in a suit commenced under How. St., § 7317, authorizing its service in an adjoining county where the demand sued on is principally for labor or services, must be directed to an officer of that county.—Antcliff v. June, 81 Mich. 477.

¶ 139. The direction of a writ commonly issued by a justice of the peace to "any constable" suffices when the writ is served by an authorized officer other than a constable having a constable's powers.—Fleugel v. Lards, 108 Mich. 682.

¶ 140. A justice's summons, returnable not less than two days from its date, is defective if made returnable on the second day after it was issued.—Everts v. Fisk, 44 Mich. 515.

¶ 141. A summons issued by a justice of the peace in an action of trespass on the case and claiming more than $100 is void on its face.—Adams v. Butler, How. N. P. 144.

§ 34. ——Long or short summons.

Objections to long or short process, see post § 50.
Special appearance to object to long summons, see post ¶ 196.
Joinder of issue as waiver of objection to long summons, see post ¶ 223.
Validity of judgment in garnishment based on short instead of long summons, see post ¶ 305.
Short summons where long one proper as ground for dismissal, see post ¶ 511.
Entry of default upon long summons where short summons proper, see post ¶ 565.
Presumptions on appeal from issuance of long summons, see post § 233.
Presumptions on certiorari from issuance of long summons, see post ¶ 1184.

¶ 142. Under Comp. L. 1857, §§ 3665, 3668, 3669, a long summons only is authorized if both plaintiff and defendants are residents of the county, but if either is a nonresident, a short summons is proper.—Allen v. Mills, 26 Mich. 123.

¶ 143. Under Comp. L. 1871, § 5264 (How. St. § 6829), if the defendant be a nonresident of the county, the summons "may" be either long or short; but by section 5265 (6830), if the defendant be a nonresident, the summons "shall," that is must, be a short one.—Moore v. Vrooman, 32 Mich. 526.

¶ 144. A short summons issued by a justice of the peace under How. St., § 6829, need not show upon its face that plaintiff is a nonresident of the county.—Stoll v. Padley, 98 Mich. 13; Hawkins v. Castenholz, 171 Mich. 85.

¶ 145. In garnishee proceedings in a justice court where plaintiff and the principal defendant are residents of the same county, a judgment against the principal defendant is void where he is served with a short summons, returnable in five days, since a long summons, returnable in not less than six nor more than twelve days, is necessary.—Katt v. Swartz, 199 Mich. 51.

¶ 146. An action will lie in justice's court against a foreign express company doing business in the county (How. St., § 3723); and if plaintiff is a nonresident, defendant may be brought in by short summons. The statute providing no different process for a corporation than for an individual.—Gallagher v. American Express Co., 56 Mich. 13.

¶ 147. Under section 719, Comp. L. 1897, it is imperative that in a suit in a justice's court against a foreign corporation, a short summons shall be used.—Wells v. United States Fidelity & Guaranty Co. of Baltimore, Md., 160 Mich. 213.

§ 35. ——Indorsement of deputed authority to serve.

Mode of service of process, see post § 37.
Service by private person, see post § 36.

¶ 148. The authority of a private person to serve a justice's summons must be indorsed thereon or no jurisdiction is acquired.—Rasch v. Moore, 57 Mich. 54; Union Mut. Fire Ins. Co. v. Page, 61 Mich. 72.

¶ 149. In indorsing upon a summons a deputation of authority to serve it the justice need not certify that the person authorized is of age and not interested in the suit. It is not presumed that he selects an incompetent person.—Buel v. Duke, 38 Mich. 167.

§ 36. Officer or person to make service.

Officer to whom summons directed, see ante § 33.
Indorsement on process of authority to serve, see ante § 35.
Defects in and objections to service, see post § 50.
Service by wrong person as ground for collateral attack, see post § 151.
Fees for serving process taxable as costs, see post § 161.
Person or officer to levy justices' execution, see post § 170.
Testimony of justice on appeal to show service by competent person, see post ¶ 1018.
General powers, functions and duties of sheriffs and constables, see Sheriffs and Constables.

¶ 150. The "competent person" empowered by How. St. § 6827, to serve a justice's summons must appear to have been personally designated by the justice, and must be selected upon sufficient inquiry to determine his competency.—Rasch v. Moore, 57 Mich. 54.

¶ 151. A justice of the peace who would authorize a private person to serve a summons must first assure himself that such person is not interested in the case.—Union Mut. Fire Ins. Co. v. Page, 61 Mich. 72.

¶ 152. Under How. St., § 7074, authorizing a justice of the peace to empower a private person to serve process, the request of a party and the fitness of the person designated must be shown in some responsible way.—Gadsby v. Stimer, 79 Mich. 260.

¶ 153. An officer of a corporation is not a disinterested person competent to serve a summons in a case in which the corporation is plaintiff.—Union Mut. Fire Ins. Co. v. Page, 61 Mich. 72.

¶ 154. The next friend of an infant plaintiff has no interest in the case that disqualifies his brother, who is appointed by the justice to serve the summons, from making service.—Kees v. Maxim, 99 Mich. 493.

§ 37. Mode, time and place for service.

Service of writs of attachment, see post § 57 et seq.
Service of summons in garnishment, see post § 70.
Service of writs of replevin, see post § 79.
Territorial limits of justice's jurisdiction, see ante § 16.
Indorsement of authority of private person to serve, see ante § 35.
Sufficiency of efforts to obtain service to warrant second summons, see post § 41.
Voluntary appearance after irregular or void service, see post § 44.
Defects in and objections to service, see post § 50.
Special appeal for want of due service of summons, see post ¶ 795.
Availability on certiorari of objection that process served on wrong person, see post ¶ 1082.
Mode of serving corporations and proper officers and agents to be served as representatives of corporations, see Process, II, B.
Computation of time generally, see Time.
Statutes authorizing service of process against railroad companies upon conductors, etc., see Process II, B.

¶ 155. How. St., § 6827, provides that a justice's summons shall be served "at least six days before the time of appearance mentioned therein"; therefore a summons returnable February 18 is properly served February 12, since the day of service is excluded and the return-day included in computing the time.—People, for use of Chaddock v. Barry, 93 Mich. 542.

¶ 156. Under the ruling in Chaddock v. Barry, 93 Mich. 542, a summons issued from justice court against a nonresident on the 7th day of the month served upon the same day and returnable on the 10th day of the month one intervening day being Sunday confers jurisdiction upon the justice to render a valid judgment.—Lemon v. Hampton, 128 Mich. 182.

¶ 157. A short summons issued out of the justice court June 28, returnable July 1, and personally served June 29, is timely served.—Stewart v. Barber, How. N. P. 101.

¶ 158. Under the justice's act, process of a justice's court in civil cases is not authorized to run into another county, or to be served beyond the bailiwick.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

¶ 159. A justice's summons under Comp. L. 1871, § 6463, How. St., § 8055 in garnishment against a corporation cannot be served outside of the county.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400.

¶ 160. Service by the sheriff upon the president of a corporation, which is the owner of logs of an attachment issued by a justice of the peace under the log lien law, was sufficient notice to the corporation (Log Lien Law of 1887, § 6; Laws 1887, Act No. 229), though served outside the justice's county.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 161. Where a city charter authorizes the chief of police to serve any process which by law a constable may serve, and contains no words limiting said authority to the city or to particular cases, civil process out of justice's court may be served by him anywhere within the county.—Fleugel v. Lards, 108 Mich. 682.

§ 38. ——Service upon foreign corporations.

Justice's jurisdiction of actions against foreign corporations, see ante § 24.
Proof of service upon foreign corporations, see post § 39.
Amendment of return on appeal to show authority of insurance commissioner to accept service, see post ¶ 859.

¶ 162. The service upon foreign insurance companies provided by Comp. L. 1871, § 1683, How. St., § 4331 is not applicable to justices' courts.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

§ 39. Return and proof of service.

Loss of jurisdiction by adjournment on return day without return having been made, see ante ¶ 110.
Directions in summons as to time for return, see ante ¶ 140.
Alias summons upon return "not found," see post § 41.
Effect of alterations of return, see post § 42.
Return and proof of service of attachment, see post § 60.
Return of summons in garnishment, see post § 70.
Return of replevin writ, see post § 79.
Proof of service to support default, see also post § 135.
Return on justices' execution, see post § 172.
Amendment of docket to make it show date of return of service, see post ¶ 634.
Computation of time allowed for returning summons, see also Time.

¶ 163. The return to a summons in these words: "Served the within by reading personally,"—the statute requiring it to be served by reading it to defendant and delivering to him a copy,—is bad, and does not give the justice jurisdiction.—Campau v. Fairbanks, 1 Mich. 151.

¶ 164. Under R. S. 1846, p. 389, § 15, which required that summons should be served "by reading the same to defendant, and (if required by him) delivering a copy thereof," a return in these words, "Personally served true copies of the within by reading," properly dated and signed, was held sufficient.—Shaw v. Moser, 3 Mich. 71.

¶ 165. The following return of service of a justice's summons is prima facie sufficient to give the justice jurisdiction: "I hereby certify that I have personally served the within summons on the within named defendant, by reading the same and by giving a copy, on the 5th day of August, 1874."—Merrick v. Mayhue, 40 Mich. 196.

¶ 166. A justice acquires no jurisdiction over a defendant who does not appear, where the return to the summons only shows that it was served at his last place of residence upon a specified person described as a person of suitable age and discretion, but not as a member of the family, and does not show that it was served in the presence of some one of the family.—Laidlaw v. Morrow, 44 Mich. 547.

¶ 167. Where the return of service of a justice's summons is signed by the person making it as "under-sheriff," without specifying the county of which he is under-sheriff, and the return shows that the service was made in the city where the summons was issued, it sufficiently appears that he assumed to act as under-sheriff of the county in which said city is situated, and the official designation is sufficient.—Stoll v. Padley, 98 Mich. 13.

¶ 168. Act No. 321, Pub. Acts 1907, provides that certain foreign corporations admitted to do business in Michigan shall appoint the insurance commissioner to act as their attorney in accepting service. Held, that to give jurisdiction against such corporations, proof of such appointment must be made in a suit before a justice of the peace.—Wells v. United States Fidelity & Guaranty Co. of Baltimore, Md., 160 Mich. 213.

§ 40. ——Construction, conclusiveness and effect of return.

Construction and interpretation of judgment recitals, see post § 146.

¶ 169. Strict grammatical rules of construction are not to be applied in determining the fair import and meaning of a constable's return of a summons.—Shaw v. Moser, 3 Mich. 71.

¶ 170. A mistake in an officer's return by which a summons issued March 2, 1888, and returnable March 10, 1888, is shown to have been served March 3, 1886, corrects itself, and an ex parte judgment based thereon is not void.—Evans v. Calman, 92 Mich. 427.

¶ 171. Where, under a city charter, the marshal is ex officio chief of police, to which last-named officer power is given to serve any process which by law a constable may serve, a return of service made by the city marshal, as such, admits of no other conclusion than that the writ was served by the chief of police.—Fleugel v. Lards, 108 Mich. 682.

¶ 172. A defendant in a justice's summons may appear on the return day and by affidavit dispute the officer's return so as to show that the summons was served upon him more than twelve days before the return day.—Lane v. Jones, 94 Mich. 540.

§ 41. Alias summons.

Character and sufficiency of justice's summons, see ante § 33 et seq.

Adjournment of case to issue alias summons, see post ¶ 213.

Alias summons as commencement of another action, see post ¶ 1004.

¶ 173. A justice has no jurisdiction to issue a second summons and follow it with an attachment unless the statutory requirements as to service have been complied with; e. g., in making a diligent effort to obtain personal service and in taking the full time allowed therefor before returning defendant "not found."—Isabelle v. Iron Cliffs Co., 57 Mich. 120.

¶ 174. Under Comp. L. 1897, § 720, which provides that when suit is brought upon a contract or obligation against two or more joint defendants, one of whom shall not be found in the county where suit is brought, the justice may "at any time within four days from the return day of the writ by which such action was commenced, issue one or more alias writs of summons," alias writs may be issued upon the return day of the summons. (Reed v. Parker, 134 Mich. 68 distinguished.)—Brown v. Knop, 137 Mich. 284.

¶ 175. Under Comp. L. 1897, § 720, which provides that when suit is brought upon a contract or obligation against two or more joint defendants, one of whom shall not be found in the county where suit is brought, the justice may at any time within four days from the return day of the writ, issue one or more alias writs of summons, it is not essential to the jurisdiction of the justice that the officer's return should state that he had used due diligence to obtain personal service, and had left a copy of the summons at defendant's last place of abode.—Brown v. Knop, 137 Mich. 284.

¶ 175a. Plaintiffs in a suit on a contract against three joint defendants caused a short summons to be issued. Due and regular service was had on two of them. A return showed that the third contracting defendant could not be found in the county. A request for an alias writ was granted on the day before the return day and after it was too late to make service under the original summons. On the return day of the original writ the justice continued the cause until the return day of the alias writ. Service was had on the third defendant and judgment entered by default of all the defendants upon the return day. The alias writ was made returnable on the fifth day after its issuance including the return day, and was served on the date it issued. Held, on certiorari to review order and judgment of the circuit court dismissing transcript proceedings based on justice court judgment and recalling an execution, that the transcript showed a good and valid judgment, and that the question as to whether or not the alias writ should have been returnable one day later could be raised after judgment only by the third defendant.—Hawkins v. Castenholz, 171 Mich. 85.

§ 42. Alterations or amendments of process.

Sufficiency of justices' summons, see ante § 33 et seq.

¶ 176. Any alteration of the date and return day of a justice's summons, not made by the justice himself, or by another in his presence and under his direction, renders the summons void.—Harring v. Allen, 25 Mich. 509.

¶ 177. The filling up or alteration by a sheriff, under the authority of the justice, of the teste and return day of a justice's summons is forbidden by How. St., § 590, and, being illegal, makes the summons void. —Garrison v. Hoyt, 25 Mich. 509.

¶ 178. One McClennahan brought suit in a justice's court in his own name, as guardian of one Osborne. Held, the justice properly allowed him to amend the summons so as to make Osborne the plaintiff suing by his guardian.—Osborne v. Osborne, 156 Mich. 413.

§ 43. Civil warrants for arrest.

Liability of justice for wrongful issuance of warrant, see ante § 8.

Objections and waiver thereof, see post § 52.

Conclusiveness of entries as to arrest, see post ¶ 640.

Objections for first time on appeal to sufficiency of affidavit for warrant, see post ¶ 865.

Civil arrest and bail in general, see Civil Arrest.

Presumption of jurisdiction to issue warrant of arrest, see also False Imprisonment ¶ 112.

¶ 179. A showing under oath of probable cause is required to justify the issue of a warrant for arrest for trespass.—Meddaugh v. Williams, 48 Mich. 172.

¶ 180. Where suit is begun before a justice of the peace for the wrongful conversion of goods belonging to the plaintiffs, authority to make an affidavit for a civil warrant is presumed if the affidavit is made by one of two plaintiffs who were cotenants of the property converted.—Deitz v. Groesbeck, 32 Mich. 303.

¶ 181. The constitutional prohibition against the issue of any warrant for arrest "without probable cause supported by oath or affirmation" makes it needful to set forth in the affidavit for the warrant the facts which support the belief that probable cause exists.—DeLong v. Briggs, 47 Mich. 624.

¶ 182. The affidavit required by Comp. L. 1857, § 3673, How. St., § 6834, for a justice's warrant of arrest under § 6832 must set forth facts and circumstances within the knowledge of the affiant, and not mere conclusions of law; and the facts must be such as in law tend to make out the cause of complaint.—Brown v. Kelley, 20 Mich. 27.

¶ 183. An affidavit showing that defendant has taken the property of the plaintiffs from the possession of their bailee and converted it to his own use is sufficient to authorize a justice to issue a civil warrant; the affidavit need not negative any possible defense, e. g., the bailee's consent, if that would be a defense.—Dietz v. Groesbeck, 32 Mich. 303.

¶ 184. A justice's warrant for arrest for trespass cannot issue on an affidavit which sets forth merely that affiant "has, as he has good reason to believe, a just cause of action against [defendant, etc.], against whom he applies for process by warrant for trespass committed by said [defendant] upon lands owned by this deponent, said lands being," etc.—DeLong v. Briggs, 47 Mich. 624; Maxwell v. Deens, 46 Mich. 35; Meddaugh v. Williams, 48 Mich. 172.

¶ 185. An affidavit for a civil warrant in a suit to recover penalty for bringing pauper into state is insufficient if it fails to state with positiveness the facts that warrant its issue, and to give the circumstances upon which is based affiant's "good reason" to believe that they exist.—Luton v. Newaygo Circuit Judge, 70 Mich. 152.

¶ 186. An affidavit for a civil warrant which sets forth that defendant represented to plaintiff that he was superintendent for a railroad contractor, and authorized to hire men and teams, and that he would pay $3.50 per day for the services of plaintiff and his team, and would furnish transportation to the place where the work was to be done, where he would be furnished accommodations at $1 per day, and that in reliance

upon such representations, which were averred to be false, plaintiff agreed to go to work at the price stated, and on arriving at the place designated was informed by a person claiming to be the contractor that defendant had no authority to hire men and teams, and that plaintiff would only be paid $2.25 per day, for which sum he worked for a time and then returned to his home, is sufficient to give the court jurisdiction.—Lamper v. Roberts, 83 Mich. 547.

¶ 187. An affidavit for a civil warrant in behalf of a township for trespass upon land, in which affiant states that he is the agent of the township, and makes the affidavit in its behalf, and that the township has been the owner in fee of the land on which the trespass is claimed to have been committed for more than ten years last past, sufficiently shows affiant's authority to make the affidavit in behalf of the township, and its ownership of the real estate trespassed upon.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

§ 44. Appearances in general.

Appearance in justices' attachment, see post § 63.
Nonappearance of parties in replevin as ground for dismissal, see post § 80.
Authority of attorney to appear, see post § 46.
Appearance to obtain continuance to which parties have consented, see post ¶ 491.
Loss of jurisdiction by nonappearance of parties, see ante ¶ 101.
Plaintiff's failure to appear as operating a discontinuance, see post § 118.
Nonappearance as ground for dismissal or nonsuit, see § 119.
Defaults upon nonappearance of defendant, see post § 135.
Appearance to confess judgment, see post § 136 et seq.
Operation of appearance to reinstate cause, see post § 48.
Docket recitals as to appearance, see post § 142.
Irregularities as to appearance as ground for collateral attack, see post § 151.
Collateral attack for failure to wait an hour for appearance, see post § 152.
Appearance on appeal to circuit, see post § 211.
General law as to appearance, see Appearance.

¶ 188. The appearance of a stenographer to take the testimony of a party in a justice's court is not an appearance.—Hoben v. Citizens' Tel. Co., 176 Mich. 596.

¶ 189. Written request by plaintiff or his attorney, within an hour after return hour, that case be adjourned or held open, is an appearance, and gives jurisdiction.—Wagner v. Woodhouse, 92 Mich. 616.

¶ 190. A general demurrer by the defendant in justice's court to the plaintiff's declaration is a sufficient appearance to give the justice jurisdiction of defendant's person, which appearance is not defeated by the subsequent withdrawal of the demurrer.—Stevens v. Harris, 99 Mich. 230.

¶ 191. A general appearance before a justice cannot be considered a submission to the jurisdiction in attachment when taken in connection with defendant's motion to dismiss the writ for want of proper service.—Michels v. Stork, 44 Mich. 2.

¶ 192. A defendant may confer jurisdiction upon the court by a voluntary appearance after an irregular or void service upon him.—Dailey v. Kennedy, 64 Mich. 208.

§ 45. ——Special appearance.

See also ante ¶ 172.
Special appearance in attachment, see post § 63.
Waiver by appearance, see post § 51.
Pleas in abatement and to the jurisdiction, see post § 95.

¶ 193. Appearing in an attachment suit before a justice and moving to dismiss the writ for want of proper service is not a submission to jurisdiction.—Michels v. Stork, 44 Mich. 2.

¶ 194. A special appearance for the sole purpose of making an objection is not a submission to jurisdiction.—McLean v. Isbell, 44 Mich. 129.

¶ 195. Special appearance in a justice's court for the sole purpose of moving to quash a writ gives no right to thereafter serve the attorney with notice of an amendment of the constable's return.—Bushey v. Raths, 45 Mich. 181.

¶ 196. Defendant in a suit in a justice's court was served with a long summons. He mailed to the justice by registered letter an affidavit that he was a resident of another county and a motion to dismiss on this ground. Held, the justice erred in giving judgment to plaintiff upon defendant's nonappearance on the return day, since defendant's course amounted to filing a special appearance showing him entitled to a short summons.—Nelson v. Hillen, 164 Mich. 507.

¶ 197. A special appearance before a justice, in attachment proceedings, for the purpose of objecting to the jurisdiction, is not such an appearance, within the meaning of section 736, Comp. L. 1897, as will justify the justice in naming a day for the trial without making the statutory continuance.—Knack v. Berlin, 150 Mich. 550.

¶ 198. Where the docket shows that defendant appeared for the purpose of objecting to the jurisdiction, and that the justice proceeded to a trial on the merits, that is equivalent to a decision of the motion.—Wright v. Russell, 19 Mich. 346.

§ 46. Appearance by and authority of attorney.

Liability of justice for not requiring showing under oath of authority to appear, see ante ¶ 20.

Docket showing as to attorney's authority to appear, see post § 142.

Failure to prove authority of attorney as ground for collateral attack, see post § 151.

Authority of attorney to make affidavit for transcript of judgment, see post § 176.

Availability on special appeal of objection that attorney failed to prove authority to appear, see post ¶¶ 794, 1037.

Presumptions on certiorari as to showing of attorney's authority, see post ¶ 1180.

Conflict between affidavits and return on certiorari as to proof of attorney's authority, see post ¶ 1186.

Authority of attorneys generally, see Attorney.

¶ 199. Where the attorney appearing for plaintiff on the return day failed to prove his authority when requested by defendant, the action was defeated. The demand is not mere matter of form, but a right conferred by statute.—Spier v. M'Queen, 1 Mich. 252.

¶ 200. The requirement of Comp. L. 1871, § 5305, How. St., § 6870, that in actions before justices an attorney shall prove his authority in all cases where the opposite party does not appear is peremptory, and failure to make such proof is not a mere "omission or misrecital of an oath" cured by Comp. L. 1871, § 5479, How. St., § 7046.—Scofield v. Cahoon, 31 Mich. 206.

¶ 201. One cannot prove his authority to appear as attorney for a party in a suit before a justice by producing a letter from a third person asking him to appear; nor will the fact that the third person is himself a lawyer be sufficient to give authority if it does not distinctly appear that he is attorney for the party.—Westbrook v. Blood, 50 Mich. 443.

¶ 202. A writing instructing and empowering a specified attorney to appear on behalf of a corporation in all suits which may be brought in any justice's court in a certain city against it is sufficient to authorize him to appear for it in justice's court and to follow the case on appeal.—Norberg v. Heineman, 59 Mich. 210.

¶ 203. Under Comp. L. 1897, § 762, providing that authority to appear as attorney shall be proved when requested or when the opposite party shall not appear, failure to prove such authority will not reverse, where the defendant appeared specially by counsel in the justice court and remained throughout the trial without objection to counsel's authority.—Hirsh v. Fisher, 138 Mich. 95.

¶ 204. Comp. L. 1897, § 762, requiring proof, if demanded, of the authority of an attorney to appear for another, does not apply where a village treasurer, empowered by law thereto, brings assumpsit for the recovery of village taxes on personalty in the name of the village.—Village of Wayne v. Goldsmith, 141 Mich. 528.

¶ 205. A justice's attachment was not personally served, nor did defendant appear; on the return day plaintiff appeared by attorney, and the justice, as required by How. St., § 6846, adjourned the case for thirty days. Held, that it was of no importance how plaintiff appeared on the return day, and as the docket showed that his appearance on the adjourned day was regular, a judgment in his favor cannot be objected to on the ground that his attorney did not prove his authority as required by How. St., § 6870.—Churchill v. Goldsmith, 64 Mich. 250.

§ 47. ——Extent of authority.

¶ 206. The authority of an attorney who appears in justice's court extends no further than the proceedings before the justice.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 207. After judgment in a justice's court there is no implied authority in the attorney to receive service in subsequent proceedings. Clark v. McGregor, 55 Mich. 412.

§ 48. Operation of appearance to reinstate cause.

Loss or divestiture of jurisdiction, see ante § 26.

¶ 208. The general appearance of the defendant in justice court upon many adjournments of the cause after three months have expired will operate to reinstate a cause in which the judge has lost jurisdiction.—Gilmore v. Lichtenberg, 129 Mich. 275.

§ 49. Hour for appearance on return or trial day.

Defaults and judgments thereon, see post § 135.

Necessity that docket show appearance within the hour, see post § 142.

Collateral attack for failure to wait an hour for appearance, see post § 152.

Certiorari as method of reviewing failure to wait an hour, see post ¶ 1083.

Hour for appearance in forcible entry and summary proceedings, see Forcible Entry § 30.

¶ 209. A justice must wait an hour for defendant to appear in any case where How. St., § 6938, allows plaintiff that time.—Bossence v. Jones, 46 Mich. 492; Noyes v. Hillier, 65 Mich. 636.

¶ 210. A justice of the peace cannot, upon a service made on the return day of an at-

tachment, proceed at once, upon such return day, to a trial of the cause.—Noyes v. Hillier, 65 Mich. 636.

¶ 211. A justice's jury was discharged upon failure to agree, and another trial was set for the next day, with notice to defendant; defendant did not appear at the time set, made no motion for a continuance, and did not request or pay for a second jury. Held, that the justice after waiting an hour for defendant could try the case in his absence and render judgment.—Roberts v. Tremayne, 61 Mich. 264.

¶ 212. It is erroneous for a justice of the peace to hear and give judgment on a cause adjourned to a certain time without waiting one hour for the defendant to appear. —Hoben v. Citizens' Tel. Co., 176 Mich. 596.

¶ 213. A justice need not wait an hour upon the return day of a summons for defendant to appear before adjourning the case for the purpose of issuing an alias summons, since Comp. L. 1897, § 836, providing for judgment in case a party fails to appear within an hour, has no application to an adjournment.—Brown v. Knop, 137 Mich. 284.

§ 50. Defects in process or service, objections and waiver of same.

Waiver by causing case to be certified to circuit court to try title, see ante ¶ 130.
Defects in and objections to attachment, see post § 64.
Objections to writ of replevin or service or return thereof, see post § 80.
Failure to object to long summons where short summons proper, see also post ¶ 565.
Collateral attack for defects in process or service thereof, see post § 151.
Special appeal as method of reviewing errors and irregularities in respect to process, see post §§ 188, 282.
Raising objections for first time on appeal, see post §§ 206, 228.
Raising objections for the first time on certiorari, see post §§ 263, 273.
Going to trial on merits in circuit court as waiver of defects in justice's process, see post § 229.

¶ 214. The objection that a short summons was issued where a long one was prescribed by the statute may be raised in the cause itself before the justice, or on appeal or certiorari.—Allen v. Mills, 26 Mich. 123.

¶ 215. A defendant who does not appear in justice's court waives nothing; for plaintiff must in all cases prove his cause of action as upon appearance.—Gilbert v. Hanford, 13 Mich. 40; Barber v. Taylor, 1 Mich. 352.

¶ 216. A party who does not appear in a suit before a justice waives nothing, but may raise the objection upon appeal or certiorari.—Campau v. Fairbanks, 1 Mich. 151.

§ 51. ——Waiver by appearance and joinder of issues.

Waiver by failure to appear, see ante ¶¶ 215, 216.
Of defects in affidavit for attachment, see post §§ 55, 64.
Pleading to the merits, see post § 96.

¶ 217. An appearance for the purpose of objecting to irregularities does not waive them, but if it is for some other purpose, as for obtaining a continuance, it is a waiver, and no objection can afterwards be taken to prior defects even though the motion for which the appearance was made was denied. —Lane v. Leech, 44 Mich. 163.

¶ 218. A justice before whom a suit was begun fell sick and directed it to be tried before another justice who had jurisdiction over the subject-matter. Held, that as the parties appeared on the adjourned day and tried the case on the merits without objection, they waived all questions of regularity and the judgment was binding.—Smith v. St. Joseph Circuit Judge, 46 Mich. 338.

¶ 219. If one who is individually sued before a justice pleads the general issue as administrator, he cannot deny the jurisdiction.—Singer Mfg. Co. v. Benjamin, 55 Mich. 330.

¶ 220. Objections to a defective affidavit in trespass in justice's court are waived by pleading the general issue and proceeding to trial without objection.—Jacklin v. Soutier, 82 Mich. 648.

¶ 221. Jurisdictional defects, in proceedings in justice's court to enforce a lien for labor, are waived by a general appearance, plea of the general issue and trial upon the merits.—Fisher v. Hardwood Mfg. Co., 120 Mich. 490.

¶ 222. The fact that defendant appeared in the justice's court on the return day and indicated his special appearance without specifying his objection to the jurisdiction of the court was not a waiver of the objection to the jurisdiction. Statement of counsel that he appeared specially is a statement that he does not appear generally, and is a sufficient indication of an intention to reserve his right to question the jurisdiction of the court.—Marr v. Cook, 147 Mich. 425.

¶ 223. The objection that plaintiff in an action brought in justice's court had improperly sued by a long summons is one that is waived by joining issue.—Hart v. Blake, 31 Mich. 278.

¶ 224. A defendant appeared and pleaded to the merits. The constable then amended his return so as to show that the service was bad. Defendant did not ask leave to withdraw his plea, but moved to dismiss, and his motion was properly denied, as his plead-

ing to the merits raised an issue and made the question of service of no importance.—Slattery v. Hilliker, 39 Mich. 573.

¶ 225. The presence of the parties to a suit in justice's court, and their consent to an adjournment, without pleading, cures any defects in the service or return of service of the summons by which the suit was commenced.—Waldron v. Palmer, 104 Mich. 556.

¶ 226. A justice's docket which shows that the parties appeared upon the return day of the writ, and that by consent the suit was adjourned "without pleadings or prejudice to either party," does not establish a waiver by defendant of a defect in the service of process.—Tunningly v. Butcher, 106 Mich. 35.

¶ 227. An entry by a justice before whom a garnishment case was tried, reciting that the parties were in court and consented to an adjournment without pleading, conclusively shows that the defendant waived all defects of service.—Priest v. American Ins. Union, 171 Mich. 321.

§ 52. ——Objections to warrant or arrest thereunder and waiver of objections.

Issuance of civil warrants by the justice, see ante § 43.
Raising objection for first time on appeal, see post § 206.

¶ 228. Giving bail on arrest upon warrant, and an adjournment obtained before pleading by the party arrested, do not waive the right of the party to object to the proceedings on which the arrest was founded.—Brown v. Kelley, 20 Mich. 27.

¶ 229. The fact that an affidavit for the arrest of a trespasser on land is defective does not affect the issue on the merits.—Maxwell v. Deens, 46 Mich. 35.

¶ 230. The statement of counsel on a motion to quash in justice's court, that defendant, who was arrested on a civil warrant, was a juror in attendance on the circuit court, is too informal to establish the fact of his privilege from arrest. It must be specially pleaded.—Brower v. Tatro, 115 Mich. 368.

§ 53. ——Objections to appearance by attorney.

¶ 231. The right to object to an appearance as attorney in justice's court for want of authority to do so is not waived by having demanded a plea before the question of adjournment was considered.—Westbrook v. Blood, 50 Mich. 443.

C. ATTACHMENT, GARNISHMENT AND REPLEVIN.

§ 54. Attachment in general.

Jurisdiction of justices of the peace, see ante § 10.
Township in which proceedings to be brought, see ante § 16.
Loss of jurisdiction in attachment by unauthorized adjournment, see ante ¶ 114.
General law of attachment, see Attachment.
Provisions as to attachment in justice's court, see Jud. Act, chap. LXXV; Comp. L. 1915, §§ 14337-14360.

¶ 232. Being governed by the general law (How. St., § 6818), a justice of the peace cannot issue an attachment under the log lien law where the parties are residents of his county, but not of the township wherein he resides, or of an adjoining township.—Burlingame v. Marble, 95 Mich. 5.

§ 55. ——Necessity and sufficiency of affidavit or showing.

Dissolution of attachment because of defective affidavit as divesting jurisdiction, see ante ¶ 104.
Objections and amendments, see post § 64.
Pleading in justices' courts, see post § 87 et seq.
Presumptions on certiorari as to filing of affidavit, see post ¶ 1167.
Affidavits for attachment generally, see Attachment, IV.

¶ 233. The affidavit in attachment proceedings under Comp. L. 1897, § 717, is jurisdictional and if the affidavit is void the whole proceedings fail unless the defect is waived by a general appearance.—Dutcher v. Grand Rapids Fire Ins. Co., 131 Mich. 671.

¶ 234. An affidavit for an attachment in justice's court stated that affiant was "one of the plaintiff named in the annexed writ of attachment," but it did not otherwise identify such plaintiffs, and it was not annexed to the writ, nor does the statute (How. St. § 6839) contemplate that it shall be so annexed. The writ issued in favor of two plaintiffs. Held, that the affidavit was void for not identifying plaintiffs.—Burnside v. Davis, 65 Mich. 74.

¶ 235. Under the attachment statute for justice courts, Comp. L. 721, providing for attachment against a defendant in any action founded on contract, express or implied, an affidavit setting out an amount due "upon contract" need not specify whether express or implied.—Freer v. Hamilton, 127 Mich. 381.

§ 56. ——Bond or security.

Effect of defective bond upon justices' jurisdiction, see post § 64.
Presumptions on certiorari as to execution of bond, see post ¶ 1167.
Bonds upon attachment generally, see Attachment, IV, B.
Insufficiency of bond as ground for reversal, see Jud. Act, chap. LXVIII, § 36; Comp. L. 1915, § 14436.

¶ 236. Bond must be filed before a justice's attachment can issue.—Wight v. Warner, 1 D. 384.

¶ 237. A justice of the peace obtains no jurisdiction in an attachment suit until after a bond has been filed.—Marr v. Cook, 147 Mich. 425.

§ 57. ——Service of writ and inventory.

Service upon president of corporation, see ante ¶ 160.

Return of service, see post § 60 et seq.

Defects in and objections to service, see post § 64.

Adjournment to perfect attachment service, see post § 112.

¶ 238. A constable who has attached property and served copies of the writ and inventory upon the persons in whose possession the property was found is not thereby precluded from afterwards serving the writ upon the defendant if found within the county at any time within six days before the return day.—Nicolls v. Lawrence, 80 Mich. 395.

¶ 239. An attachment issued by a justice of the peace in a "log-lien suit" brought under Laws 1887, Act No. 229, may be served by the sheriff of the county where the attachment is issued upon the log owner in any county in the state.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 240. Under Comp L. 1897, § 717, permitting an alias summons and a subsequent attachment against the defendant in justice court, the fact that the first summons and the alias were not served after due diligence because the defendant had no last place of abode in the county, will not deprive the court of jurisdiction in the subsequent attachment in the same suit notwithstanding the institution of garnishee proceedings with the first summons.—Adams v. Osborne, 138 Mich. 161.

§ 58. ——Time to serve.

Time to serve summons, see ante § 37.

¶ 241. Service January 29, of a justice's attachment returnable February 4, is void, being less than six days before the return.—White v. Prior, 88 Mich. 647.

¶ 242. Under How. St., § 6840 providing that a justice's attachment shall be executed at least six days before the return thereof by seizing goods of the defendant, making an inventory thereof, and serving a copy of the attachment and inventory upon the defendant if he can be found within the county, and section 6841, authorizing substituted service if defendant cannot be so found, the service of copy whether personal or substituted, must be made at least six days before the return day of the writ.—Tunningly v. Butcher, 106 Mich. 35.

¶ 243. Service in an attachment suit was made on the person in possession of the goods, the owner having no last place of residence within the county. The service was made on July 3, 1911, and returned on July 8, 1911. Held, the attachment proceedings were void, the service not having been made at least six days before the return day.—Grand Haven Military Club v. Mulholland, 170 Mich. 592.

¶ 244. The fact that substituted service of a justice's writ of attachment was made more than six days before the return day does not invalidate the service, where it appears that the officer retained the writ and made diligent search for all the time required.—Davidson v. Fox, 120 Mich. 385.

§ 59. ——Mode and manner of service.

Mode and manner of serving justices' summons, see ante § 37.

¶ 245. As the statute makes no provision for a summons clause in a justice's writ of attachment the latter cannot be regarded as a summons, and personal service, unless made after levy and inventory, as provided by How. St., § 6804, gives no jurisdiction.—Langtry v. Wayne Circuit Judges, 68 Mich. 451.

¶ 246. Whether a justice can proceed in attachment where no property has been seized and no service had upon part of the defendants, and upon the other only substituted service by leaving a copy of the writ at his last place of residence, quære.—Manhard v. Schott, 37 Mich. 234.

¶ 247. Substituted service of an attachment by leaving a copy with defendant's wife at his last place of residence will not give a justice jurisdiction over his person.—Rolfe v. Dudley, 58 Mich. 208.

¶ 248. Failure to serve a certified copy of the inventory is fatal to the proceeding, and ousts a justice of jurisdiction.—Davison v. Davison, 99 Mich. 625.

¶ 249. Under How. St., § 6831, as amended, which allows attachment where defendant is a foreign corporation, service as provided by §§ 6840 and 6841, personally or by leaving a copy with the custodian of the property seized is sufficient; since § 8143 providing for service in attachment proceedings against foreign corporations where an officer or agent is found within the county, is permissive and does not provide the exclusive mode of service.—Davidson v. Fox, 120 Mich. 385.

¶ 250. Under Comp. L. 1897, § 731, providing for service of writs of attachment from justice courts on garnishees, where the defendants are not found and no property is seized or attached, it is essential by express terms of the statute to serve the attachment and inventory on the garnishees by copy as required by the act.—Faul v. Beucus, 124 Mich. 25.

¶ 251. Service upon the principal defendants in attachment before justices of the peace by leaving a certified copy of the writ with a party described in the return as having "acted in the capacity of agent for said defendants," and who was not stated to have had any property in his possession, is not valid service under Comp. L. 1897, § 731, providing for service of attachment where the defendants cannot be found within the county by "copy" * * * left "with any person in whose possession such goods and chattels, moneys and effect may be found."—Faul v. Beucus, 124 Mich. 25.

§ 60. ——Return and proof of service.

Return and proof of service of summons, see ante § 38.
Amendment of return, see post § 64.
Disregard on certiorari of error in respect to date of return, see post ¶ 1210.

¶ 252. A justice's writ of attachment cannot be returned nor found until the expiration of the last day for serving it personally; the officer must make personal service when he can, and the jurisdiction to take any subsequent proceedings depends upon a proper return of a diligent attempt to get service.—Withington v. Southworth, 26 Mich. 381; Kidd v. Daugherty, 59 Mich. 240.

¶ 253. A justice's attachment returned "not served" as soon as issued, is of no validity.—Kraft v. Raths, 45 Mich. 20.

¶ 254. If a constable's return is silent as to the place of seizure it is presumed to have been within his county, as directed by statute.—Bushey v. Raths, 45 Mich. 181.

¶ 255. Failure of the officer's return, in a suit to enforce a log lien, to show that a copy of the inventory of the property seized, was served upon the principal defendant or the owner, prevents the court from acquiring jurisdiction.—Davison v. Davison, 99 Mich. 625.

¶ 256. Under the statute relating to proceedings by attachment in justice's court the officer who seizes and inventories the property must complete the execution of the writ by making personal or substituted service upon the defendant, and a return of such service by another officer, to whom the writ was delivered, confers no jurisdiction upon the justice to proceed to judgment.—Carry v. Everett, 107 Mich. 654.

§ 61. ——Return of substituted service.

¶ 257. Return of substituted service will not give a justice jurisdiction to proceed in attachment if it does not appear that diligent search was made for the defendant until the time allowed by law for making personal service had expired.—Town v. Tabor, 34 Mich. 262; Brown v. Williams, 39 Mich. 755.

¶ 258. A return of a justice's attachment not personally served must show that a copy has been left at defendant's last place of residence in the county, or that there was no such last place of residence.—Adams v. Abram, 38 Mich. 302, 304.

¶ 259. A return of service of a justice's attachment upon a member of defendant's family at his place of residence, but failing to show that defendant himself could not be found, is, under Comp. L. 1871, § 5276, insufficient.—Michels v. Stork, 44 Mich. 2.

¶ 260. Where a defendant is proceeded against by attachment, under How. St., §§ 6827, 6828, 6841, on failure to secure personal service of a justice's summons, the officer's return must show that he left a copy of the summons and of the attachment at defendant's last place of residence in the county, or that he had no such last place of residence, in order to give the justice jurisdiction to render judgment.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344.

¶ 261. As How. St., § 6840, requires a justice's attachment to be served at least six days before the return day, upon defendant, if he can be found, a return which shows substituted service seven days before such return day, without effort thereafter to find defendant, confers no jurisdiction.—Hubbell v. Rhinesmith, 85 Mich. 30.

¶ 262. A return that shows only a service on the date of the writ upon persons in whose possession the officer found the property, and contains the bare recital, "the defendant not having any last place of residence," but is silent as to whether the defendant was not or could not be found, and as to any attempt to find him, gives no jurisdiction to a justice of the peace to try the cause or to render judgment if the defendant fails to appear.—Nicolls v. Lawrence, 30 Mich. 395.

¶ 263. Substituted service of a justice's writ of attachment, made on the sixth day before the return day of the writ, is valid, under How. St., §§ 6840, 6841, where the officer's return shows that he retained the writ in his hands, and made proper effort to obtain personal service, during the full time within which such service might lawfully be made.—Matthews v. Forslund, 113 Mich. 416.

¶ 264. Substituted service of an attachment under How. St., § 6841, is insufficient to confer jurisdiction upon the justice, where the officer's return fails to show that he retained the writ in his hands, and made diligent search for the defendant, during all of the time within which personal service might lawfully have been made. So held where the return to a writ issued on June 25th, returned July 2d, and served upon garnishee defendants on the teste day, showed that the officer "had the writ in his possession" on June 27th, that he "carried it around with him" for several days after receiving it, and that he "could not have served the writ on

the defendant between June 25th and 27th, or on either of said days."—Bargh v. L. R. Ermeling & Co., 110 Mich. 164.

¶ 265. A return in case of substituted service of a justice's writ of attachment, which states that "I am unable to find" the defendant, and further states that the officer has retained the writ in his hands and made diligent search during all the time within which personal service might be made, is sufficient as showing that he could not find the defendant.—Davidson v. Fox, 120 Mich. 385.

¶ 266. A return in case of substituted service of justice's writ of attachment which states that defendant has no last place of residence within the county, is sufficient as the statute does not require that in such case the return also state that the officer made diligent search to find the last place of residence.—Davidson v. Fox, 120 Mich. 385. The foregoing decision as to the validity of a return of service in attachment was followed in Lutz v. Davidson Cycle Co., 121 Mich. 108.

§ 62. ——Return of service upon joint debtors.

¶ 267. A return by an officer to an attachment issued against two joint debtors that he had attached the goods of one of them upon whom he had made personal service, and that after diligent attempts he was unable to find the other defendant in his county, and had left a certified copy of the attachment and inventory with the defendant in whose possession he found the attached goods, the other defendant having no last place of residence in the county, is in accordance with How. St., § 6841, and authorizes the justice to proceed under How. St., § 6845, allowing the justice to proceed as upon a summons personally served where the attachment is returned as personally served upon any one of the defendants.—Buehler v. De Lemos, 84 Mich. 554.

§ 63. Appearance in attachment cases.

Motion to dismiss the writ as constituting appearance, see ante ¶ 193.

Appearance in justices' cases generally, see ante § 44.

¶ 268. An appearance in an attachment case to object to the jurisdiction is not sufficient to confer jurisdiction to render judgment before thirty days, where there has been no personal service.—Wright v. Russell, 19 Mich. 346.

¶ 269. Where defendant is not personally served in an attachment case, it is error for the justice to render judgment within thirty days from the return day of process, unless the defendant appears and requests a trial. An appearance to object to the jurisdiction is not sufficient.—Wright v. Russell, 19 Mich. 346.

¶ 270. Where a justice's attachment actually contained a provision for a summons, and where upon personal service defendant appeared, there was jurisdiction to render judgment whether there had been a levy or not.—Hunt v. Strew, 33 Mich. 85.

§ 64. Defects, objections and amendments in attachment cases.

Defects in and objections to justice's process generally, see ante §§ 50-53.

Amendments of pleading in justice's courts, see post § 108.

Raising objections for first time on appeal, see post § 206.

Availability on certiorari of objection that no proof of ownership was made, see post ¶ 1125.

¶ 271. A defective bond does not oust a justice's jurisdiction.—Hills v. Moore, 40 Mich. 210. Overruled in Borland v. Kingsbury, 65 Mich. 59, on another point.

¶ 272. Personal service of a justice's writ is not sufficient to confer jurisdiction if the affidavit is defective in matters of substance and the defects are not waived by a general appearance.—Burnside v. Davis, 65 Mich. 74; Borland v. Kingsbury, 65 Mich. 59; overruling Hills v. Moore, 40 Mich. 210.

¶ 273. The date of the constable's return to a writ of attachment may be amended by changing it according to the fact.—Kidd v. Dougherty, 59 Mich. 240.

¶ 274. Quære, whether there need be notice of an amendment of a constable's return to a justice's writ of attachment where the writ was not personally served and the defendant has not appeared.—Bushey v. Raths, 45 Mich. 181.

¶ 275. Proceedings in justice's court to amend the return of service of an attachment after judgment were quashed on certiorari where notice thereof had not been duly served, and the amendment consisted in changing the name of the person on whom the writ had been served and against whom judgment was rendered.—Clark v. McGregor, 55 Mich. 412.

¶ 276. The justice cannot cure a defective return which fails to show that a copy of the inventory was served on the principal defendant or the owner, by returning that a certified copy was, of his own knowledge, served, and that the officer was allowed to correct the return to the original writ, where no corrected return in fact appears.—Davison v. Davison, 99 Mich. 625.

¶ 277. Where a constable's return to a justice's writ of attachment shows that some inferior mode of service has been had, though a day remained in which to try a better mode, the justice gets no jurisdiction; and an offer to amend the return by parol evidence that

the writ was not in fact returned until return day, and that between the service and the return the constable could not find defendant, does not cure the defect, even if admissible at all, for it does not show that he actually tried to find him.—Town v. Tabor, 34 Mich. 262.

§ 65. Dissolution of attachment and release of lien.

Dissolution of attachment as divesting jurisdiction, see also ante ¶ 104.
Motion to dismiss attachment as submission to jurisdiction, see ante ¶ 193.
Sufficiency of service and return of attachment, see ante §§ 57-62.
Submission to jurisdiction on special appeal from ruling on motion to quash, see post § 211.
Jurisdiction of commissioners to dissolve justices' attachments, see Attachment § 116; Courts § 86.
General law as to dissolution and quashal of attachment, see Attachment, IX.

¶ 278. An attachment suit in justice's court is not suspended by proceedings for dissolution had before a circuit court commissioner.—Churchill v. Goldsmith, 64 Mich. 250.

¶ 279. An appeal bond releases the lien of a justice's attachment.—Bushey v. Raths, 45 Mich. 181.

¶ 280. Where plaintiff in attachment before a justice has recovered judgment, the attachment is dissolved and the attached property is released by defendant's suing out a certiorari and giving the statutory bond for the payment of any judgment that may be rendered in the circuit court.—Vanderhoof v. Prendergast, 94 Mich. 18.

§ 66. Judgment in attachment.

Sufficiency of process to give jurisdiction in attachment, see ante § 57 et seq.
Sufficiency of appearance to confer jurisdiction in attachment, see ante § 63.
Judgments in justices' courts generally, see post § 131 et seq.
Docket entry of judgment by confession in attachment, see post ¶ 617.
General law of judgments, see Judgments.

¶ 281. A personal judgment in attachment upon insufficient service to give jurisdiction over defendant's person, is void.—Rolfe v. Dudley, 58 Mich. 208.

¶ 282. A justice's judgment on a log lien against the owner of attached logs is invalid where it was rendered the day after the writ was served on the owner, and it does not appear that the officer made any search or inquiry to find him earlier.—Newbauer v. Newbauer, 112 Mich. 562.

¶ 283. A judgment rendered by a justice's court in a proceeding commenced under attachment and wherein a summons was also issued, although the court had no jurisdiction of the attachment suit, but the goods levied on had never been returned, is one in attachment and is not merely a personal judgment.—Marr v. Cook, 147 Mich. 425.

§ 67. Liability and actions on attachment bonds.

Liabilities on justices' appeal bonds, see post § 248.
Liability and actions on attachment bonds generally, see Attachment, XIV.

¶ 284. In suit upon a bond given on an attachment in justice's court, to which bond the principal's name was signed by the attorney who began the attachment, its execution was denied under oath by the principal, and plaintiff testified that before the trial of the attachment suit said principal, the plaintiff in that suit, refused to settle the case, saying that he had put the matter in the hands of the attorney in question and would abide by his action. The files of the attachment suit were offered in evidence to show the agency of defendant's attorney therein. Held, that the jury might infer a ratification of the attorney's action, and that it was error to exclude the files.—Hutchinson v. Smith, 86 Mich. 145.

§ 68. Garnishment in general.

Jurisdiction of garnishment by and against corporations and members, see ante § 23.
Justices' jurisdiction of garnishment of municipalities, see ante ¶ 98.
Loss of jurisdiction in garnishment by unauthorized adjournment, see ante ¶ 111.
Sufficiency of docket entries, see post § 140.
Effect of appeal in garnishment, see post § 209.
Amendments on appeal in garnishment, see post § 220.
General law as to garnishment, see Garnishment.
Combining claims to make jurisdictional amount for garnishment in circuit court, see Garnishment § 8.
Provisions as to garnishment in justice's courts, see Jud. Act, chap. LXXVI; Comp. L. 1915, §§ 14361-14396.

¶ 285. Under Comp. L. 1897, § 1014, providing for garnishment of corporations, foreign or domestic, in justice court, an affidavit and writ in garnishment against a corporation without stating whether it is a foreign or a domestic corporation and a return showing service upon a person as "agent of the above named company" are sufficient to confer jurisdiction where the defendant's agent appeared and made disclosure and no claim of want of jurisdiction is made in the trial below.—Grinnell v. Niagara Fire Ins. Co., 127 Mich. 19.

§ 69. ——Property and claims subject to garnishment.

Plea to jurisdiction that defendant holds property under attachment, see post ¶ 351.
Property subject to garnishment generally, see Garnishment, II.

¶ 286. A claim pending before one justice is not subject to garnishment in a proceeding before another.—Noyes v. Foster, 48 Mich. 273; Custer v. White, 49 Mich. 262.

¶ 287. A judgment recovered before one justice of the peace is not subject to garnishment before another.—Sievers v. Woodburn Sarven Wheel Co., 43 Mich. 275.

§ 70. ——Summons, service and return.

Service of attachment writs upon garnishees, see ante ¶ 250.

Whether long or short summons required, see ante § 34.

Return and proof of service of justices' summons generally, see ante § 38.

Service of summons in garnishment outside county, see also ante ¶ 159.

General law as to process, see Process.

Mandamus to compel issuance summons, see Mandamus.

Effect of garnishment against one partner upon rights of other partner in partnership fund, see Partnership.

¶ 288. Service of a justice's summons in garnishment, under Comp. L. 1871, § 6463, How. St., § 8055, on a corporation cannot be made beyond the county; and an acceptance of service which shows it was made outside the county thereby shows it was made where the process had no legal force.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400.

¶ 289. A justice does not acquire jurisdiction in garnishment over a railway company on return of service upon a specified person, described merely as "agent of the within named defendant," and the appearance of some person of a different name describing himself as "ticket agent of said road."—Lake Shore & M. S. Ry. Co. v. Hunt, 39 Mich. 469.

¶ 290. In an action in justice court begun by short summons and followed by garnishment process personally served, both fall upon the return of an alias summons and a subsequent attachment process not personally served as such garnishment does not come under either Comp. L. 1897, § 731 or section 745 not having been instituted with the attachment proceedings, but under section 990 providing for garnishment in a contract action which in this instance failed for want of service.—Adams v. Osborne, 138 Mich. 161.

§ 71. ——Disclosure by garnishee.

Examination of garnishee, see post § 73.

Disclosure as evidence on appeal, see post § 236.

That disclosure was a mistaken one shown under general issue on appeal, see post ¶ 908.

Disclosure in garnishment generally, see Garnishment, V.

Sufficiency of disclosure by common carrier as garnishee, see also Garnishment ¶ 171.

¶ 291. A garnishee in justice's court need not sign his disclosure, nor, unless plaintiff requires, need it be under oath.—Sutherland v. Burrill, 82 Mich. 13.

¶ 292. Under Laws 1885, Act No. 175, a garnished corporation which has its business office in a township other than that in which the justice issuing the summons holds his office, may transmit its sworn disclosure by mail.—Whitworth v. Pelton, 81 Mich. 98.

¶ 293. The disclosure of a railroad company in a garnishment proceeding in justice's court purported to have been made by the assistant treasurer of the company, who testified that he was such officer, and that he made the disclosure in behalf of the company, and that he had knowledge of the facts therein stated. Held, that sufficient authority was shown to make such disclosure.—Whitworth v. Pelton, 81 Mich. 98.

§ 72. ——Purpose and conclusiveness of disclosure.

¶ 294. The garnishee's disclosure is the foundation of all further proceedings against him.—Maynards v. Cornwell, 3 Mich. 309.

¶ 295. Disclosure in garnishment before a justice is conclusive upon plaintiff.—Karp v. Citizens' Nat. Bank, 76 Mich. 679.

¶ 296. Upon his examination the garnishee in justice's court stands as a witness for the plaintiff.—Maynards v. Cornwell, 3 Mich. 309.

¶ 297. A garnishee in justice's court is a witness for plaintiff, and the latter is bound by the disclosure.—Sutherland v. Burrill, 82 Mich. 13.

¶ 298. A garnishee's disclosure in justice's court concludes neither him nor the principal defendant, but may be corrected or explained, and is amendable to protect the garnishee.—Barber v. Howd, 85 Mich. 221.

§ 73. ——Examination of garnishee.

Garnishee as witness for plaintiff upon disclosure, see also ante § 72.

¶ 299. A garnishee in justice's court may acknowledge his indebtedness, and, to protect himself against cost and expense, has a right to waive further or other examination.—Barber v. Howd, 85 Mich. 221.

¶ 300. Whether or not an entry on a justice's docket, instead of on a separate piece of paper to be filed in the cause, of the minutes of an examination of a garnishee defendant, would be a sufficient compliance with Comp. L. 1871, § 6444, How. St., § 8036, requiring the justice to "take minutes of such examination, and file the same with the other papers in the cause," quære. But it would not be admissible against objection to prove the examination, in the absence of any showing that it constituted the original

and only minutes of the examination, particularly where it seems probable that other minutes were in fact taken and filed.—Watson v. Kane, 31 Mich. 61.

¶ 301. It is not prejudicial error for a justice to strike written disclosures in garnishment from the files and order the defendant to submit to an oral examination.—Grinnell v. Niagara Fire Ins. Co., 127 Mich. 19.

§ 74. ——Payment by and release or discharge of garnishee.

Liability of justice for money paid by garnishee, see ante ¶ 21.
Application of money paid in garnishment to satisfaction of different judgment, see post ¶ 680.
Payment by and release of garnishee generally, see Garnishment, XII.
General law as to payment, see Payment.

¶ 302. The object of How. St., § 8037, permitting a garnishee to pay to the justice before whom examination is had the amount due and owing from him to the principal defendant is to terminate the controversy, release the garnishee, and to apply the sum paid to the liquidation of the debt.—Barber v. Howd, 85 Mich. 221.

¶ 303. Payment by a garnishee defendant upon a particular demand is in the hands of a justice as payment on that demand only, and is not applicable to a judgment on another demand against the same garnishee.—Dane v. Holmes, 41 Mich. 661.

¶ 304. Judgment was rendered against a garnishee by a justice who had never acquired jurisdiction in the principal case, though he had rendered judgment therein, but the garnishee paid the judgment, and being afterwards sued by the assignee of another claim against the principal debtor, interposed her payment of the judgment in garnishment as a defense. Held, that, as the judgment in the principal case was void, the defense could not be allowed.—Laidlaw v. Morrow, 44 Mich. 547.

¶ 305. Although a judgment against the principal defendant in garnishment proceedings before a justice of the peace is void because he is served with a short summons instead of a long summons, the garnishee is protected from liability to the principal defendant on a claim for personal work and loan where he appears and makes a full disclosure and pays the amount found due into court, and takes the justice's receipt, under the Judicature Act, Pub. Acts 1915, No. 314, chap. LXXVI, § 9, providing that where it appears upon the examination of a garnishee that he owes the principal defendant for personal work and labor and the indebtedness is due and payable, he shall forthwith pay to the justice the money shown to be due, and it shall be the duty of the justice to give the garnishee defendant a receipt for the money so paid.—Katt v. Swartz, 199 Mich. 51.

¶ 306. A garnishee made his disclosure under How. St., § 8057a, providing that a garnishee may deliver such money to the justice, who shall cause a written notice to be served on the claimant, and that after the service of such notice and the payment of such money to the justice, the garnishee shall be discharged from liability in respect to such money. Held, that service of the claimant's notice before the payment of any money into court, rendered the subsequent proceedings and a judgment against the garnishee invalid.—Stone v. Dowling, 119 Mich. 476.

¶ 307. As a justice of the peace would not be authorized to render judgment in a garnishee suit based solely upon an answer admitting an indebtedness upon a note overdue at time of garnishment and which third parties claim to be bona fide purchasers of, before maturity and for value, payment by the garnishee upon such answer is voluntary.—Button v. Trader, 75 Mich. 295.

¶ 308. Where wages are garnished, and the employer, at the close of his examination as garnishee, which discloses an indebtedness to the principal defendant for personal labor, but is silent as to whether he is a householder, pays the amount admitted to be due to the justice, under How. St., § 8037, which permits such payment except as to the $25 exemption allowed the principal defendant by How. St., § 8032, where he is a householder having a family, such payment is made at the peril of the garnishee defendant, and the principal defendant, unless estopped from asserting such a claim, may recover from the garnishee defendant the indebtedness due him at the time of the service of the writ of garnishment, not exceeding the amount of the exemption.—Crisp v. Fort Wayne & E. R. Co., 98 Mich. 648.

¶ 309. Payment by garnishee, under justice's order, directly to plaintiff, whereupon judgment against principal defendant is discharged on the docket, must be presumed to have been made in the presence and with the consent of the justice and sufficiently complies with the statute.—Barber v. Howd, 85 Mich. 221.

¶ 310. A justice before whom a judgment had been obtained, and to whom the same had been paid pending proceedings in garnishment to reach the avails thereof, correctly applies such payment upon the judgment subsequently rendered by him in garnishment, after the time for appealing therefrom had expired. Accordingly mandamus to compel him to pay over the amount to the first judgment creditor was denied.—People ex rel. Griffin v. Potter, 27 Mich. 166.

§ 75. Proceedings for and judgment on garnishment.

Appealability of judgment in garnishment, see post § 185.

Effect of appeal from garnishment judgment, see post § 209.

Certiorari as method of reviewing judgment, see post § 252.

¶ 311. Declaration, second process and proofs are waived where the garnishee appears on the return day of the summons, with the plaintiff, before the justice, after judgment against the principal defendant, and subscribes on the docket a statement that he is indebted in a specified sum to the principal defendant, and authorizes the justice to enter judgment against him; and the garnishee cannot thereafter object to the judgment for the want of such declaration, etc.—Bigelow v. Barre, 30 Mich. 1.

¶ 312. Where, at the close of the examination of a garnishee defendant in justice's court, the time for staying execution upon and of appeal from the judgment theretofore rendered against the principal defendant has expired, plaintiff may file his declaration against the garnishee defendant without issuing a summons to show cause.—Elser v. Rommel, 98 Mich. 74.

¶ 313. Under How. St., § 8038, providing that, at any time within thirty days after the final determination of a suit in justice's court against the principal defendant in garnishment proceedings, the justice shall, at plaintiff's request, issue a summons against the garnishee, commanding him to appear and show cause why judgment should not be rendered against him, the jurisdiction of the justice to issue the summons is limited to thirty days after judgment, not to thirty days after the expiration of the time for appeal.—Kayser v. Farmers' & Mechanics' Bank, 115 Mich. 688.

¶ 314. Even though a garnishee in justice's court has appeared and pleaded to the merits, a judgment against him founded upon proceedings instituted before judgment in the principal suit cannot be sustained upon a short summons to show cause issued seventy-four days after the termination of the suit against the principal defendant, no continuance having been had under How. St. § 8053, Heritage v. Armstrong, 101 Mich. 85.

¶ 315. Where, in garnishment proceedings in a justice's court, the garnishee had possession of certain potatoes, and a third person claimed them as his property, a judgment in favor of the plaintiff against the claimant, for the value of such potatoes less warehouse charges, is not open to the objection that it is a personal judgment for money or property, against the claimant.—Toner v. Toner, 151 Mich. 696.

¶ 316. Service of a justice's summons requiring a garnished foreign corporation to show cause why judgment should not be rendered against it must be quashed if not made upon a principal officer of such corporation.—First Nat. Bank v. Burch, 76 Mich. 608.

§ 76. ——Basis for judgment and sufficiency of showing.

¶ 317. A justice cannot give judgment against a garnishee until after he has rendered a valid judgment against the principal defendant in a cause in which he had jurisdiction.—Laidlaw v. Morrow, 44 Mich. 547.

¶ 318. Upon the hearing to show cause, etc., in justice's court the garnishee's disclosure is the evidence and all the evidence that can be introduced against him. And unless that shows him to be liable to the principal defendant, no judgment can be rendered against him whether he appears or not, nor can any judgment be rendered except for such liability as his disclosure clearly shows and admits (see Pub. Acts 1885, No. 175, requiring delivery of the money).—Newell v. Blair, 7 Mich. 103; Thomas v. Sprague, 12 Mich. 120; Wellover v. Soule, 30 Mich. 481; Lorman v. Phoenix Ins. Co., 33 Mich. 65; Hewitt v. Wagar Lumber Co., 38 Mich. 701; Hackley v. Kanitz, 39 Mich. 398; Spears v. Chapman, 43 Mich. 541; Weirich v. Scribner, 44 Mich. 73; Custer v. White, 49 Mich. 262.

¶ 319. The minutes of the examination of a garnishee, taken by a justice of the peace under How. St. § 8036, are not such a record as imports absolute verity, and, on a trial of the issue framed on the issuance of a summons to show cause, the garnishee may show that the justice failed to take down the disclosure actually made.—Sutherland v. Burrill, 82 Mich. 13.

¶ 320. No judgment can be rendered against the garnishee where the disclosure was by an officer of a foreign corporation who could not have personal knowledge of all the facts stated by him.—Lorman v. Phoenix Ins. Co., 33 Mich. 65.

¶ 321. No recovery can be had against a garnishee in justice's court or on appeal upon any evidence contradicting his own statement that nothing is due from him to the principal defendant.—Newell v. Blair, 7 Mich. 103; Thomas v. Sprague, 12 Mich. 120; Wellover v. Soule, 30 Mich. 481.

¶ 322. Judgment cannot be rendered against a garnishee in justice's court unless his disclosure clearly shows a liability to the principal defendant.—Ruhl v. Ruoff Brewing Co., 113 Mich. 291.

¶ 323. A garnishee's disclosure, which does not expressly admit an indebtedness to the principal defendant, but, on the contrary, avers that the latter is indebted to the garnishee, and further states that, prior to the

service of the summons, the garnishee had contracted in writing to pay the liquor tax of the defendant, who thereupon paid a part of the amount of such tax to the garnishee, agreeing to pay the balance in monthly instalments, and that the garnishee had not paid the tax at the time the summons was served, fails to make a prima facie case for plaintiff against the garnishee.—Ruhl v. Ruoff Brewing Co., 113 Mich. 291.

¶ 324. Disclosures by a garnishee insurance company in justice court setting out a fire loss by the debtor and no acknowledgment of liability to him by the company, will not defeat judgment against the garnishee on the ground that they failed to show a basis for liability where the company settled with the insured pending the garnishment proceedings and the company adjuster admitted on trial that the company was indebted to the insured.—Grinnell v. Niagara Fire Ins. Co., 127 Mich. 19.

§ 77. Replevin and affidavit for writ.

Justices' jurisdiction in replevin, see ante § 17.
Transfer of replevin suit to another justice, see ante § 29.
Dismissal for failure to give plaintiff's Christian name in writ, see post ¶ 509.
Pleading in justice's replevin, see post § 81.
Pleading to merits on appeal in replevin as waiver of defects in writ, see post ¶ 982.
Raising question of misnomer for first time on appeal from replevin judgment, see post § 206.
Amendment of writ after appeal to circuit court, see post § 221.
Decision on appeal in replevin, see post § 240.
Liability and actions on replevin bonds, see post § 85.
General law of replevin, see Replevin.
Amendment of replevin affidavit to supply jurat, see also Affidavits ¶ 15.
Provisions as to replevin, in justices' courts, see Jud. Act, chap. LXXIV; Comp. L. 1915, §§ 14332, 14336.

¶ 325. The office of the affidavit in replevin in justice's court is to confer jurisdiction; and it can only be looked into to ascertain that fact, not made to operate as a defense on the trial upon the merits.—Elliott v. Whitmore, 5 Mich. 532.

¶ 326. An affidavit for a writ of replevin will not give a justice jurisdiction if it does not state that the property sought does not exceed $100 in value; and the defect, unless waived, is fatal if seasonably urged (Comp. L. 1871, § 5291; How. St. § 6856).—Sager v. Shutts, 53 Mich. 116.

¶ 327. In a replevin suit in justice's court it is the affidavit which gives jurisdiction; and if that contains a description of the property, jurisdiction accrues, the sufficiency of the description not having been questioned.—Simmons v. Robinson, 101 Mich. 240.

¶ 328. In an affidavit in a replevin case instituted in a justice's court a description, viz.: "24 Michigan Reports, * * * one lot of books, * * * one lot of papers and envelopes, * * * one lot of written matter" is sufficient.—Burt v. Addison, 74 Mich. 730.

¶ 329. An affidavit in replevin wherein the plaintiff was a partnership is not so fatally defective as to oust a justice of the peace of jurisdiction for failure to give the names of the partners where there is a reference in the mortgage mentioned in the affidavit, and upon which the act on is founded, by which the plaintiffs are sufficiently identified.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

¶ 330. An affidavit in replevin, describing the plaintiff as affiant, and to which the usual jurat, signed by the justice in his official character, is attached, is not fatally defective because not signed by such affiant.—Bloomingdale v. Chittenden, 75 Mich. 305.

¶ 331. The value stated in an affidavit for a justice's replevin is presumably the real value of the property until shown to be erroneous.—Peterson v. Fowler, 76 Mich. 258.

¶ 332. A justice of the peace who has omitted to attach his signature to the jurat to an affidavit in replevin signed and sworn to before him may do so when the objection is raised during the subsequent proceedings in the case.—Peterson v. Fowler, 76 Mich. 258.

¶ 333. A justice's writ of replevin issued in a partnership name is not sustainable where the amendment permitted by Comp. L. 1871, § 5307 (How. St. § 6872), in cases where suit is so brought shows that there was only one plaintiff.—Stirling v. Heintzman, 42 Mich. 449.

¶ 334. A replevin writ in justice court was not void because of the use of initials instead of full Christian names of plaintiffs, and an amendment would have been proper.—Stever v. Brown, 119 Mich. 196.

§ 78. ——Security or bond for replevin.

Dismissal for absence or insufficiency of bond, see post § 80.
Waiver of right to amend replevin bond, see post ¶ 343.
Liability and actions on bonds, see post § 85.
Replevin bonds generally, see Replevin, II.

¶ 335. Under the statutes the filing of a new and adequate bond on the return day cures a defective bond in replevin before a justice of the peace.—Moore v. Lewis, 76 Mich. 300.

¶ 336. A replevin bond insufficient because signed as surety by one of the plaintiffs may be amended under How. St. §§ 6856, 7631.—Hopkins v. Green, 93 Mich. 394.

¶ 337. Where plaintiff in replevin before a justice takes an appeal, his appeal bond gives defendant a cumulative security which does not supersede that furnished by the bond in replevin.—Brabon v. Pierce, 34 Mich. 39.

¶ 338. Upon a justice's replevin by a firm, the firm's bond with one of the partners as surety is insufficient, since the statute requires security in addition to the pecuniary responsibility of plaintiffs.—Hopkins v. Green, 93 Mich. 394.

¶ 339. Where a justice of the peace issued a writ of replevin before any bond had been filed by the plaintiff, and approved it next day under a misapprehension as to a surety's qualifications, it was held that Comp. L. 1871, § 5294 (How. St. § 6857), would not prevent the defendant from excepting to the sureties.—Johnson v. Stilson, 42 Mich. 541.

§ 79. ——Service and return of writ.

Return of justice's summons generally, see ante § 39.
Dismissal or quashal for errors in service or return, see post § 80.
Judgment upon defendant's waiving return, see post § 83.
General law as to service and return of process, see Process.

¶ 340. A city marshal signed his return of service of a writ of replevin, "Almon S. Krapf, city marshal." Preceding the return was the oath of the appraisers, the jurat to which was signed, "Almon S. Krapf, city marshal of the city of Adrian." Held, that the failure to append the words "of the city of Adrian" to the signature to the return was unimportant, and that the justice might take judicial notice that the person so signing was marshal of said city.—Fleugel v. Lards, 108 Mich. 682.

¶ 341. A return of service to a writ of replevin, after showing the seizure of the property, its appraisal by a disinterested person duly sworn for that purpose, and its delivery to plaintiff, concluded: "And I further return that, on the 28th day of June, 1894, the defendant named in the said writ, by delivering to him, the said defendant, personally, a certified copy of said writ." Held, that the omission of the words, usually found in such a return, showing that service of the writ was made on defendant, was clerical, and that it was evident that defendant had been served in the manner required by law.—Fleugel v. Lards, 108 Mich. 682.

§ 80. ——Quashal, dismissal or nonsuit.

See also post ¶¶ 509, 942.
Dismissal and nonsuit in justices' cases generally, see post § 119.
Objections to justice's process generally, see ante § 50 et seq.
Appeal from dismissal of replevin for defects in affidavit, see post ¶¶ 780, 781.
Certiorari as method of reviewing judgment of dismissal, see post § 252.
Judgment upon dismissal for value of property, see post ¶ 355.

¶ 342. Under Comp. L. 1897, § 10659, requiring delivery of a certified copy of the writ in replevin, service by delivery of a copy omitting the signature of the justice was irregular, and upon failure of plaintiff to remedy the defect the motion to dismiss should have been allowed.—Chapelle v. Webster, 122 Mich. 482.

¶ 343. Although an insufficient replevin bond is amendable, the defendant does not waive his rights by insisting that the bond cannot be amended; and where the court does not direct either an amendment or a new bond the proceedings should be quashed.—Hopkins v. Green, 93 Mich. 394.

¶ 344. Where a writ of replevin was sued out of a justice's court in the name of H. C. Fisher, plaintiff being so designated in all the prior papers, and on the return day defendant moved to quash for that reason, and the party representing plaintiff stated that he could not amend, as he did not know plaintiff's full name, the justice properly dismissed the case.—Fisher v. Northrup, 79 Mich. 287.

¶ 345. Under Comp. L. 1897, §§ 836 and 10679, a justice is required to enter judgment of nonsuit with the return of property replevied upon failure of either party to appear on the day set unless he has notice that the parties had agreed upon an adjournment; the failure of the parties to appear does not deprive him of jurisdiction.—Barlow v. Riker, 138 Mich. 607.

¶ 346. The failure of both parties in a replevin suit to appear in justice court on a day set entitles defendant to a judgment of nonsuit and return of the property, and the entry of such nonappearance on the justice's docket shows a judicial determination sufficient to entitle defendant to such a judgment upon failure of defendant to appear on a subsequent day set after several intervening agreed continuances.—Barlow v. Riker, 138 Mich. 607.

§ 81. ——Pleading.

Affidavit for writ of replevin, see ante § 77.
Pleading in justices' cases generally, see post § 87 et seq.
Pleading in replevin generally, see Replevin, III.

¶ 347. The forms of pleading prescribed by statute for actions of replevin are applicable alike to justices' courts and courts of record.—Elliott v. Whitmore, 5 Mich. 532.

¶ 348. Oral pleadings in replevin suits are admissible.—Smith v. Dodge, 37 Mich. 354.

¶ 349. A declaration in replevin to recover exempt property seized under process need not specifically set out the character of the property so as to show the exemption; it need only follow the form of declaring prescribed by How. St. § 8337, which is applicable to all courts.—Elliott v. Whitmore, 5 Mich. 532.

§ 82. ——Pleas and objections to the jurisdiction.

Justices' jurisdiction in replevin, see ante § 17.
Pleas to the jurisdiction in justices' cases generally, see post § 95.
Evidence admissible under general issue in replevin, see also post ¶ 453.
Dismissal of appeal where amount involved in excess of jurisdiction, see post § 223.

¶ 350. In replevin before a justice a plea which prays judgment of the writ for want of jurisdiction, "for that the value of the property described in said writ exceeds in value $100," contains no averment of fact, and is bad, because the jurisdiction depends upon the value alleged.—Burt v. Addison, 74 Mich. 730.

¶ 351. It is not a good plea to the jurisdiction of a justice's court in replevin that defendant holds the property as constable under an attachment issued by another justice.—Dayo v. Provinski, 90 Mich. 351.

¶ 352. By pleading the general issue, where the affidavit, writ and declaration allege value under $100, defendant admits a justice's jurisdiction and cannot afterwards question it on the ground that the value of the property exceeded the jurisdictional limit of $100.—Henderson v. Desborough, 28 Mich. 170.

§ 83. ——Judgment and enforcement of judgment.

See also post ¶ 554.
Justices' judgment generally, see post § 131 et seq.
Appealability of judgment in replevin for damages, see post ¶¶ 781, 782.
Presumptions on appeal as to propriety of judgment, see post § 233.
Judgment upon appeal in replevin, see post § 240.
Certiorari as method of reviewing judgment, see post § 252.
Error in taxing costs in replevin as ground for collateral attack, see post ¶ 676.
Mandamus to compel justice to enter judgment in replevin, see Mandamus.
Mandamus to compel justice to assess damages upon discontinuance, see Mandamus.

¶ 353. A defendant who prevails in replevin before a justice may recover the value of the property replevied, not exceeding $500, which is the constitutional limit of the jurisdiction of justices.—Henderson v. Desborough, 28 Mich. 170; Humphrey v. Bayn, 45 Mich. 565; Chilson v. Jennison, 60 Mich. 235.

¶ 354. Under How. St. §§ 8346, 8347, it is not a prerequisite to a judgment for damages in replevin, that the return of the officer show he took the property and delivered it to the plaintiff; as the defendant may waive a return and have his damages assessed.—Frank v. Brown, 119 Mich. 631.

¶ 355. In replevin in justice court, where plaintiff failed to appear at the return hour and there was no return of the writ, the officer having refused to make a return, and where upon the subsequent appearance of plaintiff the court dismissed the proceeding and entered a judgment of nonsuit; it was proper, upon defendant waiving a return of the property, to enter a judgment for its value in favor of defendant, pursuant to proof that the property had been delivered to plaintiff, and of its value.—Frank v. Brown, 119 Mich. 631.

¶ 356. A waiver of return in a justice's court, made in open court and entered by the justice at defendant's request, is sufficient to authorize a judgment for value instead of for a return.—Humphrey v. Bayn, 45 Mich. 565.

¶ 357. Election to take judgment for value in replevin before a justice cannot be exercised, as matter of right, after an adjourned day on which the plaintiff discontinued and defendant did not appear.—Stack v. Smith, 54 Mich. 238.

¶ 358. Where defendants in an action of replevin in justice's court pleaded simply the general issue, and recovered upon the sole ground that their possession was lawful when the writ issued because no demand had been made upon them for the property, and there is nothing in the record to indicate any claim upon their part of ownership or right to continued possession against demand, they are not entitled to a return of the property.—Farrah v. Bursley, 100 Mich. 547.

¶ 359. Imprisonment of the judgment defendant in replevin is allowable on justices' judgments (Comp. L. 1871, § 5393); but not on the circuit judgment on appeal; hence defendant might, by such appeal, avoid the imprisonment.—Tomlin v. Fisher, 27 Mich. 524.

§ 84. ——Liability and actions for restitution.

Right of defendants to judgment for return of property, see also ante § 83.

¶ 360. If a replevin suit abates through no fault of plaintiff, as by the justice's removal from his township, defendant's remedy is not upon the bond, but he may bring replevin or trover.—Kidder v. Merryhew, 32 Mich. 470.

¶ 361. Where a replevin suit was abated by the justice's failure to appear at his office on the return day of the writ, suit could not be brought on the bond; but other remedies might be resorted to if plaintiff in replevin should detain the goods.—Scott v. Scott, 50 Mich. 372.

§ 85. ——Liability and actions on bonds.

See also ante ¶¶ 360, 361.

Necessity and sufficiency of bond, see ante § 78.

¶ 362. A surety in a replevin bond, who acted as plaintiff's agent in the issue of the writ by the justice, and in the seizure of the property, which was delivered to plaintiff, cannot escape liability in a suit on the bond for a failure to return the property pursuant to a judgment for such return by showing that no affidavit was filed with the justice before the writ was issued.—Stimer v. Allen, 88 Mich. 140.

¶ 363. A replevin bond in justice's court covers costs recovered by defendant on appeal; it is not satisfied by a return of the property, with costs, on judgment by the justice.—Brabon v. Pierce, 34 Mich. 39.

¶ 364. A replevin bond covers the costs of all courts, even though the case be removed on certiorari from before a justice, if a final judgment on writ of error awards costs of all the courts.—Monroe v. Heintzman, 46 Mich. 12.

D. PARTIES AND PLEADING.

§ 86. Parties and joinder.

Relationship to parties as disqualifying justice to act, see ante § 6.

Residence of parties as determining township in which suit to be brought, see ante § 16.

Statements as to parties in affidavit for transcript, see post § 176.

Names of parties in notice of execution, see post ¶ 723.

Parties to appeal, see post § 190.

Raising question of misnomer for first time on appeal, see post § 206.

Right to discontinue as to some defendants, see post § 222.

General law as to parties, see Parties.

Prosecuting attorney as proper representative of public in action for penalty, see also Penalties.

¶ 365. An action on a labor debt may be brought in a justice's court against a corporation and stockholders jointly under Laws 1877, Act No. 113, § 35 (How. St. § 4110).—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

§ 87. Pleadings in general.

Jurisdictional amount as determined from declaration, see ante § 12.

Affidavits in attachment, see ante § 55.

Pleading in justice's replevin, see ante § 81.

Conformity to rules of circuit court, see post ¶ 368.

Conformity of pleading to process, see post § 89.

Bill of particulars, see post § 101.

Construction and interpretation of pleadings, see post § 103.

Substance rather than form required in pleadings, see post § 103, ¶ 370.

Pleadings on appeal to circuit court, see post § 213.

Presumptions on appeal as to form of pleadings, oral or written, see post § 233.

General law of pleading, see Pleading.

Jurisdictional allegations in summary proceedings to give justice jurisdiction rather than commissioner, see Forcible Entry § 23.

Provisions as to pleadings in justices' courts, see Jud. Act, chap. LXIX; Comp. L. 1915, §§ 14215-14240.

¶ 366. Special pleading is not required in a justice's court; it is sufficient that plaintiff set forth his cause of action, and defendant his defense, to entitle the cause to be heard upon its merits.—Bancroft v. Peters, 4 Mich. 619.

¶ 367. An oral declaration is sustainable in justice's court to recover for grantor's breach of covenant against back taxes.—Lynch v. Craney, 95 Mich. 199.

§ 88. Declaration or statement of demand.

Waiver by garnishee of declaration, see ante ¶ 311.

Declarations upon contract, see post § 90.

Declarations in tort, see post § 91.

Demurrer to declaration, see post § 94.

Waiver of declaration, see post ¶ 402.

Waiver of defects in declaration, see post § 94.

Declaration or copy thereof as part of return or record on appeal, see post ¶¶ 846, 854.

Loss of declaration shown on appeal by affidavit of the justice, see post ¶ 1019.

Amendment of declaration in circuit court on appeal, see post § 217.

Changing or enlarging claims or demands on appeal to circuit court, see post § 219.

Sufficiency of allegation of damages for false imprisonment, see False Imprisonment § 25, ¶ 106.

¶ 368. Where a party declares in writing before a justice the declaration must be conformed in substance to the rules of the circuit courts (Comp. L. 1871, § 5310; How. St. § 6875).—Benalleck v. People, 31 Mich. 200.

¶ 369. The declaration if in writing should be signed by someone.—Benalleck v. People, 31 Mich. 200.

¶ 370. Whenever the declaration in a suit in justice's court contains a substantial statement of a cause of action it must be held sufficient. Substance is required, not form. —Barber v. Taylor, 1 Mich. 352.

¶ 371. Where a declaration, though informal, fairly apprises the defendant of the claim made against him, it will be held sufficient if not demurred to.—Wilcox v. Toledo & A. A. R. Co., 43 Mich. 584.

¶ 372. Declarations in justices' courts are to be liberally construed, and, though informal, may be held sufficient when they fairly apprise defendant of the claim made against him.—Costello v. Ten Eyck, 86 Mich. 348.

¶ 373. A declaration that "defendant and divers other persons, desiring to celebrate the 4th day of July, 1865, and also on that day to serve a free dinner to the soldiers and their families of G. county, and also desiring to raise a sum of money for the said purpose, did designate the said plaintiff as a proper person to raise such sum of money by subscription as would be necessary to defray the expenses of said celebration," etc., and that "the said defendant for the carrying out of said purpose became indebted to the said plaintiff in the sum of $10," referring to the subscription on file, held sufficient.—Comstock v. Howd, 15 Mich. 237.

¶ 374. The rule that where an action is brought under a penal statute the declaration should show the fact, and where it does not, the penalty is not recoverable, does not apply to an action in justice court to recover the statutory penalty for selling liquor to a minor, in which an oral declaration was filed which did not refer to the statute, and the general issue was pleaded, a trial was had, and the justice's return showed that the question was not raised.—Carmer v. Hubbard, 123 Mich. 333.

§ 89. ——Conformity to process.

¶ 375. Where a justice's summons based on contract is followed up by a declaration sounding in a different action, the variance is waived by a failure to object or to demur, and by pleading the general issue.—La Barre v. Bent, 154 Mich. 520.

§ 90. ——In actions on contracts; common and special counts.

Joinder and misjoinder of counts, see post § 92.

¶ 376. Where, in a declaration in justice's court, a special count for a failure to accept certain barrels contracted for was followed by "one other count for the sale of said barrels, and delivery of part, and refusal of defendant to receive same as agreed upon; also the common counts," held, that this could hardly be called a special count, but was good as to the common counts.—Hinman v. Eakins, 26 Mich. 80.

¶ 377. Where the plaintiff exhibited a promissory note and stated that he declared against the defendant as indorser, without making any averment or statement as to the presentation of the note for payment, and notice of nonpayment to the defendant, the declaration was held bad in substance, and judgment thereon for the plaintiff—the defendant not appearing—was reversed.—Barber v. Taylor, 1 Mich. 352.

¶ 378. A justice's return set forth that "the plaintiff declared verbally against said defendants on common counts in assumpsit, and also on breach of a written contract, now on file in court, in all for $300 or under." Held a sufficient declaration to warrant the admission of the contract in evidence.—Bradshaw v. McLoughlin, 39 Mich. 480.

¶ 379. A declaration in a justice's court for breach of warranty must show the nature of the warranty and state the breach.—Smith v. Hobart, 43 Mich. 465.

¶ 380. Plaintiff in a justice's court declared on the common counts, and filed, as specifying the exact nature of his demand, an instrument which in itself constituted a contract sufficient to sustain an action and on which the transferee could sue. It was in terms payable to bearer, but bore the indorsement "without recourse" signed by the payee. It was understood by both parties as the substance of the declaration, and it fairly imported that the plaintiff was the transferee. There was no demurrer for uncertainty. Held, that under the liberal rules for construing pleadings in a justice's court there was enough to entitle plaintiff to show that he was the lawful transferee and to put the instrument itself in evidence.—Soper v. Mills, 50 Mich. 75.

¶ 381. Plaintiff in justice's court declared orally on "all the common counts" in assumpsit, and filed a bill of particulars claiming the balance of the purchase price of land sold to defendant. Held that, while the common counts as used in our practice do not usually include a count for real property sold and conveyed, yet the bill of particulars sufficiently apprised defendant of plaintiff's claim and rendered the pleading sufficient.—Nugent v. Teachout, 67 Mich. 571.

¶ 382. An oral declaration in justice's court upon the common counts and especially upon a certain contract to rent a house upon certain specified terms, which lease plaintiff is ready and willing to execute, but which defendant refuses to accept, contains no proper statement of the cause of action on the agreement, it not appearing what property the lease was to cover.—Lovette v. Essig, 92 Mich. 461.

¶ 383. A declaration filed in justice court in an action of assumpsit on all the common counts, and specially on a judgment in justice court against a corporation on a labor

debt, which clearly apprised the defendant in an action to enforce his personal liability as a stockholder of said corporation, of the claim against him, was sufficient under the liberal rules governing practice in justice court.—Wineman v. Fisher, 135 Mich. 604.

¶ 384. The common counts in assumpsit are not a sufficient declaration in a justice's court to authorize a recovery of the value of goods paid for but not delivered by the seller to the buyer, pursuant to a contract of sale.—Applebaum v. Goldman, 155 Mich. 369.

¶ 385. An instrument in the form of a promissory note, but rendered nonnegotiable by a condition appearing on its face, was indorsed on its back with the name of the payee. In a suit in justice's court on this instrument and on the common counts, the declaration failed to allege an assignment to the plaintiff, but the defendants in their special notice stated that the note had been transferred to the plaintiff. Held, the declaration was sufficient.—Worden Grocer Co. v. Blanding, 161 Mich. 254.

¶ 386. While pleadings in the justice court are treated with great liberality the common counts aided by a bill of particulars will not support an action arising from the violation of a contract regarding the breaking, care and keep of horses whereby the party having charge of them was to be paid by the use of the horses in his work, but the declaration must be one on the case for damages arising from the breach of the contract.—Cook v. Dade, 191 Mich. 561.

§ 91. ——In actions on torts.

Waiver of declaration in trespass, see post ¶ 402.

Construction of declaration in trespass, see also post ¶ 452.

¶ 387. A declaration in case claiming to recover back as damages money which defendant had caused to be extorted from plaintiff by duress of imprisonment on criminal process procured by him for that purpose states a lawful ground of action with sufficient precision, if not demurred to, to be sustained.—Holbrook v. Cooper, 44 Mich. 373.

¶ 388. A general ad damnum clause at the end of a declaration in justice's court will apply to a count for assault and battery, especially if the other counts are invalid; and if there were any defect in making it general it would be within the statute of amendments.—Sheldon v. Sullivan, 45 Mich. 324.

¶ 389. A declaration in justice's court sounding in tort for obtaining money under misrepresentation, fraud and deceit is insufficient where it fails to state what the charges consist of, and does not apprise the defendant of what matters are to be litigated.—Prest-O-Lite Co. v. Widrig, 179 Mich. 230.

¶ 390. A declaration in case before a justice for overflowing defendant's land sufficiently sets forth the cause of action in alleging that defendant damned, or caused to be damned, a ditch which plaintiff had used as a matter of right for more than twenty years, and was situated on a road laid out by the commissioners of highways, and that by the obstruction of the ditch the plaintiff had suffered damage as specified.—Enright v. Hartsig, 46 Mich. 469.

¶ 391. In an action in a justice court for injuries caused by defendant's horse running away, a declaration is sufficient which alleges that the defendant "negligently, wrongfully and recklessly left his horse on a public street unsecurely fastened knowing that the horse was of a wild and vicious disposition."—Sinsabaugh v. Brown, 126 Mich. 538.

¶ 392. In an action in justice's court a sufficient cause of action is stated by a declaration which alleges that defendant operated through a certain township a road nowhere fenced, and that plaintiff's colt, lawfully in said township, went on the track of said railroad and was killed through defendant's negligence, and because its track was not fenced.—Talbot v. Minneapolis, St. P. & S. S. M. R. Co., 82 Mich. 66.

¶ 393. A declaration in a justice's court, entered upon his docket, and set out in the record as follows: "Plaintiff declared in trespass to his damage, one hundred dollars for injury to buggy and horse," and to which no objection was taken before the justice, held sufficient.—Daniels v. Clegg, 28 Mich. 32.

¶ 394. Where a justice's court declaration in trespass does not state that plaintiff owns the premises in fee or otherwise, but merely that defendant broke and entered plaintiff's lands and premises, describing them, it fails to aver title in plaintiff.—Orris v. Kempton, 105 Mich. 229.

¶ 395. A declaration in trespass on the case held sufficient for a declaration in justice's court and not questionable on error to the supreme court.—Tyler v. Nelson, 109 Mich. 37.

¶ 396. In a declaration in justice's court for negligently setting out fire, an ad damnum stating plaintiff's damages at $100, and his right to have them doubled because of the statutory provision applicable thereto, is sufficient.—Rosevelt v. Hanold, 65 Mich. 414.

¶ 397. A declaration in justice's court for false imprisonment, averring that plaintiff was "thereby delayed and injured in his business," to wit, at the venue stated, suf-

fices to admit evidence of damage.—Thompson v. Ellsworth, 39 Mich. 719. [Note. The quoted words in this paragraph are derived from the official syllabus. The opinion does not show them. Editor.]

§ 92. ——Joinder and misjoinder of counts.

Common and special counts, see ante § 90.

¶ 398. There is not such a misjoinder of counts in the declaration as to deprive a justice's court of jurisdiction, where, it is claimed, such declaration adds to the special count on a contract, common counts in trespass, trover, etc., but where the language used in setting out the breaches of the contract is sufficient in form and substance to include the common counts; since pleadings in justice's court are liberally construed.—Thayer v. Gibbs, 140 Mich. 60.

§ 93. ——Splitting causes and demands.

Aggregation or division of claims to determine jurisdictional amount, see ante § 13.

As to demurrer, see also ante ¶ 371.

Assertion of set-off up to justice's jurisdictional limit as a splitting of it barring further right to assert it, see Former Adjudication ¶¶ 247, 248.

¶ 399. Separate actions are maintainable for parts of an amount due upon a continuous account of book entries made in the ordinary course of business, the only penalty fixed by statute (Comp. L. 1897, § 768) for splitting the cause of action being loss of costs in the second suit.—Phelps v. Abbott, 116 Mich. 624.

§ 94. Demurrer and objections for sufficiency.

Demurrer as constituting appearance, see ante § 44.

Waiver of objection that declaration for penalty fails to allege the statute, see ante ¶ 374.

Objections to pleas and notices, see post § 100.

Demurrer to plea in abatement, see post ¶ 415.

Special appeal as method of reviewing rulings on pleading, see post § 188.

Raising objections for first time on appeal, see post § 206.

General law as to demurrers, see Pleading, IV.

¶ 400. In whatever form it be put, any objection by a defendant in justice's court that plaintiff's declaration is insufficient in law is sufficient to constitute a general demurrer.—Stevens v. Harris, 99 Mich. 230.

¶ 401. An admission of plaintiff's title would be a demurrer to a declaration alleging title.—Stout v. Keyes, 2 D. 184.

¶ 402. By pleading not guilty to an action of trespass in a justice's court for assault and battery, wherein defendant was arrested and the affidavit read to him as a declaration, and by trying the case without a declaration, one is waived and the justice has jurisdiction.—Simon v. Spiro, 124 Mich. 484.

¶ 403. Defects in a declaration will be waived by defendant if he pleads issuably and goes to trial on the merits.—Hurtford v. Holmes, 3 Mich. 460.

¶ 404. Pleading to the merits and going to trial precludes the defendant from objecting to evidence on the ground that the declaration was not specific enough to warrant it, if it sufficiently states a cause of action and he was not misled.—Chancey v. Skeels, 43 Mich. 347.

¶ 405. Suit on a conditional promise to pay money to the order of a railroad company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was indorsed the name of a person who added to his name the word "assignee." The defendant pleaded the general issue and went to trial. It was shown on the trial that the payee in the promise had been put in bankruptcy, and the indorser of the paper was assignee in bankruptcy thereof. Held, that the objection that the plaintiff did not by its declaration aver its right to recover as assignee would not be sustained on the final submission of the case.—Wilcox v. Toledo & A. A. R. Co., 43 Mich. 584.

¶ 406. A declaration in trespass for breaking and entering plaintiff's close without asserting and describing a title in plaintiff in the lands is not such a claim of title as, under Comp. L. 1871, §§ 5326-5329; How. St. § 6894, is admitted by the plea of the general issue. The land is plaintiff's close if he had peaceable possession, even though he had no title; and it was not plaintiff's close if defendant was in peaceable possession.—Vandoozer v. Dayton, 45 Mich. 247.

¶ 407. Where a declaration in justice's court is good in substance, and defendant is present and pleads to the merits, he waives any objection on the ground of its being too general.—Whelpley v. Nash, 46 Mich. 25.

¶ 408. Where the defendant demurs to a declaration in the justice court and then pleads issuably, goes to trial and takes a general appeal to the circuit court and there goes to trial on the pleadings as they stood in the justice court, he cannot raise the question of the sufficiency of the declaration.—Sinsabaugh v. Brown, 126 Mich. 538.

¶ 409. The insufficiency of a declaration could not be complained of after defendant pleaded issuably and permitted the evidence to come in without specific objection, where the justice's return stated that the plaintiff declared orally and "especially on an order herewith filed as part of plaintiff's declara-

tion."—Mohr Hardware Co. v. Dubey, 136 Mich. 677.

¶ 410. An objection that a declaration in a justice court did not sufficiently describe a breach of contract is waived by pleading the general issue, by setting out the contract, seeking recoupment, and by trying the case in justice court without objection.—Fowles v. Rupert, 138 Mich. 150.

¶ 411. A defendant in an action commenced in the justice court who fails to question the sufficiency of a declaration admits its sufficiency.—Taylor v. Belton, 188 Mich. 302.

¶ 412. Formal defects in the pleadings in justices' courts will be overlooked if no objection is made to them until evidence is offered.—Holbrook v. Cooper, 44 Mich. 373.

§ 95. Pleas in abatement and to jurisdiction.

Waiver by appearance and joinder of issues, see ante § 51.
Appearance in attachment to object to jurisdiction, see ante § 63.
Pleas to the jurisdiction in replevin, see ante § 82.
Motion to dismiss as in effect a plea in abatement, see post ¶ 509.
Common-law certiorari to review decision on plea to jurisdiction, see post § 254.
Ruling on plea in abatement as ground for reversal on certiorari, see post ¶ 1216.
General law as to abatement, see Abatement.

¶ 413. Whether a plea in abatement to an action of trespass brought before a justice raises a question of title which cannot properly be entertained without the filing of the bond required by Comp. L. 1876, § 5327, How. St. § 6892, is unimportant if the plea is bad in itself.—East v. Cain, 49 Mich. 473.

¶ 414. No plea in abatement is necessary to destroy the jurisdiction of a justice depending on the sum in controversy, if shown on the trial to be excessive.—Chilson v. Jennison, 60 Mich. 235.

¶ 415. A plea in abatement by a defendant proceeded against as a fraudulent debtor, which avers that the justice of the peace before whom the proceedings are pending is an interested party, and that he is the attorney of plaintiffs in a pending replevin suit which involves the title to the property which defendant is charged with having fraudulently concealed, assigned and disposed of, is sufficiently certain on demurrer, and under How. St. § 6822, the justice is disqualified to act and is ousted of jurisdiction.—Clark v. Mikesell, 81 Mich. 45.

¶ 416. If the justice is an interested party at the time the plea in abatement in fraudulent debtor proceedings is filed, he is disqualified under the statute, and the fact that the plea fails to aver that he was so interested at the time the warrant was issued is immaterial.—Clark v. Mikesell, 81 Mich. 45.

¶ 417. A plea of not guilty in proceedings before a justice under the fraudulent debtor act, or filing an affidavit denying the fraud charged after the overruling of the plea in abatement on the ground that the justice is an interested party, is not a waiver of such plea, nor can such action be construed as an assent that the justice may proceed to try and determine the case.—Clark v. Mikesell, 81 Mich. 45.

¶ 418. By pleading the general issue in replevin, where the affidavit, writ and declaration set forth the value of the property as not exceeding $100, defendant admits a justice's jurisdiction, and cannot afterwards question it on the ground that the value of the property exceeded the jurisdictional limit of $100.—Henderson v. Desborough, 28 Mich. 170.

¶ 419. Where the want of jurisdiction of a justice of the peace, because of the nonresidence of the parties, is not apparent on the face of the record, a plea to the jurisdiction, properly verified, or a motion to quash, also properly verified, is the proper manner in which to raise the question, and it cannot be raised by an unsupported motion to dismiss.—Appleman v. Hahn, 149 Mich. 245.

§ 96. Pleas and notices of defenses.

Waiver by appearance and pleading to the merits, see ante § 51.
Pleading to the merits as waiver of defects in declaration, see ante § 94.
Pleading to the merits as waiver of security for costs, see post ¶ 699.
Pleas to the jurisdiction, see ante § 95.
Pleas in abatement, see ante § 95.
General issue in replevin as admission of allegations as to jurisdictional amount, see ante ¶ 352.
Objections to pleas and notices, see post § 100.
Evidence admissible under general issue, see post § 104 et seq.
Pleading title for first time on appeal, see post ¶ 939.
On appeal to circuit court, see post § 214.
Amendments in circuit court on appeal, see post § 218.
Plea and notice generally, see Pleading, III.
Provisions as to notice that title will come in issue, see Jud. Act, chap. LXIX, §§ 18, 19; Comp. L. 1915, §§ 14232, 14233.

¶ 420. A plea in a justice's court is sufficient if it fully apprises the plaintiff as to what the defense is.—Eddy v. Manshaun, 42 Mich. 532.

¶ 421. If a notice given under the general issue fairly apprises plaintiff of the defense

intended to be made it is sufficient.—Whittle v. Bailes, 65 Mich. 640.

¶ 422. An oral notice unaccompanied by the statutory bond (How. St. § 6890), by defendant in an action of trespass in justice's court, that title to land will come in question, is properly disregarded by the justice.—Ostrom v. Potter, 71 Mich. 44.

¶ 423. A notice of title in an action of trespass to lands in justice's court, which states that the land on which the injuries complained of were committed was a legal highway, and that defendant in removing the fence of the plaintiff was acting as highway commissioner under the statute, but which does not describe all of the land claimed to have been trespassed upon, is sufficient to apprise the plaintiff of the nature of the defense, and under it all pertinent testimony may be admitted.—Weber v. Stagray, 75 Mich. 32.

¶ 424. While 1897 C. C. Rule 7, subd. c, requiring notice of the defense that a note was obtained by fraud, does not apply to an action begun in justice court in which the general issue is pleaded, and thence appealed, it does apply where the defendant does not appear generally in justice court.—Ward v. Reed, 134 Mich. 392.

¶ 425. The requirement that in cases tried before a justice the plea shall be the general issue in all cases, with notice of any special defense, is mere matter of form, and will not invalidate a special defense pleaded alone.—Eddy v. Manshaun, 42 Mich. 532.

§ 97. ——Denials of execution of instruments.

Affidavits in replevin, see ante § 77.
Failure to deny execution as affecting admissibility of evidence, see also post § 126.
On appeal to circuit court, see post ¶ 909.
General law as to execution of instruments, see Execution of Instruments.

¶ 426. By Sess. L. 1855, p. 439, § 62, and p. 449, § 115, How. St. §§ 6875, 6928, if the written instrument declared on or set off before a justice is filed at the time of declaring or pleading, or giving notice of set-off, its execution must be denied on oath at the time of such filing, and not afterwards.—Fish v. Hale, 4 Mich. 506.

¶ 427. Under Comp. L. 1897, § 767, providing that the execution of written instruments shall not be denied except upon affidavit filed with the plea in justice court, a defendant in an action for stock subscription containing his genuine signature cannot, in the absence of such denial, avail himself of the defense that his signature was conditioned on his right to withdraw, and that he exercised such right.—Ada Dairy Ass'n v. Mears, 123 Mich. 470.

¶ 428. Under Comp. L. 1897, § 826, and C. C. Rule 8, failure of defendant to file an affidavit denying the execution of a written instrument upon which action is brought, amounts to an admission of its execution by the defendant or defendants who fail to file such affidavit, and the admission includes delivery and where the signature is by a partnership, the fact of the copartnership.—Naftzker v. Lantz, 137 Mich. 441.

¶ 429. Whenever in a suit on a promissory note before a justice of the peace it is claimed that a note declared upon and filed is not in substance the instrument executed by the party, under Comp. L. 1897, §§ 767, 826, How. 2nd Ed., §§ 12220, 12273, its execution must be denied under oath.—Ensign v. Fogg, 177 Mich. 317.

¶ 430. In an action in a justice's court on a promissory note begun by a summons, if the declaration was not filed or made until the trial day, such day is the proper time to produce and file the note and the defendant claiming an alteration should then deny its execution under oath.—Ensign v. Fogg, 177 Mich. 317.

§ 98. Pleading set-off and recoupment.

Objections to notice of recoupment, see post ¶ 439.
Recovery on recoupment limited to transactions specified in bill of particulars, see post ¶ 552.
Failure to interpose set-off as affecting costs in subsequent suit on the claim, see post ¶ 685.
Amendment of set-off in circuit court on appeal, see post § 219.
General law as to set-off and recoupment, see Set-off.
Provisions as to set-off and recoupment in justices' court, see Jud. Act, chap. LXIX, §§ 11-17; Comp. L. 1915, §§ 14225-14231.

¶ 431. In an action brought by a municipality defendant is entitled to all defenses, including the right of set-off, that he would have if sued by an individual.—City of Eaton Rapids v. Houpt, 63 Mich. 371.

¶ 432. A poundmaster sued by a city before a justice, for fees collected, may set off a claim which he has against the city.—City of Eaton Rapids v. Houpt, 63 Mich. 371.

¶ 433. Where defendant "pleaded the general issue, and gave notice of set-off and recoupment," such notice was held too general to authorize admission of evidence as to the damages sought to be recouped.—Ritter v. Daniels, 47 Mich. 617; Watkins v. Ford, 69 Mich. 357.

¶ 434. An affidavit verifying an account pleaded in set-off and showing the balance due, which states that the "annexed account is just, due and unpaid" is a substantial compliance with How. St. § 7525, which requires such affidavit to show that the ac-

count "is justly owing and due."—McGowan v. Lamb, 66 Mich. 615, by divided court.

¶ 435. Service of copy of account and affidavit filed under notice of set-off and required by How. St. § 7525, was waived where plaintiff in justice's court was present, making no objection, when the account and affidavit were filed, and where he moved an adjournment.—McGowan v. Lamb, 66 Mich. 615, affirming lower court by equal division.

¶ 436. Though the rules of pleading in justices' courts are more liberal than at the circuit, yet the nature of the claim of the parties litigant must be stated so as to show a cause of action, and with sufficient certainty to prevent surprise of the other party as to what he will be called upon to meet with his proofs; and the notice of recoupment comes within this rule.—Watkins v. Ford, 69 Mich. 357.

¶ 437. Even under the liberal rules of pleading in justices' courts, a mere general notice of recoupment without any particulars is insufficient.—Watkins v. Ford, 69 Mich. 357; Ritter v. Daniels, 47 Mich. 617.

§ 99. Entry of pleas on docket.

Justices' dockets generally, see post § 139 et seq.

¶ 438. A justice should enter an oral defense on his docket unless it is imperfect in substance, but his failure to do so will not deprive the defendant of his defense. If it is imperfect the defendant should be allowed to amend.—Eddy v. Manshaun, 42 Mich. 532.

§ 100. Objections to pleas and notices.

Objections to declaration, see ante § 94.
Objections to plea in abatement, see also ante § 95.
Saving questions for review on appeal to circuit court, see post § 206.

¶ 439. An objection that a notice of recoupment is too indefinite to permit evidence under it, comes too late on a request to charge when the plaintiff goes to trial in both the justices' and circuit courts without any objection to the sufficiency of the plea and notice, as the plaintiff should not be permitted to raise such an objection at the close of the trial.—Bacon v. Reich, 121 Mich. 480.

§ 101. Bill of particulars.

See also ante ¶¶ 381, 386.
Limiting recovery on recoupment to bill of particulars, see post ¶ 552.
Presumptions on certiorari as to service of bill of particulars, see post ¶ 1175.
General law as to bills of particulars, see Pleading, V.

¶ 440. The cost of refilling lots excavated below grade in taking gravel sold, which refilling was required by the contract, is sufficiently specified by an item in a bill of particulars: "Damage done to lots * * * in lowering same below street and alley grade, and in leaving surface of same irregular and uneven."—Grady v. Sullivan, 112 Mich. 458.

¶ 441. A bill of particulars is not a pleading in the justice court, and while it may restrict, it cannot enlarge the scope of the recovery permissible under the declaration.—Cook v. Dade, 191 Mich. 561.

¶ 442. Where plaintiff refuses to comply with the justice's order to file a properly demandable bill of particulars, the justice may exclude all testimony on his part and dismiss the case, such refusal being a virtual discontinuance of the suit.—Lovette v. Essig, 92 Mich. 461.

¶ 443. Where a motion to dismiss for failure to file bill of particulars is refused, defendant's consenting to an adjournment and his pleading to the declaration and joining in striking a jury will not preclude him from objecting to the reception of any evidence on the trial.—Lovette v. Essig, 92 Mich. 461.

¶ 444. It is an abuse of discretion for a justice, acting solely on his own motion, to exclude a defendant's bill of particulars of his claim of set-off merely because it was not filed within the time allowed for that purpose after being demanded by plaintiff, if it was in fact filed before trial, and if there was nothing to show that its reception would prejudice plaintiff.—Boatz v. Berg, 51 Mich. 8.

§ 102. Filing of instruments sued on.

Filing of affidavit and account not authorized, see post ¶ 539.

¶ 445. A written instrument upon which suit is brought may be filed previous to declaring, etc., and if it is on file at that time it will be sufficient.—Smoke v. Jones, 35 Mich. 409.

§ 103. Interpretation and construction of pleadings.

See also ante ¶¶ 380, 383, 386; post ¶ 905.
Rule of liberal construction, see also ante ¶¶ 398, 436, 437.
Construction of declaration, see also ante §§ 88, 90.
Construction of pleadings generally, see Pleadings, I.

¶ 446. The pleadings should be viewed with liberality, technicalities discountenanced, and substance instead of form required.—Hurtford v. Holmes, 3 Mich. 460; Cicotte v. Morse, 8 Mich. 424; Comstock v. Howd, 15 Mich. 287; Wilcox v. Toledo & A. A. R. Co., 43 Mich. 584; Snyder v. Winsor, 44 Mich. 140; First National Bank of Port

Huron v. Carson, 60 Mich. 432; Whittle v. Bailes, 65 Mich. 640; Nugent v. Teachout, 67 Mich. 571; Costello v. Ten Eyck, 86 Mich. 348.

¶ 447. Declarations in justices' courts are to be liberally construed.—Fletcher v. Bradford, 45 Mich. 349; Copas v. Anglo-American Provision Co., 73 Mich. 541; Canal St. Gravel-Road Co. v. Paas, 95 Mich. 372.

¶ 448. Oral pleadings in justices' courts are governed by liberal rules.—Lynch v. Craney, 95 Mich. 199.

¶ 449. An oral declaration in justice's court is not to be construed very strictly.—Grady v. Sullivan, 112 Mich. 458.

¶ 450. Where the pleadings are oral, only matters of substance are regarded, and judgment should not be reversed for objections not made at the trial.—Smith v. Dodge, 37 Mich. 354.

¶ 451. Pleadings in justice's court are treated with great liberality, and a declaration good in a justice's court is usually held good on appeal.—Applebaum v. Goldman, 155 Mich. 369.

¶ 452. A declaration in justice's court averring that defendant with force and arms plaintiff's "lands and premises" (describing them) "broke and entered, and carted and hauled away from said land a quantity of earth or sand, being the property of" plaintiff, etc., does not allege that the title to the land was in plaintiff; the giving of the description of the land only tends to identify the place where the alleged trespass was committed.—Orris v. Kempton, 105 Mich. 229.

§ 104. Issues and variance.

See also ante ¶¶ 378, 427, 433.
Joinder in issue as waiver of objections, see ante § 51.
Conformity of pleading to process, see ante § 89.
Admission of execution of instrument by failure to deny execution, see ante § 97.
Raising objections for first time on appeal, see post § 206.
Changing issues on appeal to circuit court, see post § 219.

¶ 453. In replevin brought by one claiming a special lien on the property for freight, defendant, under the general issue, without notice, may give evidence to reduce the lien by showing injury to the property while in transit.—Bancroft v. Peters, 4 Mich. 619.

¶ 454. The defense of total failure or want of consideration is admissible in justice court under the general issue without notice.—Hubbard v. Freiberger, 133 Mich. 139.

¶ 455. The defense of settlement with one of two trespassers was not available against the other, under the general issue in an action which originated in justice court and was appealed to the circuit court (Cir. Ct. Rule 7; Comp. L. 1897, § 767).—Sunlin v. Skutt, 133 Mich. 208.

¶ 456. A parol agreement tending to show fraud in the inception of a contract or modification of the written agreement is not admissible under a plea of the general issue although the action was originally commenced in justice court.—R. K. Carter & Co. v. Weber, 138 Mich. 576.

§ 105. ——Involving title to land.

Jurisdiction to pass upon title to land, see ante § 20
Transfer to circuit court to try title, see ante § 30.
Admission of claim of title, see post § 106.
Pleading title for first time on appeal, see post ¶ 939.

¶ 457. Under a declaration against defendant for falsely representing himself to have title to a piece of land, which plaintiff was induced to buy of him, the title to the land must necessarily come in question.—Brooks v. Delrymple, 1 Mich. 145.

¶ 458. For the purpose of identifying and proving his title to personal property a party may show that it was taken off from certain lands, and that he was the owner thereof, but this does not bring the title to lands in question.—Hart v. Hart, 48 Mich. 175.

¶ 459. In an action of trover, brought before a justice for the conversion of a quantity of hoops, it was held proper to show, under the plea of the general issue, that they were cut from lands belonging to a certain estate, and to put in evidence the government patent to the former owner and a power of attorney from his heirs, including plaintiff, empowering the defendant to sell and convey any of the property belonging to them. The introduction of such testimony would not be litigating a claim of title, and the evidence would be admissible for the purpose of identifying the property in suit.—Hart v. Hart, 48 Mich. 175.

¶ 460. Under a declaration in trespass quare clausum fregit containing no allegation of title but where plaintiff relies upon his possession, defendant may disprove it under the general issue.—Vandoozer v. Dayton, 45 Mich. 247.

¶ 461. In trespass if plaintiff claims and describes a title in himself in the declaration, it seems that defendant, under the general issue merely, will not be allowed to dispute it, or claim any right or possession in himself inconsistent therewith.—Vandoozer v. Dayton, 45 Mich. 247.

¶ 462. Tenancy of any sort is a species of title; and where a defendant, in an action

brought before a justice and involving title, has not given notice that title will come in question, he cannot rely upon his tenancy as a defense.—Vandoozer v. Dayton, 45 Mich. 247.

¶ 463. Deeds of land may be admissible as evidence in a justice's court for many purposes; and their admission will not sustain a presumption that the judgment in the suit was rendered in a case of which the court had no jurisdiction as determining the title to real property.—Schlatterer v. Nickodemus, 50 Mich. 315.

¶ 464. A question of title to land is raised in an action of trespass brought before a justice, if plaintiff offers deeds in evidence of his right of possession, or claims such right under a third person whose ownership he proposes to show, whatever reason may have been given by counsel for introducing such evidence.—Gay v. Hults, 55 Mich. 327.

¶ 465. Where a declaration in trespass avers title in fee and possession of the locus in quo, describing the land, and defendants' plea denies such title, averring that the freehold is in one of the defendants and that both entered upon the premises by lawful right, the question of title to the land is involved.—Labeau v. Labeau, 61 Mich. 81.

¶ 466. A title or claim of title does not come in question unless it is in issue in the case; and it is not in issue unless the title or claim of title is essential to plaintiff's right of recovery or to defeat a recovery in the action.—Ostrom v. Potter, 71 Mich. 44.

¶ 467. In an action to recover damages for cutting and carrying off certain pine trees "standing on his land," the title to land is in question unless title is admitted by defendant.—Maynard v. Reynolds, 137 Mich. 42.

§ 106. ——Admissions of claim of title.

See also ante ¶ 79.

As demurrer to declaration alleging title, see ante ¶ 401.

General issue as admission of title in trespass, see also ante ¶ 406.

¶ 468. A claim in plaintiff's declaration that defendant "did cut down and carry off * * * two pine trees of great value * * * then and there being and standing * * * on the land of plaintiff," is not a claim of title to the land since it could be established by proving plaintiff's possession, and hence title to the land is not admitted by a plea to the general issue without filing a bond and paying costs, under Comp. L. 1897, § 786, which provides that title is admitted by defendant unless he files a bond, etc.—Maynard v. Reynolds, 137 Mich. 42.

¶ 469. Under Comp. L. 1897, § 782 et seq., an oral declaration in justice's court for breach of a warranty deed and a claim for money fraudulently obtained by the vendor without any title whatever presents an issue as to title, and the defendant having failed to file a bond suffered the justice to have jurisdiction under section 786, and cannot dispute the averments in the plaintiff's declaration.—Parkinson v. Woulds, 125 Mich. 325.

§ 107. ——Admission of sworn account.

Confession of judgment, see post §§ 136-138.

¶ 470. The defendant in assumpsit in justice's court is not obliged to make any objections to the affidavit to an account authorized by How. St. § 7525, until introduced in evidence, and waives nothing by his silence, but if he has appeared and is present when the affidavit is introduced, and is silent, he waives all objections.—Gordon v. Sibley, 59 Mich. 250.

§ 108. Amendments.

Amendment of return of attachment, see ante § 64.

Amendments of affidavit in replevin, see ante § 77.

Amendment of replevin bond, see ante § 78.

Right to amend ad damnum clause, see also ante ¶ 388.

Amendment of plea, see also ante ¶ 438.

Special appeal as method of reviewing rulings as to amendments, see post § 232.

Amendments on appeal, see post § 216.

Amendment of appeal bond, see post § 199.

General law as to amendments, see Pleading, VI.

Amendment upon discontinuance as to some defendants, see Jud. Act, chap. LXX, § 28; Comp. L. 1915, § 14268.

¶ 471. Amendments to obviate mere technical errors are to be favored.—Snyder v. Winsor, 44 Mich. 140.

¶ 472. It was not the intention of Comp. L. 1897, § 764, to take away from a justice's court the power of granting amendments which it theretofore possessed, but rather to grant to litigants in justice's courts the absolute right to amend pleadings at any time, leaving with the court the discretionary power to permit amendments after the pleadings were closed which power the court had before the statute.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

¶ 473. Suit was brought on a promissory note which was payable one day after date, and had run eight years. The defendant pleaded nonassumpsit within six years, when he should have pleaded actio non accrevit within six years. The error being pointed out, he asked leave to amend, but the justice refused it. Held, that the plea as it stood fairly apprised the plaintiff of the defense relied upon, namely, the statute of limitations, and the justice should have allowed the defendant the benefit of it, either

with or without the amendment.—Snyder v. Winsor, 44 Mich. 140.

¶ 474. An amendment to a written declaration in an action in the justice court which relates to the same transaction to which reference is made in the original declaration is properly allowed.—Thompson v. W. W. Kimball Co., 190 Mich. 579.

¶ 475. Defendants arrested on a warrant issued upon an affidavit fatally defective were required to plead immediately and did so. On the adjourned day they asked leave to amend by giving notice of justification under an execution. The justice refused leave unless they would consent to an adjournment to accommodate the plaintiff, which they declined to do. Held, that under the circumstances they should have been permitted to amend without conditions.—Meddaugh v. Williams, 48 Mich. 172.

§ 109. ——Amendments to insert names of defendant partners.

¶ 476. Comp. L. 1871, § 5307 (How. St. § 6872), permitting a suit in justice's court to be instituted in the firm name, amendable by inserting the partners' names before the pleadings are closed, does not apply where there is no partnership in fact.—Stirling v. Heintzman, 42 Mich. 449.

¶ 477. Comp. L. 1871, § 5307 (How. St. § 6872), permitting suits to be brought in justices' courts in partnership names, amendable afterwards by inserting the partners' names, does not apply to cases where there is no partnership in fact.—Stirling v. Heintzman, 42 Mich. 449.

§ 110. ——Time for amendment.

¶ 478. Amendments in matters of form or substance in the furtherance of justice can be allowed at any time before the final submission of the cause; and whether allowed or not, if they were not such as would cause surprise, and, after the evidence is introduced, if the amendment is such as would be allowed as matter of course, the declaration should be treated as amended.—Webster v. Williams, 69 Mich. 135.

¶ 479. After submission of the cause the justice has no authority to make or allow any substantial amendments to the declaration.—Webster v. Williams, 69 Mich. 135.

¶ 480. A justice of the peace may in his discretion permit the filing of an amended declaration and bill of particulars on an adjourned day.—Moser v. White, 171 Mich. 105.

¶ 481. A party arrested and brought before a justice on a civil warrant has a right to a reasonable time for pleading. If the justice requires him to plead immediately, and he pleads the general issue and the case is then adjourned, he is entitled of right to amend his pleadings and put in any justification he may have on the adjourned day.—Meddaugh v. Williams, 48 Mich. 172.

E. CONTINUANCES, DISCONTINUANCES AND DISMISSALS.

Res adjudicata effect of dismissal, discontinuance or nonsuit, see Former Adjudication § 17.

§ 111. Continuance or adjournment; grounds, affidavit and showing.

Request for adjournment as appearance, see ante § 44.
Waiting an hour for appearance before adjourning case, see ante ¶ 213.
Adjournment as condition to amendment, see also ante ¶ 475.
Adjournment to perfect attachment service, see post § 112.
Consent to continuance, see post § 113.
Effect of adjournment, see post § 116.
Effect upon jurisdiction of unauthorized continuance or adjournment, see ante § 27.
Necessity that adjournments be shown on docket, see post § 117.
Continuance to render decision, see post § 134.
Presumptions on appeal as to the propriety of adjournment, see post § 233.
Presumptions on certiorari as to existence of grounds, see post ¶¶ 1176, 1181.
General law as to continuances, see Continuance.
Mandamus to compel justice to proceed with the cause on the adjourned day, see Mandamus.
Provisions as to adjournments, see Jud. Act, chap. LXVIII, §§ 1-6; Comp. L. 1915, §§ 14206-14211.

¶ 482. It is error for a justice to refuse an adjournment on a return day of summons upon a sworn showing that defendant is too unwell to attend to business or leave his house.—Locke v. Leonard Silk Co., 37 Mich. 479.

¶ 483. The showing for a continuance need not be as complete upon the return day of summons as would be required later in the case.—Locke v. Leonard Silk Co., 37 Mich. 479.

¶ 484. It is not a legal cause for the adjournment of proceedings on the return day that the party asking it wants the assistance of counsel.—Warner v. Comstock, 55 Mich. 615.

¶ 485. A defendant in an attachment suit before a justice asked for its adjournment to a specified day, but the justice refused and adjourned it instead to the hour fixed for the hearing of an application for a dissolution of the attachment before a circuit court commissioner in a remote township; though the defendant showed that the presence of himself and of two witnesses was necessary at both places on the adjourned

day, the justice refused a continuance asked for by defendant's attorney; held, that as the justice's refusal to adjourn to the day specified occasioned the necessity for a continuance, it was a valid reason for asking the continuance, and a refusal to continue, knowing why the continuance was asked, was an abuse of whatever discretion might belong to the justice in the matter.—Mercer v. Lowell Nat. Bank, 29 Mich. 243.

¶ 486. Where there is an express understanding between the parties to an action in justice's court that the cause will be heard upon a certain day, to which an adjournment is taken, and the plaintiff procures witnesses then to be present from a distance, the refusal of the justice further to adjourn the cause is not such an abuse of discretion as amounts to legal error, although security for costs demanded on return day is not entered until the adjourned day, if it does not appear that defendant was prevented from preparing his defense on account of such delay; especially where defendant, upon the return day, with knowledge of the facts, procured the adjournment without insisting that security for costs be previously entered.—Wood Mowing & Reaping Machine Co. v. Vanderbilt, 109 Mich. 489.

¶ 487. It is not error to refuse adjournment, although a bill of particulars was not served until two days prior to the adjourned day, where it was contemplated by the parties that plaintiff should have some time for its preparation, and no time was fixed for the service thereof, and where it further appears that defendant knew before the service of the same who were to be his witnesses, and no affidavit of merits is filed.—Wood Mowing & Reaping Machine Co. v. Vanderbilt, 109 Mich. 489.

¶ 488. Defendant's refusal to submit to cross-examination upon his affidavit for continuance is sufficient reason for denying the continuance.—Boatz v. Berg, 51 Mich. 8.

¶ 489. The filing of an affidavit sworn to on February 18th, showing that defendant was on that day engaged in the circuit court as a juror, that cases were assigned for each day from February 18th to and including the following week, and that, by reason of his duties as a juror, he could not go to trial on February 19th in the case against him, entitled him to a continuance, and it was error to proceed to judgment in his absence.—Brower v. Tatro, 115 Mich. 368.

§ 112. Adjournment to perfect attachment service.

Service of writ of attachment, see ante § 57.

¶ 490. While service of a justice's attachment in proceedings to enforce a lien upon logs may, under How. St. § 8427f, be made upon the agent of the owner, where the latter is not the defendant named in the writ, and is a nonresident of the state, plaintiff in such case is bound, under How. St. § 8427k, providing the proceedings shall follow the general statute, "except as herein otherwise provided," to cause an adjournment to be taken for thirty days, in accordance with How. St. § 6846.—Brabant v. Lillie, 117 Mich. 167; Kennard v. Lillie, 117 Mich. 169.

§ 113. Postponement by consent.

As waiver of defects and objections, see ante § 51.

Consenting party's right to object to adjournment, see post § 115.

Adjournment upon stipulation in absence of parties as ground for collateral attack, see post ¶ 671.

Right upon collateral attack to show want of consent to adjournment, see post ¶ 672.

¶ 491. Where defendant in justice court signs a stipulation for continuance of a replevin suit at the instance of the plaintiff, it is the plaintiff's duty to appear and obtain the continuance on the day set for hearing.—Barlow v. Riker, 138 Mich. 607.

¶ 492. Attorneys cannot dispute the authority of a clerk who has represented them without question at an appearance and adjournment, to consent to a further adjournment in a justice's court.—Simon v. Sempliner, 86 Mich. 136.

§ 114. Period for which adjournment allowed.

See also ante ¶ 105.

Divestiture of jurisdiction by adjournment for too long a period, see ante § 27.

Mistake as to date of adjournment as ground for allowing belated appeal, see post ¶ 813.

¶ 493. The three months in all for which, under How. St. § 6899, postponements may be had on cause shown, date from the return day of a writ of replevin.—Hatch v. Christmas, 68 Mich. 84.

§ 115. Waiver of objections to improper adjournment.

Loss of jurisdiction by unauthorized continuance or adjournment, see ante § 27.

Objections available on appeal, see post §§ 206, 228.

Consideration of objections made for first time on certiorari, see post § 263.

¶ 494. A defendant who has requested, or at least consented, to an adjournment of a suit in a justice's court on account of the sickness of the justice, cannot complain that the adjournment was on the justice's own motion, and, being for more than six days, wrought a discontinuance depriving the justice of jurisdiction to proceed further with the cause.—Patterson v. McRea, 29 Mich. 258.

¶ 495. Where, on the return-day of summons both parties ask for an adjournment, plaintiff for eight days and defendant for thirty, and, where, upon their failing to agree upon the time, the justice adjourns the case for seven days, defendant cannot be heard to say that such adjournment was upon the justice's motion and without the consent of the parties.—Shaw v. Fortine, 98 Mich. 254.

¶ 496. The objection that the case had been illegally adjourned in justice's court is unavailable if not taken before the trial. —Erie Preserving Co. v. Witherspoon, 49 Mich. 377.

¶ 497. Where, after a cause had been adjourned on mutual consent to a certain date, the attorneys of the parties agreed upon a later date of which they at different times orally informed the justice, upon which he altered the minutes of the adjournment, held, that the consent individually given waived all irregularity.—Simon v. Sempliner, 86 Mich. 136.

¶ 498. Any irregularity in an adjournment of a cause, made by a justice at plaintiff's requests, without a showing of cause, and against the objection of defendant, before the pleadings were filed, was waived, where defendant selected the date to which adjournment was made, and demanded security for costs after the adjournment was agreed upon.—Bernstein v. Thayer, 157 Mich. 625.

§ 116. Operation and effect of continuance or adjournment.

Effect of unauthorized continuance or adjournment to divest jurisdiction, see ante § 27.
Hour for appearance upon adjourned day, see ante § 49.
Waiver by adjournment in civil arrest proceedings, see ante § 52.
Temporary absence of justice on adjourned day as discontinuance, see post ¶ 508.
Demanding and calling jury on adjourned day, see post ¶ 521.
Nonappearance on adjourned day as discontinuance, see post § 118.
Validity of default judgment rendered on adjourned day, see post § 135.
Refusal of justice to proceed on adjourned day tantamount to nonsuit, see post ¶ 776.

¶ 499. Where a suit in justice's court is continued by consent of parties, without pleading, the case is regularly in court on the adjourned day.—Pattridge v. Lott, 15 Mich. 251.

¶ 500. An adjournment on plaintiff's motion, after defendant, under his notice of set-off, had filed an account of said set-off, verified by affidavit as provided by How. St., § 7525, operated as a waiver of the service of the account, affidavit, etc.—McGowan v. Lamb, 66 Mich. 615, affirming lower court by equal division.

¶ 501. Where a case in the justice court is adjourned to a certain date it is improper for the justice to allow plaintiff in the meantime to withdraw his case and pay the costs. —People ex rel. Dota v. McKay, How. N. P. 103.

§ 117. Docketing and entering adjournment.

See also post § 143.
Justice's dockets generally, see post § 139 et seq.
Sufficiency of the docket entry and facts required to be shown therein, see post § 143.

¶ 502. A justice's judgment, rendered upon defendant's failure to appear on the adjourned day, is void, where the docket entry of an adjournment by consent does not show the place to which the cause was adjourned as required by How. St., § 7053.—Waldron v. Palmer, 104 Mich. 556; Fitzhugh v. Rivard, 109 Mich. 154.

¶ 503. A justice may continue a proceeding before him by holding it over from day to day, in order to perform other official duties, without losing jurisdiction of the case; and such holding over is not technically an adjournment, within the meaning of How. St., §§ 6899-6903, even though it is so called in his docket; and it is not within the provisions of section 7053, requiring the docket to show adjournments, and the place to which they are made.—Woempener v. Ketchum, 110 Mich. 34.

¶ 504. A justice's docket, which shows that a cause was adjourned to a specified date "the same hour and place" and that it was called on that date and defendant appeared specially and moved to dismiss for other stated reasons, which motion was denied, and the trial had and judgment rendered, does not show lack of jurisdiction on its face in that the hour and place of adjournment are not stated.—Prouty v. Brown, 125 Mich. 507.

§ 118. Discontinuances.

For refusal to file bill of particulars when ordered, see ante ¶ 442.
Unauthorized adjournment as discontinuance of suit, see ante § 27.
Effect of discontinuance to oust jurisdiction, see ante § 28.
Nonappearance of plaintiff within the hour as discontinuance, see also post ¶ 600.
Discontinuances on appeal, see post § 222.
General law as to discontinuances, see Discontinuance.
Discontinuance where title in issue, see Jud. Act, chap. LXIX, § 26; Comp. L. 1915, § 14240.
Discontinuance as to some defendants, see Jud. Act, chap. LXX, § 28; Comp. L. 1915, § 14268.

Provisions as to discontinuance and nonsuit where set-off as recoupment interposed, see Jud. Act, chap. LXIX, § 17; Comp. L. 1915, § 14231.

¶ 505. Plaintiff in justice court, where no set-off or recoupment is pleaded or offered, may discontinue at any time before verdict, to wit, after he has judgment followed by the grant of a new trial by the justice.—Burkart v. Blaumann, 142 Mich. 41.

¶ 506. Plaintiff's failure to appear on the return day of the summons and within an hour after the time fixed therein works a discontinuance.—Redman v. White, 25 Mich. 523; Mudge v. Yaples, 58 Mich. 307.

¶ 507. The failure of the plaintiff to appear within an hour of the time to which a cause in justice's court has been adjourned for the completion of the trial operates, under the statute as a discontinuance, and deprives the justice of all jurisdiction thereafter to render any judgment against the defendant or any judgment whatever, except that of nonsuit, and for costs.—Brady v. Taber, 29 Mich. 199; Post v. Harper, 61 Mich. 434.

¶ 508. On the adjourned day of a cause, the absence of the justice for a few minutes more than an hour after the time to which the cause had been adjourned, for the purpose of holding a coroner's inquest, will not operate as a discontinuance of the cause.—Stadler v. Moors, 9 Mich. 264.

§ 119. Dismissal or nonsuit.

See also ante ¶ 120.
Duty to enter nonsuit where neither party appears within the hour, see also ante ¶ 103.
Right of plaintiff to withdraw his case after adjournment, see ante ¶ 501.
Dissolution of attachment, see ante § 65.
Dismissal and nonsuit in cases of replevin, see also ante § 80.
Refusal to file bill of particulars as ground for dismissal, see also ante § 101.
Dismissal for defect in summons as judgment of nonsuit, see post ¶ 777.
Refusal of justice to continue on adjourned day tantamount to nonsuit, see post ¶ 776.
Failure to file security for costs, see also post § 164; ¶ 779.
Costs on dismissal, see post ¶ 686.
Appealability of judgments of nonsuit and dismissal, see post § 185.
Dismissals on appeal, see post § 222.
General law as to dismissal and nonsuit, see Discontinuance, Dismissal and Nonsuit.
Provisions as to nonsuit, see Jud. Act, chap. LXXI, § 1; Comp. L. 1915, § 14272.

¶ 509. The effect of a motion to dismiss a case in justice's court, because plaintiff's Christian name is not given in the replevin writ, is in effect a plea in abatement, which is admitted by the statement of the party who appears for plaintiff that he cannot amend because of a want of knowledge of plaintiff's full name; and the case is then properly dismissed.—Fisher v. Northrup, 79 Mich. 287.

¶ 510. Failure of a plaintiff to file security for costs as directed by the court, is as much voluntary as his failing to appear or to declare would be, and leaves no discretion to the justice, but compels a judgment for a voluntary nonsuit, no proper showing for adjournment having been made.—Walmsley v. Bowman, 151 Mich. 553.

¶ 511. Where a short summons is issued when not justified, defendant, on making that fact appear, is entitled to an order dismissing the case.—Stoll v. Padley, 98 Mich. 13.

¶ 512. Where a defendant served by a long summons in a suit in a justice's court, sends by registered letter to the justice an affidavit that he is a nonresident of the county, and entitled to be served by a short summons, together with a motion to dismiss, it is the duty of the justice to dismiss the suit where he finds the facts alleged in the affidavit to be true.—Nelson v. Hillen, 164 Mich. 507.

¶ 513. A motion to dismiss a suit in the justice's court because of the nonresidence of the parties, is properly denied where the facts of nonresidence do not appear on the face of the record, and there is no proof to support the motion.—Appleman v. Hahn, 149 Mich. 245.

¶ 514. Where a case is adjourned to a certain date, but in the meantime plaintiff improperly dismisses it and pays the costs, if plaintiff fails to appear at the date to which the case is adjourned, it seems that the only thing that the justice can do is to render a judgment of nonsuit and for costs.—People ex rel. Dota v. McKay, How. N. P. 103.

¶ 515. A motion to dismiss on the ground that the plaintiff did not appear before a justice of the peace within an hour of the time to which a case had been adjourned is properly denied where the defendant was still in the court room when the plaintiff arrived and had not moved for a dismissal before the belated arrival, there being a waiver on the part of the defendant.—Charles Bakrow & Co. v. Totten, 146 Mich. 57.

¶ 516. A justice's summons was made returnable at one o'clock in the afternoon. It was read to defendant and a copy given him, which, however, specified one o'clock in the forenoon as the time for appearance. Defendant appeared at one in the morning, got the justice out of bed, and in plaintiff's absence took a nonsuit. But before the real time arrived he saw the original summons, which stated it correctly. Held, that the nonsuit was void.—Merrick v. Mayhue, 40 Mich. 196.

¶ 517. Under Comp. L. 1897, § 836, providing that judgment of nonsuit with costs shall be rendered by a justice if plaintiff discontinue or withdraw his action, etc., no other judgment could be entered where after judgment for plaintiff and a grant of a new trial by the justice the plaintiff discontinued.—Burkart v. Blaumann, 142 Mich. 41.

§ 120. ——Setting aside or vacating dismissal.

¶ 518. While a justice of the peace cannot under How. St., § 6817, set aside his own judgment and grant a new trial, yet it has been held that where he has, through mistake or otherwise, rendered a void judgment of dismissal, he may, the parties being present, treat it as a nullity, and proceed as though it had not been rendered.—Hodges v. Bagg, 81 Mich. 243.

¶ 519. A justice of the peace, under the supposition that plaintiffs had not appeared, announced that the case would be dismissed for that reason; but ascertaining within the statutory hour, and before any record had been made or injury resulted to the defendant, that plaintiffs had appeared by counsel, who was then just outside the court room door, he notified defendant's attorney to appear at a given hour the same day. The attorneys for both parties appeared at the hour named, when defendant's attorney stated that he appeared specially, and orally pleaded such dismissal as an abatement of the suit. The justice assumed jurisdiction of the case, heard the plaintiffs' testimony, and rendered a judgment in their favor, which was sustained.—Hodges v. Bagg, 81 Mich. 243.

F. TRIAL AND JUDGMENT.

Nature and extent of justice's jurisdiction and rules controlling its exercise, see ante § 10.
Waiting an hour for appearance, see ante § 49.
Continuances and adjournments, see ante IV, E.
Appeal or certiorari as appropriate method to review errors on the trial, see post § 251.
Conduct of trials generally, see Trial.
Provisions as to trial in justices' courts, see Jud. Act, chap. LXX; Comp. L. 1915, §§ 14241-14271.

§ 121. Calling and notice of trial.

Notice of trial in circuit court on appeal, see post § 227.

¶ 520. If a justice, whether properly or not, has erased his docket entry of the appearance of a defendant, he ought not to proceed in the case without giving notice of his purpose to the defendant, or the attorney who had assumed to appear for him.—King v. McKenzie, 51 Mich. 461.

§ 122. Juries; demand, allowance and waiver.

Right to award a venire de novo, see post ¶ 549.
Waiver of jury trial in justices' cases, see Jury § 10.
Functions and province of jury in forcible entry or summary proceedings, see Forcible Entry § 42.
General law as to juries, see Jury.

¶ 521. Where a party has failed to demand a jury at the joining of issue and before adjournment, it is nevertheless competent for the justice to order one to be called on his demand on the adjourned day. The failure of the party to demand a jury within the time allowed by law is only a waiver of the right; but the justice possesses the same power to order one afterwards as is possessed by the circuit court.—Van Sickle v. Kellogg, 19 Mich. 49.

¶ 522. If a justice of the peace has any doubt, or is not able to certify in positive terms, that no jury was demanded at the time provided for by the statute, he should entertain the demand and allow a jury.—Pontiac & L. Plank-Road Co. v. Hopkinson, 69 Mich. 10.

¶ 523. Defendant's absence from further proceedings in justice's court after demanding a jury and paying the jury fee does not amount to a waiver of the jury, and the justice cannot proceed to try the case alone.—Boatz v. Berg, 51 Mich. 8.

§ 123. ——Tender or payment of fees.

See also post ¶ 997.
Costs and jury fees in general, see post IV, G.
Payment of jury fees as condition to appeal, see post § 200.
Provisions as to jury in justices' courts, see Jud. Act, chap. LXX, §§ 12-22; Comp. L. 1915, §§ 14252-14262.
Provisions as to fees of jurors, see Jud. Act, chap. LXXVII, § 2; Comp. L. 1915, § 14398.

¶ 524. If a jury is demanded at the time of joining issue and before adjournment, the jury fee may be paid on the day to which the cause stands adjourned at any time before the trial is entered upon by the swearing of witnesses.—Pontiac & L. Plank-Road Co. v. Hopkinson, 69 Mich. 10.

¶ 525. One who demands a jury in justice's court, and pays their fees, has no right, if this jury disagrees, to insist upon trial by another without advancing an additional jury fee.—McGraw v. Sturgeon, 29 Mich. 426; Roberts v. Tremayne, 61 Mich. 264.

§ 124. ——Summoning, selection and challenges.

Review on special appeal of court's refusal to summon second jury, see post ¶ 997.
Certiorari as method of reviewing rulings upon challenges, see post ¶ 1091.

Summoning juries generally, see Jury, IV.
Selecting and challenging jury generally, see Jury, V.

¶ 526. A justice's juries may be summoned from the county at large.—Faulks v. People, 39 Mich. 200.

¶ 527. In justice court the trial should proceed before the jury struck by the parties, unless there is challenge for cause, and it was error to allow a peremptory challenge.—Eldridge v. Hubbell, 119 Mich. 61.

¶ 528. How. St., § 6935, in so far as it limits the time for the selection and summoning of a new jury in justice's court to forty-eight hours, unless the parties agree to a shorter time, applies only to cases where such jury has been properly demanded and the statutory fees paid.—Roberts v. Tremayne, 61 Mich. 264.

¶ 529. One of the regular panel of jurors in justice court cannot be excused on a peremptory challenge.—Reed v. Peacock, 123 Mich. 244.

§ 125. ——Deliberations and conduct of jury.

Deliberations and conduct of jury in general, see Trial, VIII.
Provisions as to deliberation and discharge of jury, see Jud. Act. chap. LXX, §§ 29, 31; Comp. L. 1915, §§ 14269, 14271.

¶ 530. A justice of the peace has no right to go alone into the jury room to advise the jury, even at their request, unless the parties or their counsel consent.—Galloway v. Corbitt, 52 Mich. 460.

¶ 531. Where the justice, at the request of the jury and with the consent of the parties, went to the jury room with the latter to answer a question the jury wished to ask him as to their right to find for an amount less than the face of the note sued on, held no error.—Smoke v. Jones, 35 Mich. 409.

¶ 532. If the parties to a suit in justice's court allow the justice to participate with the jury's consultations in the jury room, they constitute a tribunal of their own to determine what verdict shall be rendered, and after the rendition of the same, all having been done by consent, the justice may render judgment upon it, and if the verdict was wrong the parties are remediless by certiorari.—Snyder v. Wilson, 65 Mich. 336.

¶ 533. It is error for a justice of the peace after a jury has retired to deliberate upon a verdict to hold communications with the jury in the jury room in the absence of the parties or their counsel or without their consent.—Donville v. Russell, How. N. P. 8.

§ 126. Burden of proof, presumptions and evidence.

Necessity of proof to sustain judgment, see also post § 131.
Effect upon jurisdiction of proving more than is claimed, see ante § 15.
Disclosure by garnishee, see ante §§ 71, 72.
Examination of garnishee, see ante § 73.
Judicial notice that person signing return of replevin writ was marshal, see ante ¶ 340.
Evidence upon application for execution, see post § 165.
Docket entries as to evidence on application for execution, see post § 173.
Evidence on appeal to circuit court, see post §§ 235, 236.
Presumptions and burden of proof on certiorari, see post § 268.
General law as to burden of proof, presumptions and evidence, see Evidence.
Right of justice to take judicial notice of signature and office of city marshal, see Evidence ¶ 153.
Compelling attendance of witnesses, see Witnesses I.
Fees of witnesses, see Witnesses VII.

¶ 534. A cause of action must be as fully proved in a justice's court as in any other.—Cicotte v. Morse, 8 Mich. 424.

¶ 535. Proof of the execution of the statutory bond given by a contractor for a public building is not dispensed with in an action in assumpsit begun by a materialman in justice's court, though there is no affidavit denying execution as required by 1897 C. C. Rule 8.—People for use of Holmes v. Cotteral, 115 Mich. 43.

¶ 536. Orders for the payment of money are admissible in evidence without proof, when sued upon, and when their execution is not denied under oath, as required by the statutes (How. St., § 6928).—Ryerson v. Tourcotte, 121 Mich. 78.

¶ 537. An affidavit proving the claim and served with a justice's summons is admissible in evidence to make a prima facie case for the plaintiff, although not signed by the affiant as agent, attorney, or bookkeeper of the plaintiff.—Hirsh v. Fisher, 138 Mich. 95.

¶ 538. Under Comp. L. 1897, § 826, providing that a written instrument declared upon may be used in evidence without proving its execution, unless such execution is denied under oath, no other evidence than the note need be introduced in a suit upon a note in a justice's court, and no witnesses need be sworn where the execution of the note is not so denied.—Charles H. Warner & Sons Co. v. Lewis, 155 Mich. 450.

§ 127. Offer and introduction, reception and order of proofs.

Objecting to reception of evidence where bill of particulars not filed as ordered, see ante ¶ 443.
Docket entry of waiver of proof of the execution of written instrument, see post ¶ 588.

Evidence as to costs, see also post § 162.
Special appeal to review errors in admitting evidence, see post § 188.
Availability on special appeal of questions as to evidence, see post § 232.
Raising objections for the first time on certiorari, see post § 263.
Review on certiorari of rulings on evidence, see post § 265.
Statutory power to call adverse party for cross-examination, see Examination of Witnesses § 81.

¶ 539. The affidavit and account authorized by How. St., § 7525, like any other testimony, must be introduced in evidence to become operative, the statute making no provision for its being filed with the justice.—Gordon v. Sibley, 59 Mich. 250.

¶ 540. It is discretionary with a justice to allow proof to be made after the argument as to the time when the summons was delivered for service, provided such proof does not prejudice the opposite party.—Gray v. Willcox, 56 Mich. 58.

¶ 541. Where defendant's attorney declines to cross-examine plaintiff's witness and says he submits his case, upon which plaintiff rests, and after arguments by both sides a decision is given to plaintiff, the justice acts within his discretion in refusing to open the case.—Chivers v. Lytle, 97 Mich. 477.

¶ 542. A justice cannot take testimony after the case is closed.—Bullock v. Ueberroth, 121 Mich. 293.

§ 128. Verdicts and findings.

Effect upon verdict of justice's presence in jury room, see ante § 125.
Conformity of judgment to verdict, see also post ¶ 555.
Verdict equivalent to judgment for purposes of execution, see post ¶ 703.
General law as to verdicts and findings, see Verdicts.
Provisions as to delivery of verdict, see Jud. Act, chap. LXX, § 30; Comp. L. 1915, § 14270.

¶ 543. Unless the facts in a replevin suit before a justice require a special finding, a verdict that "this jury finds for the plaintiff" is sufficient, and judgment must be entered on it.—Smith v. Dodge, 37 Mich. 354.

¶ 544. Trespass was brought in justice's court on three counts, two based on the statute against forcible dispossession and one at common law for damage to plaintiff's goods. The jury's verdict was in these words: "Damages on goods twenty-seven dollars and seventy-five cents. Actual exemplary or personal damages twenty dollars, trebled sixty dollars." Held, that this would sustain judgment; the assessment of damages was sufficiently specific and the actual damages sufficiently indicated.—Wilson v. McCrillies, 50 Mich. 347.

§ 129. ——Construction, conclusiveness and effect.

Effect upon jurisdiction of doubling verdict, see ante § 15.
Execution upon verdict, see post § 166.
Review on certiorari of sufficiency of evidence, see post § 265.
Presumptions on certiorari as to sufficiency of evidence to sustain verdict or findings, see post § 268.

¶ 545. A justice must construe and apply the verdict of a jury reasonably in the light of the proceedings.—Wilson v. McCrillies, 50 Mich. 347.

¶ 546. A jury's verdict in justice's court is conclusive; the justice cannot set it aside nor make it invalid by neglecting to enter judgment on it at once. The law supplies the judgment if not entered, and its subsequent entry in accordance with the verdict is proper.—Alt v. Lalone, 54 Mich. 302.

¶ 547. Where an issue formed upon a plea of not guilty in replevin was tried by a jury, who returned a verdict as follows, "This jury find for the plaintiff," held that, although not a formal verdict in replevin, yet it sufficiently indicated for which party the jury had found the issue, and that it was the duty of the justice to enter the verdict in the proper form, according to the substantial finding, and to render judgment thereon.—People v. Foote, 1 D. 102.

§ 130. New trials.

Discontinuance after new trial granted, see ante ¶ 505.
General law as to new trials, see New Trial.

¶ 548. A justice of the peace cannot grant a new trial.—Alt v. Lalone, 54 Mich. 302.

¶ 549. Where the jury have found a verdict the justice cannot award a venire de novo, thus in effect granting a new trial of the cause.—People v. Foote, 1 D. 102.

¶ 550. A justice of the peace, under Act No. 475, Local Acts 1903, granted a motion by plaintiff for a new trial without giving defendant a chance to be heard. Later, defendant moved to vacate the order, and the justice in his return stated that both sides had been heard, and he thought a new trial should have been granted. Held, the defendant's objection that a new trial had been ordered without hearing defendant was without merit.—National Cash Register Co. v. Richards, 159 Mich. 128.

§ 131. Judgment on trial of issues.

Judgment in attachment, see ante § 66.
Judgment in garnishment, see ante §§ 75, 76.
Judgment in justices' replevin, see ante § 83.
Sufficiency of verdict to sustain judgment, see also ante ¶ 544.
Necessity of entering judgment upon proper verdict, see also ante ¶¶ 543, 546, 547.

Garnishment before one justice of judgment obtained before another, see ante ¶ 287.
Judgment on default, see post § 135.
Judgment on confession, see post § 136.
Entering and recording judgment, see post § 139 et seq.
Power of justice to vacate or modify judgment, see post § 147.
Conclusiveness and effect of judgment, see post § 148.
Docket entries as evidence of the judgment, see post § 148.
Payment, satisfaction or discharge of judgment, see post § 157.
Execution upon judgment, see post § 165.
Transcripts of justices' judgments, see post § 175 et seq.
Docketing judgment in circuit court and effect thereof, see post §§ 179-184.
Presumptions on appeal as to propriety of judgment, see post § 233.
Raising objection on appeal that justice rendered judgment outside the county, see post ¶ 906.
Judgment on appeal to circuit court, see post § 238.
Actions to enforce judgments, see Judgments, XII.
Provisions as to judgments in justice's court, see Jud. Act, chap. LXXI, §§ 1-16; Comp. L. 1915, §§ 14272-14287.
Provisions as to judgment upon set-off or recoupment, see Jud. Act, chap. LXIX, §§ 13-15; Comp. L. 1915, §§ 14227-14229.

¶ 551. Where plaintiff declared orally on a note then present on file, and the justice, in entering the substance of the declaration on his docket, described the note as dated in 1874, when in fact it bore date in 1871, there was no material variance; the incorrect date in the docket was substantially corrected by the note itself, and the mistake might have been cured in fact by correcting the entry.—Smoke v. Jones, 35 Mich. 409.

¶ 552. In a case where defendant in justice's court filed a general notice of recoupment without any particulars, the court, without considering the sufficiency of the notice to admit any evidence, held that recoupment thereunder must be limited to the transaction specified in plaintiff's bill of particulars.—McKevitte v. Feige, 57 Mich. 374.

¶ 553. A justice of the peace, or a magistrate, has no right to supply any defect in the proofs by acting upon knowledge that came to him in some other case; and in an action for goods sold and delivered, where there is no evidence that a plaintiff is doing business in the name of a company having the contract to supply the goods, or that such contract was assigned to the plaintiff, such facts cannot be supplied by the justice in the manner first mentioned.—Bullock v. Ueberroth, 121 Mich. 293.

§ 132. ——Amount and terms.

Jurisdiction as affected by amount of recovery, see ante § 15.
As affected by bill of particulars, see ante ¶ 441.
Amount of recovery in replevin, see ante § 84.
Errors in respect to amount or terms as ground for collateral attack, see post § 154.
Amount of costs, see post § 160.
Stating amount of judgment in affidavit for transcript, see post § 176.
Affidavit of amount due as prerequisite to docketing transcript, see post § 180.
Appealable amount of judgment, see post § 186.
Amount of judgment on appeal to circuit, see post § 238.
Judgment in excess of amount claimed as ground for reversal on certiorari, see post § 273.
Remission of excess over justice's jurisdiction, see Jud. Act, chap. LXXI. § 9; Comp. L. 1915, § 14280.

¶ 554. A defendant who prevails in replevin before a justice may recover the value of the property replevied, not exceeding $500, which is the constitutional limit of the jurisdiction of justices.—Henderson v. Desborough, 28 Mich. 170; Humphrey v. Bayn, 45 Mich. 565; Chilson v. Jennison, 60 Mich. 235.

¶ 555. Under a declaration in justice's court containing three counts, two based on Comp. L. 1871, § 6372 (How. St., § 7959), for forcible dispossession, the third a common-law count for damage to goods, the jury's verdict was: "Damages on goods, $27.75. Actual exemplary or personal damages $20, trebled $60." Held, that this sustained a judgment for $87.75; the preponderating inference being that nothing beyond actual damage was included in the $20.—Wilson v. McCrillies, 50 Mich. 347.

§ 133. ——Upon joint obligations or demands.

Judgments as to joint parties and rights generally, see Judgments, II, C.
Judgment on confession against persons jointly liable, see post § 138.
Appeal by one of several plaintiffs or defendants, see post ¶ 801.
Clerical errors in judgment upon joint debt as ground for collateral attack, see post ¶ 673.
Grounds for allowing one codefendant to appeal after time, see post § 194.
Provisions as to judgments in actions against joint parties, see Jud. Act, chap. LXXI, §§ 6, 7; Comp. L. 1915, §§ 14277, 14278.

¶ 556. A justice cannot render judgment on a bill or note against part of the defendants.—Berend v. Avery, 39 Mich. 132.

¶ 557. Judgment for a joint conversion cannot be entered against a defendant who had not been served with process.—McLean v. Isbell, 44 Mich. 129.

¶ 558. Under Pub. Acts 1899, No. 199, a judgment may be rendered against one de-

fendant, in assumpsit against husband and wife in justice's court, even though the other defendant was found not liable.—Wilson v. Medler, 140 Mich. 209.

§ 134. ——Time for rendition.

Time to tax costs, see post § 162.
Execution recitals as to year in which judgment rendered, see post ¶ 704.
Statements in affidavit for transcript as to time of rendition of judgment, see post § 176.
Computation of time, see Time.
Provisions as to time for rendition, see Jud. Act, chap. LXXI, § 8; Comp. L. 1915, § 14279.

¶ 559. Where a justice, when a cause is submitted, informs the parties he shall take time to decide the cause, but does not say how much, he is not obliged to wait four days.—Draper v. Tooker, 16 Mich. 74.

¶ 560. When the justice does not fix the time within the four days allowed by the statute upon which to render his judgment, the parties are bound to take notice when the judgment is rendered.—Draper v. Tooker, 16 Mich. 74.

¶ 561. If a justice determines, when a cause is submitted to him, to decide it on some particular day within the four days allowed by statute, this is in legal effect a continuance of the cause until that day, and should be so announced to the parties and so entered upon his docket.—Draper v. Tooker, 16 Mich. 74.

¶ 562. A judgment not rendered within four days after the cause has been submitted to the justice is void.—Harrison v. Sager, 27 Mich. 476; Brady v. Taber, 29 Mich. 199; Hall v. Howard, 39 Mich. 219; Weaver v. Lammon, 62 Mich. 366.

¶ 563. Under Act No. 475, Local Acts 1903, as amended by Act No. 660, Local Acts 1907, a justice has no jurisdiction in a case ten days after the trial to any further extent than to give judgment and a decision cannot be rendered thereafter.—Troy v. Rodgers, 162 Mich. 28.

¶ 564. A justice tried a case on June 20th. He announced that on June 30th he would make his decision. By consent of both parties on June 30th, he postponed his decision to July 3d. Held, that defendant was estopped to set up the lack of jurisdiction of the justice to render judgment beyond the ten-day period provided by statute.—Troy v. Rodgers, 162 Mich. 28.

§ 135. Defaults and judgments thereon.

Necessity of waiting an hour for appearance, see ante § 49.
Recitals as to defaults, see post § 142.
Failure to wait an hour for appearance as ground for collateral attack, see post § 152.
Execution upon judgment, see post § 165.
Ignorance of default as ground for allowing belated appeal therefrom, see post ¶ 813.
General law as to defaults, see Defaults; Judgments § 3.

¶ 565. It is not error for a justice to proceed to judgment upon the nonappearance of defendant served by long summons, as shown by the return, there being nothing on the face of the summons to show that defendant was a nonresident entitled to a short summons and no objection on that ground being made or any showing of nonresidence; since under that state the justice had no alternative.—Courtis v. Garrison, 148 Mich. 226.

¶ 566. Where, on the adjourned day of a cause, a justice was absent half an hour over time in the performance of official duties not pertaining to his judicial office, and on his return, upon defendant's refusal to appear, adjourned the cause in his absence and gave him notice of the adjournment, and on the next adjourned day gave judgment against him in his absence, the judgment was held void.—Ruberts v. Hathaway, 42 Mich. 592.

¶ 567. A judgment rendered in plaintiff's favor before the return hour of the summons, without defendant's consent or appearance, or when plaintiff has failed to appear in one hour thereafter, is void.—Mudge v. Yaples, 58 Mich. 307.

¶ 568. A justice should require distinct lawful evidence that summons has been served personally, before rendering judgment on its return against a defendant who has not appeared.—Smalley v. Lighthall, 37 Mich. 348.

§ 136. Judgment on confession.

Oral admissions before justice as preventing appeal, see post ¶ 787.
Docket showing to sustain, see post § 145.
General law as to confession of judgment, see Confession of Judgment; Judgments, I.

¶ 569. A confession of judgment before a justice is void unless in accordance with the statute authorizing it.—Clark v. Holmes, 1 D. 390; Beach v. Botsford, 1 D. 199; Spear v. Carter, 1 Mich. 19; Wilson v. Davis, 1 Mich. 156; Dodge v. Bird, 19 Mich. 518; Austin v. Grant, 1 Mich. 490.

¶ 570. A justice can render judgment on confession of the party only in those actions which he has jurisdiction to try.—Spear v. Carter, 1 Mich. 19.

¶ 571. Whether confession by the president of a corporation without a showing of authority from the directors gives jurisdiction to render judgment, quære.—Jones v. Avery, 50 Mich. 326.

§ 137. ——Cognovit or admission of indebtedness.

¶ 572. A judgment by confession without process is void, unless the confession is in writing signed by the defendant in the presence of the justice.—Wilson v. Davis, 1 Mich. 156.

¶ 573. Under R. S. 1838, p. 389, § 2, a judgment by confession was held void where it did not appear that the confession was "signed by the person making the same, in the presence of the justice and of one or more competent witnesses." The statute was construed to require the witnesses to subscribe their names as such.—Beach v. Botsford, 1 D. 199; Austin v. Grant, 1 Mich. 490.

¶ 574. Where parties appeared before a justice, and confessed judgment in favor of another, on a demand arising upon contract, for a sum specified, and authorized judgment to be entered thereupon, it was held a substantial acknowledgment of their indebtedness, and sufficient under this statute.—Kinyon v. Fowler, 10 Mich. 16.

¶ 575. It is only where the parties appear without process that a written confession signed by the defendant is required by the statute. If the defendant appears after due service of process, and orally admits the cause of action for which the plaintiff declares, this is sufficient to authorize judgment to be entered against him.—Crouse v. Derbyshire, 10 Mich. 479.

¶ 576. Where no suit has been commenced by process, judgment can only be taken in justice's court upon confession signed in the justice's presence.—Cox v. Crippen, 13 Mich. 502.

¶ 577. A judgment entered on confession without process is void if the paper treated as a confession is a mere due-bill.—Dodge v. Bird, 19 Mich. 518.

¶ 578. To give an oral admission of indebtedness the effect of a cognovit, in a case where a money demand is in suit, it must not only admit that the plaintiff has a demand, but it must either definitely fix the amount or furnish the means of fixing it by some process of mere calculation. Otherwise no judgment is confessed and the case requires evidence.—Morrison v. Riker, 26 Mich. 385.

§ 138. ——Against persons jointly liable.

Judgment after trial of issues upon joint obligations or demands, see ante § 133.

¶ 579. Judgment against two, on confession of one, after return day of summons, and without continuance, is void.—Clark v. Holmes, 1 D. 390.

§ 139. Dockets and entering and recording judgments.

Necessity of taking minutes of garnishee's examination, see also ante § 73.
Recitals as to appearance and defaults, see post § 142.
Recitals as to continuances and adjournments, see post § 143.
Recitals as to costs, see post § 144.
Construction and interpretation of docket entries, see post § 146.
Docket entry merely evidence of the judgment, see post § 148.
Docket entries as to payment or discharge of judgment, see post § 158.
Sufficiency of transcript, see post § 177.
Entering and docketing justice's judgment in circuit court, see post §§ 179-184.
Record on appeal, see post § 201.
Return to certiorari, see post § 259.
General law as to records, see Records.
Record of judgments generally, see Judgments, III.
Record of judgment for contempt, see Contempt § 38.
Provisions as to justice's docket, see Jud. Act, chap. LXXX, § 3; Comp. L. 1915, § 14451.

¶ 580. The docket of a justice is a public record, at all times open for proper entries.—Cox v. Crippen, 13 Mich. 502.

¶ 581. The record of the court of a justice of the peace consists of the entries required by the statute to be made upon his docket.—Goodrich v. Burdick, 26 Mich. 39.

¶ 582. A justice's judgment which was rendered upon the verdict, and entered by the justice in his minutes, is not void because it was not forthwith transcribed upon his docket.—Saunders v. Tioga Mfg. Co., 27 Mich. 520.

¶ 583. The entry of judgment should be officially signed by the justice.—Howard v. People, 3 Mich. 207.

¶ 584. Where the entry of a judgment on a justice's docket is followed immediately by a stay of execution in the same case—each being dated separately, but the dates being the same—and it is inferable from the docket that both entries were made at the same time as one transaction, and the official signature of the justice is appended at the foot of the entry of the stay, the judgment is not void for want of signature, nor the stay for want of attestation.—Hollister v. Giddings, 24 Mich. 501.

§ 140. Requisites and sufficiency of docket entries.

Entry of examination of garnishee, see ante § 73.
Entry upon docket of oral defense, see ante ¶ 438.
Entries as to stay of execution, see also post § 169.

Amendment of docket, see post § 147.
Evidence to contradict docket entries, see post § 149.
Insufficiency of docket entries as ground for collateral attack, see post § 150 et seq.

¶ 585. A judgment rendered by a justice of the peace on failure of defendant to appear on an adjourned day is void if the docket entries fail to show the hour at which the summons was returnable, the hour and place to which the cause was adjourned, the hour on the adjourned day at which plaintiff appeared, and the hour at which the case was called by the justice.—Stolte, Dangel & Foss Co. v. Cochran, 111 Mich. 193.

¶ 586. The justice's docket need not state that the proceedings were before the justice who issued the summons and signed the docket, or that the summons was returnable before him at a proper place; nor need it state where the entry was made.—O'Donnell v. Wade, 151 Mich. 103.

¶ 587. How. St., § 8035, which provides that garnishment suits in justices' courts "may be entered on the docket as suits in other cases," is permissive, not mandatory, and the judgment may be valid although the entry in respect to the title of the proceedings differs from that commonly made and names both the principal parties and the garnishee with the names of the respective attorneys opposite and does not enter the garnishment proceeding as a separate entitled suit.—Fasquelle v. Kennedy, 55 Mich. 305.

¶ 588. Where a defendant waives formal proof of the execution of a written instrument sued on in a justice's court, there is no requirement that such waiver be entered upon the docket.—Stegeman v. Fraser, 161 Mich. 35.

§ 141. ——Jurisdictional recitals in general.

To show waiver by appearance and joinder in issue, see also ante § 51.
Evidence to contradict recitals of jurisdiction, see post § 149.
Necessity that record on appeal show jurisdictional facts, see post § 201.
Conflict between return on certiorari and the justice's docket in respect to jurisdictional recitals, see post § 270.

¶ 589. The justice's docket must show by reasonable intendment that the justice had jurisdiction.—Mudge v. Yaples, 58 Mich. 307.

¶ 590. The jurisdiction of justices of the peace cannot be presumed, but must appear affirmatively in their proceedings.—Wight v. Warner, 1 D. 384; Clark v. Holmes, 1 D. 390; Spear v. Carter, 1 Mich. 19; Saunders v. Tioga Mfg. Co., 27 Mich. 520.

¶ 591. A justice's powers are statutory, and his jurisdiction must affirmatively appear.—Harbour v. Eldred, 107 Mich. 95.

¶ 592. The jurisdiction of the justice of the peace must appear affirmatively on the face of the proceedings.—Davison v. Davison, 99 Mich. 625; Wells v. United States Fidelity & Guaranty Co. of Baltimore, Md., 160 Mich. 213.

¶ 593. Under Comp. L. 1897, § 957, How. 2nd Ed., § 12403, the jurisdiction of the justice must appear affirmatively upon the face of proceedings entered upon a docket kept by him.—Tacoma v. Nyenhuis, 194 Mich. 420.

¶ 594. To establish a valid judgment, the docket of a justice of the peace, or, instead, the minutes of the proceedings made and filed by him, must affirmatively show that he acquired and retained jurisdiction, and any omission in this regard cannot be supplied by reference to the files in the case. So held where the docket contained merely a memorandum of rendition of judgment, and the minutes of the justice, indorsed upon the file wrapper, mentioned no year, except as given in the date line immediately preceding the justice's signature.—Rasch v. Bissell, 106 Mich. 106.

¶ 595. Under Comp. L. 1897, § 720, a valid judgment against partners is not made out by the justice's docket showing the return of process not served against one defendant and a continuance for ten days while service is obtained in another county, where it is not shown that the action is on contract, the county in which the defendant can be found is not stated, it does not state that the alias was directed to the officer of a given county, or that the justice indorsed on the alias writ what defendant had been served in the county where the suit was commenced.—Reed v. Parker, 134 Mich. 68.

§ 142. ——Recitals as to appearance and defaults.

See also ante ¶ 585; post ¶ 848.
Appearance in justices' courts, see ante § 44.
Effect of erasing docket entry of appearance, see ante ¶ 520.
Conclusiveness of recitals as to appearance, see post § 149.
Failure to wait an hour for appearance as ground for collateral attack, see post § 152.
Collateral attack on ground that docket fails to show attorney's authority to appear, see post § 151.

¶ 596. It is proper that in every case the justice should make his docket show in what manner the parties appear, but he is not expressly required by statute to do so.—Morton v. Crane, 39 Mich. 526.

¶ 597. The justice's docket must show affirmatively the day and hour of the appearance of the parties, and if defendant is absent that plaintiff appeared on the return day of the summons, and within one hour

after the time fixed therein.—Mudge v. Yaples, 58 Mich. 307.

¶ 598. Where there has been no appearance on defendant's part the justice's docket must affirmatively show, by way of showing the justice's jurisdiction, that plaintiff appeared within one hour of the time to which the cause was adjourned.—Post v. Harper, 61 Mich. 434.

¶ 599. A justice's docket entry reciting the date and return day of the summons, and containing no other date except to repeat at the end of it the date of the return day, and which does not state on what day the parties were called, and the plaintiff appeared and the defendant failed to appear, is not enough to comply with Comp. L. 1857, § 3890, which was not meant to leave the time of appearance to be referred to the date of the judgment in a case affording room, on the face of the docket, for the two acts on separate days.—Redman v. White, 25 Mich. 523.

¶ 600. A docket entry which does not show whether the plaintiff appeared on any particular day out of several does not show that he appeared within an hour after the return day of process; and as (Comp. L. 1857, § 3777, clause 2) his failure to appear within that time works a discontinuance, such a docket entry fails to show that the justice was authorized to render the judgment, and is, therefore, not admissible to prove the validity of the judgment.—Redman v. White, 25 Mich. 523.

¶ 601. It is not a valid objection to a justice's docket, when offered as evidence of a judgment rendered against a defendant who did not appear, that it fails to show that the justice waited one hour after the return-hour for defendant to appear.—Talbot v. Kuhn, 89 Mich. 30; Chaddock v. Barry, 93 Mich. 542.

¶ 602. How. St., § 7053, subd. 3, which requires a justice of the peace to enter upon his docket the time when the parties to a suit appeared before him, is sufficiently complied with, where the process is returnable forthwith, by stating the day on which the parties appeared.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 603. Justice is not required to enter showing of authority of plaintiff's attorney to appear.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 604. A justice's docket which does not show whether or not plaintiff appeared within one hour after the return hour, or that the justice waited one hour for the defendant to appear before beginning the trial of the case, or that the attorney for plaintiff proved his authority to act, is fatally defective.—Moore v. Frederick, 197 Mich. 573.

¶ 605. An objection that the docket entry of a justice of the peace failed to show that plaintiff appeared within the hour, was frivolous where the entry stated that the cause was called, plaintiff appeared in person, and after waiting one hour, and defendant not appearing, etc., judgment was rendered.—Cole v. Potter, 135 Mich. 328.

§ 143. ——Recitals as to continuances and adjournments.

See also ante § 117; ¶ 585.
Continuances and adjournments in justices' courts, see ante IV, E.
Entry of continuance to render judgment, see ante § 134.
Irregularities as to continuances and adjournments as ground for collateral attack, see post § 153.
Discontinuance resulting where record fails to show appearance of plaintiff, see also post ¶ 848.
Omission to state place of adjournment as error on certiorari, see post ¶ 1190.

¶ 606. The objection that the hour to which a case was continued does not appear in a justice's docket is frivolous and properly overruled if it appears that the hour was fixed and that it appeared in the justice's minutes, but had not been transferred to his docket.—Gray v. Willcox, 56 Mich. 58.

¶ 607. A justice's neglect to record in his docket the place to which a case is adjourned is a clerical irregularity for which judgment cannot be reversed if the defendant is not misled and appears and answers.—Whelpley v. Nash, 46 Mich. 25.

¶ 608. Where a justice of the peace fails to enter on his docket on whose motion an adjournment is had as provided by sec. 791, Comp. L. 1897, the error is not fatal to the judgment since such provision is directory and not mandatory.—Smith v. Kistler, 174 Mich. 367.

¶ 609. Where a justice of the peace fails to enter on his docket to what place an adjournment is had it is fatal to the judgment.—Smith v. Kistler, 174 Mich. 367.

¶ 610. The docket of a justice of the peace must show the place to which a cause is adjourned in order to make the adjourned hearing valid as against an absent party and this defect is not remedied by a supplemental return by the justice setting out the time and place of adjournment, that it had been noted in his minutes but omitted from his docket by clerical error, and that the adjournment was had upon the application of the party now complaining.—Mitts v. Harvey, 125 Mich. 354.

¶ 611. The date of entry of a judgment on a justice's docket and the date to which the cause is adjourned are shown sufficiently by

an entry under a given date and hour that the plaintiff appeared and defendant's motion for a continuance was refused followed by another paragraph stating that the motion was overruled and the cause adjourned to 1 p. m. at a specified place and at 1 p. m. at the place indicated proofs were heard and judgment rendered.—Loder v. Reed, 129 Mich. 180.

§ 144. ——Recitals as to costs.

Right to and amount of costs, see post § 159 et seq.

Provisions as to effect of judgment in assumpsit on bond, see Jud. Act, chap. LXVI, § 7; Comp. L. 1915, § 14172.

¶ 612. The reasons for allowing double costs, under Comp. L. 1897, § 11266, How. 2nd Ed., § 14401, giving a justice of the peace authority to assess same in certain cases, need not be entered upon the docket.—Peterson v. Harrington, 197 Mich. 611.

§ 145. ——Showing to sustain judgment on confession.

Judgments on confession in justices' courts, see ante §§ 136-138.

¶ 613. A justice's authority to render judgment on confession is derived solely from the statute, and the docket entries of the proceedings must show that the law has been complied with.—Beach v. Botsford, 1 D. 199; Clark v. Holmes, 1 D. 390; Spear v. Carter, 1 Mich. 19; Shadbolt v. Bronson, 1 Mich. 85.

¶ 614. A judgment was rendered by a justice in these words, after the title of the cause: "Judgment by written confession of the above named defendants, in favor of the above named plaintiff, for eighty-eight dollars and eighteen cents damages and costs of suit." Held, that the judgment did not show, and was not prima facie evidence, that the justice had jurisdiction of either the persons of the defendants, or of the subject-matter of the suit, and that it was therefore void.—Spear v. Carter, 1 Mich. 19.

¶ 615. Where two persons confessed judgment, and the judgment entry recited that "the parties appeared," it was held that this phrase purports that the creditor, as well as the debtors, was present and participated in the proceedings.—Kinyon v. Fowler, 10 Mich. 16.

¶ 616. A justice's judgment rendered on a confession in writing, signed by the defendant in due form, is valid though the justice's docket does not affirmatively show that no process was issued. A confession that is sufficient without process, and where the defendant appears voluntarily, is certainly good with it.—Hollister v. Giddings, 24 Mich. 501.

¶ 617. Where a judgment by confession in an attachment suit is entered by the justice in a different docket from that in which the attachment suit is entered, and the docket entries are connected in the two dockets as the proceedings in the attachment suit, they are sufficient to establish that the judgment entered was one in the attachment suit.—Hahn v. Seifert, 64 Mich. 647.

§ 146. ——Certainty, construction and interpretation.

Construction and conclusiveness of return of service of process, see ante § 40.

Reference to files in the case to supply jurisdictional recitals, see ante ¶ 594.

Construction of entry that "the parties appeared," see ante ¶ 615.

Justice's signature construed as applying to both the entry of judgment and stay of execution, see post ¶ 711.

Amendment of return on appeal to show against whom judgment was rendered, see post ¶ 856.

Docket entry merely the evidence of the judgment, see post § 148.

Construction of record of justice when removed to supreme court on error to circuit, see Appeal § 339.

¶ 618. The justice's docket is entitled to a fair and reasonable interpretation.—Mudge v. Yaples, 58 Mich. 307.

¶ 619. The records of proceedings before a justice are only required to be certain to a common intent.—Shaw v. Moser, 3 Mich. 71.

¶ 620. A justice's judgment, though not technically a record, has all the effect of a record, and the docket entry thereof should be as explicit and certain as to all matters of substance as a judgment in a court of record.—Howard v. People, 3 Mich. 207.

¶ 621. The docket of a justice stated that a cause was called and judgment rendered "on the return of process." Held to mean on the return day of process, and not the time of its actual return.—Aldrich v. Maitland, 4 Mich. 205.

¶ 622. A statement in the docket that judgment was rendered in favor of plaintiff—there being only one defendant—sufficiently shows that judgment was rendered against defendant.—Aldrich v. Maitland, 4 Mich. 205.

¶ 623. The docket entry of a justice showed that, on default of appearance by the defendants in a suit against the maker and indorser of a note, he proceeded to hear the cause on a return of service of summons on the within named defendant, and entered judgment as follows: "And after considering the evidence judgment is this day rendered for $300 damages and $3 costs." Held, that this judgment was indefinite and void on its face.—Sherman v. Palmer, 37 Mich. 509.

¶ 624. Where the entries in a justice's docket show that a case was held open from 9 o'clock a. m. of August 2 until the same

hour of the following day, and all of the after-proceedings are continuous, and appear by the docket to have occurred on the same day, and all appear above the date of August 3 at the foot of the docket, the docket speaks for itself, and shows that a marginal entry of August 2, opposite said latter entries, is a clerical error.—Stoll v. Padley, 98 Mich. 13.

¶ 625. Where, in a suit in justice's court, defendant, a corporation, was correctly named in the summons as "The Sands & Maxwell Lumber Company," and plaintiff declared orally "against the defendant, a corporation doing business under the name of the 'Pentwater Lumber Company,'" and, in default of defendant's appearance,—the summons having been personally served,—a judgment was rendered against it in its corporate name, the record will be given such construction as will support the judgment, by construing the language in the declaration as stating that the defendant was doing business under the name of the Pentwater Lumber Company.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 239.

¶ 626. A justice's docket record must disclose jurisdiction and show everything which the statute requires to be entered upon it; but it must also be construed fairly and reasonably, and in view of the fact that the justice is not presumed to be a legal expert. Reasonable certainty, or perhaps "certainty to a common intent," is all that is necessary.—Vroman v. Thompson, 51 Mich. 452.

¶ 627. A docket entry which states that defendants acknowledged their indebtedness, will support the inference that both defendants were present during the proceedings, although only one is mentioned as present at the time the case was called.—O'Donnell v. Wade, 151 Mich. 103.

¶ 628. An entry on a justice's docket which begins "1899, May 23rd, 10 o'clock A. M.," and goes on to state that the case was called and plaintiff and defendant were present in person, implies their presence at 10 o'clock.—O'Donnell v. Wade, 151 Mich. 103.

§ 147. Modification and amendment of judgment or entry.

See also ante ¶ 551.

Amendment by circuit court on appeal, see post § 203.

Relief by bill in equity against justices' judgments, see Judgments, VI.

¶ 629. A justice cannot amend a judgment by substituting another name for that of the defendant, even by consent of the plaintiff and the person whose name is to be substituted.—Foster v. Alden, 21 Mich. 507.

¶ 630. Where a justice enters judgment as against Peter Mayo in a suit begun by process against Peter Mayhue, it is competent to amend the error by following the summons.—Merrick v. Mayhue, 40 Mich. 196.

¶ 631. Justices' courts are courts of limited jurisdiction, having no stated terms, and when a case has been tried and the record thereof entered upon the justice's docket, his control over it has ended, except to issue execution.—King v. Bates, 80 Mich. 367.

¶ 632. A justice cannot change his docket for the purpose of taking away or conferring jurisdiction.—Toliver v. Brownell, 94 Mich. 577.

¶ 633. A justice cannot amend his docket after he has once made it up and officially signed it. Accordingly it is not possible to sustain a judgment on a material entry made later.—Kluck v. Murphy, 115 Mich. 128.

¶ 634. Whether, after the allowance of a writ of certiorari, a justice of the peace can, on motion, change the entry on his docket so as to make it show the true date of a return of service of an attachment, or permit an officer who has omitted to date his return to affix the correct date, quære.—Nicolls v. Lawrence, 30 Mich. 395.

¶ 635. When a justice of the peace has once rendered judgment in a cause he has no power to vacate the same, or set it aside, or to render a new judgment; and if he attempt this, though it be done in obedience to a writ of mandamus from the circuit court, the new judgment so attempted to be rendered will be a mere nullity, and the prior judgment will remain in full force.—O'Brien v. Tallman, 36 Mich. 13.

§ 148. Conclusiveness and effect of judgment and docket.

Nature of justice's jurisdiction, whether inferior and limited, and construction of powers conferred, see ante § 10.

Validity of judgment rendered after expiration of time for decision, see ante § 134.

Power of justice to vacate or modify, see ante § 147.

Collateral attack of justice's judgment, see post §§ 150-155.

Presumptions supporting judgment upon collateral attack, see post § 156.

Period for which judgment continues in force, see post ¶ 709.

Effect upon judgment of allowing excessive costs, see post § 163.

Effect of docketing transcript upon the judgment, see post § 182.

Effect of invalid proceedings upon transcript, see post ¶ 766.

Appeal from the judgment, see post V.

Certiorari to review the judgment, see post VI.

Effect of perfecting appeal from judgment, see post §§ 208, 253.

Presumptions on certiorari to support judgment, see post § 268.

Conflict between docket entries and the return on certiorari, see post § 270.

Grounds for equitable relief against justice's judgment, see also Judgments § 75.

Actions to enforce judgments, see Judgments, XII.
Conclusiveness as bar or estoppel of judgment pending appeal, see Former Adjudication § 27.
Judgment as bar to set-offs and recoupments, see Former Adjudication §§ 46, 52.
Effect of judgment against joint parties upon service upon one, see Jud. Act, chap. LXXI, § 6; Comp. L. 1915, § 14277.

¶ 636. The statute requiring a justice of the peace to keep a docket and to enter therein the judgments rendered by him is directory only, and the entry when made is not the judgment itself, but only the evidence of it.—Hickey v. Hinsdale, 8 Mich. 267.

¶ 637. A docket which contains the requisite entries is prima facie evidence of a valid judgment.—O'Donnell v. Wade, 151 Mich. 103.

¶ 638. The docket of a justice of the peace, verified by his own oath, is competent evidence of the facts stated therein, but a docket entry in an attachment suit is not sufficient to prove a valid judgment in the absence of any proof of the affidavit upon which the writ issued and which is essential to the jurisdiction to issue the writ at all.—Goodrich v. Burdick, 26 Mich. 39.

¶ 639. A recital in the docket of a justice of the peace on discontinuing an action that the matters in issue have been settled is not evidence of such a settlement, as the statute does not require such an entry to be made.—Shank v. Woodworth, 111 Mich. 642.

¶ 640. In an action against a justice for false arrest his own entries are not conclusive and exclusive in his own favor on the legality of the arrest.—Stensrud v. Delamater, 56 Mich. 144.

§ 149. ——Verity of docket; evidence to contradict, vary or explain.

Evidence to contradict recital as to consent to adjournment, see post ¶ 672.
Evidence to vary, explain or contradict justice's docket, see also Judgments § 117 et seq.
Mode of proving judgments, see Evidence § 546.
Best evidence of judgment, docket or files, see Evidence § 122.
Secondary evidence of record, docket and files, see Evidence, IV, B.

¶ 641. It seems that when a justice's docket shows jurisdiction no proof can be given to contradict its recitals as to the proceedings.—Clark v. Holmes, 1 D. 390.

¶ 642. Want of jurisdiction either over the person or the subject-matter may be shown by evidence, even when it tends to contradict the minutes or docket.—Clark v. Holmes, 1 D. 390.

¶ 643. Parol evidence is not admissible to prove that the letters P. and D. in the docket entry meant plaintiff and defendant.—Rood v. Bloomfield School Dist. No. 7, 1 D. 502.

¶ 644. The recital on the docket of a justice that parties appeared and pleaded, held conclusive.—Facey v. Fuller, 13 Mich. 527.

¶ 645. Oral evidence is inadmissible to vary or explain a justice's docket so as to give him jurisdiction that does not appear on its face.—Mudge v. Yaples, 58 Mich. 307.

¶ 646. A justice's jurisdiction to proceed as in case of personal service is not established by his docket entry, to the exclusion of proof that service was not personal, when the return does not show that it was.—Smalley v. Lighthall, 37 Mich. 348.

¶ 647. The docket entry as to the date of a judgment cannot be contradicted by the justice's return to a certiorari showing that judgment was really rendered on the day before the date named in the docket.—Weaver v. Lammon, 62 Mich. 366.

¶ 648. A judgment entry in the principal case which is regular upon its face, and recites the necessary facts to give the justice jurisdiction over the persons of the principal defendants and the subject-matter of the suit, cannot be attacked by proof that the principal defendants never appeared, and never consented to an adjournment.—Whitworth v. Pelton, 81 Mich. 98.

¶ 649. Where the docket entries returned by a justice of the peace on a special appeal show jurisdiction to render the judgment, his return to the matter set up in the affidavit for such appeal cannot be taken to impeach the docket itself.—Hodges v. Bagg, 81 Mich. 243.

¶ 650. Where the docket of a justice of the peace showed that a summons was returnable on September 8, and returned personally served on September 1, and that the judgment was rendered October 8, but failed to show any adjournment, and the several dates were entered upon the left-hand margin of the docket, and ditto (") marks appeared under the abbreviation "Sept." over which marks the abbreviation "Oct." had been written as the date of the judgment entry, it was competent for the justice of the peace to explain the appearance of the entries and to testify that the judgment was in fact entered on September 8, and the writing of "Oct." was a mistake.—Damm v. Gow, 88 Mich. 99.

¶ 651. A justice's docket showed that judgment was entered on a day in which, as his return to a certiorari stated, he was out of the state. Held, that the judgment was invalid, it not being competent for the justice to show in his return that the docket entry

was erroneous, and that judgment was rendered on another day when he had jurisdiction.—Tolliver v. Brownell, 94 Mich. 577.

¶ 652. A justice's docket entries showing that judgment was rendered before issue of the summons cannot be contradicted, so as to validate the judgment, either by his return to a certiorari, or by parol evidence.—Holmes v. Cole, 95 Mich. 272.

¶ 653. A justice's jurisdiction must appear upon the face of his proceedings, and cannot be made to depend upon his statement, in his return to a certiorari, of knowledge he may have outside of the papers and the evidence; e. g., that an attaching officer served a copy of an inventory.—Davison v. Davison, 99 Mich. 625.

¶ 654. An entry upon the docket of the justice that parties appeared and consented to adjournment without pleading, being facts occurring in his presence, cannot be contradicted in an action upon the judgment rendered in the case.—Waldron v. Palmer, 104 Mich. 556.

§ 150. Collateral attack on judgment.

Conclusiveness of docket entries, see ante §§ 148, 149.
Docket showing to sustain judgment on confession, see ante § 145.
Void judgment against garnishee, see also ante ¶ 304.
Judgment by court held in room adjoining barroom, see ante ¶ 136.
Collateral attack of judgment docketed in circuit court, see post § 183.
Presumptions upon collateral attack, see post § 156.
General law as to collateral attack, see Judgments, VII.

¶ 655. To review the validity of a justice's judgment on certiorari sued out to review the action of a circuit court in denying a motion to vacate a judgment docketed there on a transcript, filed in the circuit, from the justice's judgment, would be to assail the latter collaterally, and it is not allowable.—Mayhew v. Snell, 33 Mich. 182.

¶ 656. Where a justice's execution is relied on by an officer sued in replevin, plaintiff may show that there was no service of process and that the attorney appeared without authority.—Hunt v. Strew, 33 Mich. 85.

¶ 657. Objections to the judgment of a justice's court, that there was an unauthorized adjournment, that no security for costs was given by a foreign corporation plaintiff, and that no notice was given of the issuance of a commission to take a deposition, all relate to irregularities in proceedings after jurisdiction obtained and to the subject-matter of the suit and cannot be raised on a motion in the circuit court to vacate the judgment and set aside a levy made under execution.—American Copying Co. v. Stern, 148 Mich. 281.

¶ 658. It is not ground for collateral attack upon a justice's judgment that the docket does not show that the note, whereon the judgment appears to have been rendered, was negotiable, or to whom it was payable.—Van Kleek v. Eggleston, 7 Mich. 511.

¶ 659. A judgment of a justice's court, regular upon its face, cannot be impeached in a collateral proceeding by showing that neither of the parties to the case in the justice's court was a resident of the county where the justice resided.—Miller v. Smith, 115 Mich. 427.

¶ 660. A justice's judgment is not subject to collateral attack by an extraneous showing that the parties did not either of them live in a township adjoining the residence of the justice.—Cole v. Potter, 135 Mich. 326.

§ 151. ——Defects in notice, process or appearance.

Authority of attorney to appear, see ante § 46.
Objections to process and service and waiver thereof, see ante § 50.
Invalidity of personal judgment in attachment where jurisdiction over person not obtained, see ante § 66.
Validity of judgment on confession without process, see also ante § 137.
Docket showing as to appearance, see ante § 142.
Defects and irregularities in execution, see also post § 174.

¶ 661. A justice's judgment is not subject to collateral impeachment because the summons was served by a constable, it being in his own favor.—Parmalee v. Loomis, 24 Mich. 242.

¶ 662. Where, in an action before a justice on a joint note, summons was returned as served on only one of the makers, the other not being found, and judgment was rendered against this one only, this fact does not go to the jurisdiction of the justice, and is no ground for collaterally attacking the judgment while it remains unreversed, although the error is one for which it might be reversed on certiorari.—Allen v. Mills, 26 Mich. 123.

¶ 663. A judgment entry that is regular on its face, and that recites the facts necessary to give the justice jurisdiction over parties and subject-matter, cannot in an ancillary suit of garnishment be attacked by proof that the principal defendants never appeared and never consented to an adjournment.—Whitworth v. Pelton, 81 Mich. 98.

¶ 664. A justice's judgment cannot be attacked collaterally for failure to prove the authority of plaintiff's attorney where de-

fendant did not appear.—Reed v. Gage, 33 Mich. 179; Mayhew v. Snell, 33 Mich. 182.

¶ 665. A justice's judgment is not open to collateral attack upon the ground of failure to make proof of the authority of plaintiff's attorney to appear, as required by How. St., § 6870, where the defendant does not appear. —Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 666. Showing of authority of plaintiff's attorney to appear will not on collateral attack be presumed not to have been made merely because not entered on docket.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 667. A justice's judgment cannot be attacked collaterally for want of a showing from his docket that the plaintiff's attorney had authority to appear.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

§ 152. ——Failure to wait an hour for appearance.

Necessity of waiting an hour for appearance, see ante § 49.

¶ 668. The justice's failure to wait an hour for defendant is at most error, and is not such a jurisdictional defect as is open to collateral attack.—Smith v. Brown, 34 Mich. 455.

¶ 669. A justice's judgment cannot be collaterally attacked on the ground that the docket entry does not show affirmatively that the justice, on the adjourned day of the cause, waited one hour for defendant to appear; the defect is not jurisdictional.—Talbot v. Kuhn, 89 Mich. 30; Chaddock v. Barry, 93 Mich. 542.

¶ 670. Where due service of attachments in nineteen log-lien suits against the same debtor and logs was made upon the debtor, who appeared at the return-hour,—which was the same in each case,—and joined issue in each suit, and the log-owner did not appear, although duly served with notice of such attachments, the failure of the justice to wait one hour after the return-hour before proceeding in said suits will not invalidate the judgments rendered therein, in a replevin suit by the log-owner against the sheriff who had levied upon the logs under executions issued on said judgments.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

§ 153. ——Objections in respect to continuances and adjournments.

See also ante ¶¶ 502, 657, 663.

Loss of jurisdiction by unauthorized continuance or adjournment, see ante § 27.

Practice as to continuances and adjournments in justice's courts, see ante IV, E.

Validity of default judgment rendered after improper adjournment, see also ante ¶ 566.

Docket recitals as to continuances and adjournments, see ante § 143.

¶ 671. It is no objection to the judgment of a justice that he had adjourned the cause upon the written stipulation of counsel, without the presence of the parties.—Parmalee v. Loomis, 24 Mich. 242.

¶ 672. Where the transcript of the docket of a justice shows that his postponement of the decision of a case beyond the statutory period of ten days (Act No. 475, Local Acts 1903, as amended by Act No. 660, Local Acts 1907) was made with the consent of both parties, such transcript cannot be collaterally attacked to show that one party did not consent.—Troy v. Rodgers, 162 Mich. 28.

§ 154. ——Amount or terms of the judgment.

Construction of docket entries as to judgment, see ante § 146.

¶ 673. The judgment to be rendered in justice's court on a joint debt when only one defendant is served is prescribed by statute, and the use of the word "defendant" instead of "defendants" in entering judgment is a mere clerical misprision, and leaves the judgment, if not taken up for review, valid as against the defendant who was served.—Zimmer v. Davis, 35 Mich. 39; Holcomb v. Tift, 54 Mich. 647.

¶ 674. Rendering judgment for the amount of a mechanic's lien and holding the owner personally liable will not destroy a justice's jurisdiction of a suit for wages; nor is the judgment void or open to collateral attack, but it must stand unless reversed.—Smith v. Pearce, 52 Mich. 370.

¶ 675. Where a mechanic, suing for his wages, makes the owner of a building on which he works a joint defendant with the contractor who hired him, and sues them in an appropriate form of action before a justice of the peace, the justice has jurisdiction to try the issue; and though he cannot enforce a mechanic's lien, an error in rendering judgment therefor, or in holding the owner personally liable, will not destroy his jurisdiction or make his judgment void and open to attack in a collateral action; and unless reversed on appeal or certiorari it must stand. —Smith v. Pearce, 52 Mich. 370.

§ 155. ——Errors in taxation of costs.

Practice as to costs and taxation thereof, see post § 159 et seq.

Failure to give security for costs, see ante ¶ 657.

¶ 676. The question whether a justice of the peace acted outside his jurisdiction in assessing double costs against a public officer in an action of replevin should be raised, if at all, upon the taxation of costs in that suit and cannot be raised collaterally in an action

on the replevin bond.—Peterson v. Harrington, 197 Mich. 611.

§ 156. Presumptions upon collateral attack.

Nature of justice's jurisdiction and construction of powers conferred, see ante § 10.
Selection of private person to serve summons, see ante ¶ 149.
Presumptions as to return of service in attachment, see ante § 60.
As to proof of authority of attorney to appear, see also ante ¶ 666.
Presumption as to jurisdiction, see also ante § 141.
Presumptions in respect to execution, see also post ¶¶ 727, 731.
Presumptions upon appeal to circuit court, see post § 233.
Presumptions on certiorari, see post § 268.

¶ 677. When a justice's docket entries comply with the statute, the ordinary presumption in favor of the correctness of official action must support the proceedings.—Peck v. Cavell, 16 Mich. 9.

¶ 677a. A justice's judgment cannot be held invalid upon a mere presumption that the justice had lost jurisdiction, if his docket shows the parties were regularly brought into court.—Schlatterer v. Nickodemus, 50 Mich. 315.

§ 157. Payment, satisfaction or discharge of judgment.

Liability of justice for money received in payment of judgment, see ante §§ 8, 9.
Execution upon judgment, see post IV, H.
General law as to payment, see Payment.
Payment, satisfaction or discharge of judgments in general, see Judgments, XI.

¶ 678. In the absence of special instructions a justice of the peace can receive nothing but current money of the United States in satisfaction of a judgment on his docket.—Heald v. Bennett, 1 D. 513; Welch v. Frost, 1 Mich. 30.

¶ 679. A judgment recovered before one justice can be ascertained and applied by another in satisfaction of a counterclaim recovered before him by the other party.—McEwen v. Bigelow, 40 Mich. 215.

¶¶ 680, 681. Money paid to a justice to be applied upon a judgment in garnishment cannot be used to satisfy a different judgment against the same party, even though the time had expired during which the fund could be bound by the proceedings in garnishment.—McDonald v. Lewis, 42 Mich. 135.

§ 158. ——Entry of payment or discharge.

Requisites and sufficiency of docket entries, see ante § 140 et seq.

¶ 682. A justice entered across a judgment on his docket that it was paid, stating the day, and signed the entry in his official capacity. Held, that such entry was prima facie evidence that the judgment was satisfied, and that this evidence was not rebutted by proof, unaccompanied by any explanatory testimony, of another entry immediately below the former, on the same docket, without date, and signed by the justice in his individual capacity, stating in effect that the judgment had not been paid, according to the import of the former entry.—Beach v. Botsford, 1 D. 199.

¶ 683. The entry of the words "Judgment discharged," written by a justice across the face of a judgment, is no more conclusive than a receipt; it is only prima facie evidence of payment and can be shown to be incorrect.—Dane v. Holmes, 41 Mich. 661.

G. COSTS AND FEES.

§ 159. In general; parties liable or entitled.

Fees and compensation of justices, see ante § 4.
Jury fees, see also ante § 123.
Loss of costs as penalty for splitting the cause of action, see ante ¶ 399.
Costs as condition to transfer of cause to try issue of title, see also ante § 30.
Waiver by garnishee of examination as affecting his liability for costs and expenses, see ante § 73.
Docket recitals as to costs, see ante § 144.
Payment of costs and fees condition to appeal, see post § 200.
Nonpayment of costs as ground for dismissal of appeal, see post § 223.
Costs on appeal, see post § 243 et seq.
Costs on certiorari, see post § 276.
General law as to costs and allowances, see Costs.
Liability for costs in circuit dependent on title to land being involved, see Costs § 16.
Right to costs as determined by choice of proper jurisdiction, see Costs § 19.
Right to costs in replevin for goods of minor value, see Costs § 19.
Costs on mandamus against justice, see Costs, II, C.
Invalidity of agreement to charge fees only if party succeeds, see Contracts § 53, ¶ 224.
Expenses and fees in justices' courts as county charges, see Counties § 33.
Costs in forcible entry and summary proceedings, see Forcible Entry § 47.
Provisions as to costs and attorney's fees, see Jud. Act, chap. LXXI, §§ 2-5; Comp. L. 1915, §§ 14273-14276.
Costs upon nonsuit, see Jud. Act, chap. LXXI, § 1, Comp. L. 1915, § 14272.
Costs upon discontinuance as to some defendants, see Jud. Act, chap. LXX, § 28; Comp. L. 1915, § 14268.
Costs upon trial in circuit court after transfer from justice because title in issue, see Jud. Act, chap. LXIX, §§ 23, 25; Comp. L. 1915, § 14237, 14239.

Provisions as to costs upon transfer of case, see Jud. Act, chap. LXVIII, § 8; Comp. L. 1915, § 14213.
Provisions as to costs where set-off or recoupment interposed, see Jud. Act, chap. LXIX, §§ 13-16; Comp. L. 1915, §§ 14227-14230.

¶ 684. Plaintiff may recover the costs of an action on a justice's judgment; before another justice he has "good cause" as required by Comp. L. 1871, § 5479, How. St., § 6941.—Whelpley v. Nash, 46 Mich. 25.

¶ 685. If a defendant in justice's court does not use a claim as set-off when he has an opportunity to do so, Comp. L. 1871, § 5324, How. St. § 6889, denies him costs in a subsequent independent suit.—Morehouse v. Baker, 48 Mich. 335.

¶ 686. Where a justice dismisses a cause upon defendant's showing that he was served with summons more than twelve days before the return-day, judgment for costs is properly entered for defendant under How. St., § 6940.—Lane v. Jones, 94 Mich. 540.

§ 160. Amounts and items.

Remitting part of costs, see post § 163.
Appealability of judgment for costs, see post ¶ 784.

¶ 687. The provisions as to taxable costs in justices' courts were meant merely to prevent the accumulation of needless costs, and to limit the party as to such as are within his control.—Overpack v. Ruggles, 27 Mich. 65.

¶ 688. Comp. L. 1897, § 838, providing that the entire costs of suit allowable in justice court shall not exceed ten dollars, had no application to special proceedings under Comp. L. 1897, §§ 10756-10770, providing a lien on logs, shingles, etc., and regulating costs in such proceedings.—Lagoo v. Seaman, 136 Mich. 418.

§ 161. ——Taxable fees and expenses.

Fees of jurors as costs, see Jud. Act, chap. LXXVII, § 2; Comp. L. 1915, § 14398.

¶ 689. Jury fees, court fees and officers' fees for serving process other than subpoenas are taxable as costs.—Overpack v. Ruggles, 27 Mich. 65.

¶ 690. Jury fees are not included in the fixed sum to which the prevailing party's costs are limited by Comp. L. 1871, § 5375, How. St., § 6940.—Overpack v. Ruggles, 27 Mich. 65; McGraw v. Sturgeon, 29 Mich. 426.

¶ 691. Under How. St., § 7046, providing that no judgment of a justice of the peace shall be reversed on account of any fees having been improperly allowed by the justice, a justice's judgment in proceedings to enforce a lien upon logs including an attorney's fee is valid.—Backus v. Barber, 107 Mich. 468.

§ 162. Determination of right and taxation of costs.

Errors in taxation of costs as ground for collateral attack, see ante § 155.
Affidavit for appeal from judgment of costs, see post § 196.
Amendment of judgment on appeal from taxation of costs, see post ¶ 857.
Improper allowance of fees and costs as ground for reversal on certiorari, see post ¶ 1220.

¶ 692. A justice of the peace acts judicially in determining the amount of costs to be taxed in favor of the prevailing party in a suit tried before him; but has a reasonable time after judgment to investigate and tax the items.—Saunders v. Tioga Mfg. Co., 27 Mich. 520.

¶ 693. Where a justice had entered judgment in his minutes, leaving a blank for the costs, which were not entered for four days afterward, it was held that the judgment was valid as to the damages; and as to costs, that on good cause shown or by consent, and by making due announcement on the day of the trial, the justice might hold the court open even for four days to hear evidence as to the different items of costs, the determination of which would relate back and take effect as of the date of the judgment.—Saunders v. Tioga Mfg. Co., 27 Mich. 520.

§ 163. Effect of allowance of excessive costs.

¶ 694. Costs are not so inseparable from the damages as to invalidate, when excessive, a justice's judgment given therefor; and in such case, where the judgment debtor does not appeal, the party recovering judgment may rectify the error by remitting the costs and suing again upon the judgment for damages.—Whelpley v. Nash, 46 Mich. 25.

¶ 695. Comp. L. 1897, § 950, providing that no judgment of a justice of the peace shall be reversed merely for improper allowance of fees, had no application to special proceedings for a lien on lumber, etc., under Comp. L. 1897, §§ 10756-10770, which specifically regulate the matter of costs in such proceedings.—Lagoo v. Seaman, 136 Mich. 418.

§ 164. Security for costs.

Payment of costs and fees as condition to removal to circuit to try title, see ante § 30 and ¶ 102.
Costs covered by replevin bond, see ante § 85.
Failure to file security for costs as ground for compulsory nonsuit see ante ¶ 510.
Failure to give security for costs as ground for attacking judgment, see ante ¶ 657.
Appealability of judgment of dismissal for failure to file security for costs, see post ¶ 779.

Ruling on motion for security for costs questioned for first time on appeal, see post § 206.
Showing in return to certiorari as to security for costs, see post ¶ 1116.
Presumptions on certiorari, see post ¶ 1182.
Estoppel to rely on cost bond after reversing for insufficiency of it, see also Estoppel ¶ 178.
Provisions as to security for costs, see Jud. Act, chap. LXVII, §§ 1, 2; Comp. L. 1915, §§ 14178, 14179.
Bond for costs upon transfer to circuit court to try issue of title, see Jud. Act, chap. LXIX, § 20; Comp. L. 1915, § 14284.
Power of circuit court to require security for costs, see Jud. Act, chap. LXXVIII, § 17; Comp. L. 1915, § 14417.

¶ 696. The neglect of a nonresident plaintiff in justice's court to file security for costs before process issues does not exclude the justice's jurisdiction, but such security may be allowed to be given nunc pro tunc at any time before a motion to set aside process for want of it is granted.—Parks v. Goodwin, 1 D. 56.

¶ 697. Where security for costs was filed by a nonresident plaintiff in justice's court upon the return day of the summons, there was no error in overruling a motion to dismiss for failure to file it before process issued.—Gray v. Willcox, 56 Mich. 58.

¶ 698. How. St., § 7717e, which provides that, in any suit to recover for the personal labor of the plaintiff, security for costs "shall not be ordered" if the plaintiff shall make and file an affidavit that he has a meritorious cause of action and is unable to give such security, does not apply to a plaintiff in justice's court who is a nonresident of the county, and as such is required by How. St., § 6824, to give security for costs before the issue of process.—Osowicki v. Ferrick, 106 Mich. 41.

¶ 699. In an action in the justice's court the failure of a nonresident to give security for costs is waived by pleading to the merits and going to trial thereon.—Lacomb v. Godkin, 143 Mich. 198.

¶ 700. A judgment of a justice of the peace will not be reversed because the plaintiffs, who were nonresidents, did not file the security for costs until after the return day when in fact it was then filed.—Charles Bakrow & Co. v. Totten, 146 Mich. 57.

H. EXECUTIONS AND TRANSCRIPT OF JUDGMENT.

Capias ad satisfaciendum on justices' judgments, see Civil Arrest, III.

§ 165. In general; right to and issuance of writ.

Liability of justice for wrongful issuance of execution, see ante §§ 8, 9.
Payment, satisfaction and discharge of judgment, see ante § 157.
Alias writs, see post § 168.
Right to issue and file transcript before time when execution issuable, see post § 181; ¶¶ 744, 745.
Presumption that execution issued at time judgment was rendered, see post ¶ 731.
Issuance and return of execution as prerequisite to suit on appeal bond, see post ¶ 1072.
General law as to executions, see Executions.
Provisions as to executions on justices' judgments, see Jud. Act, chap. LXXII, §§ 1-36; Comp. L. 1915, §§ 14288-14323.

¶ 701. Upon an application to a justice for issue of immediate execution, R. S. 1846, chap. 93, §§ 112, 113 (How. St., §§ 6961, 6962) he should require proof of facts and circumstances tending to show danger of losing the debt, unless, etc., and this evidence must be such as to satisfy him.—Rash v. Whitney, 4 Mich. 495.

¶ 702. Proof merely that the applicant believes he will be in danger is not sufficient to warrant the issuance of execution.—Rash v. Whitney, 4 Mich. 495.

§ 166. ——Execution upon verdict.

¶ 703. The verdict of a jury in justice's court is equivalent to judgment and will support issue of execution.—Gaines v. Betts, 2 D. 98; Overall v. Pero, 7 Mich. 315.

§ 167. Contents and sufficiency of writ.

¶ 704. The omission in a justice's execution of the year in which the judgment was rendered will not vitiate the execution, it being in all other respects regular.—Perkins v. Spaulding, 2 Mich. 157.

¶ 705. The omission from a justice's execution of the name of the county or of any township or city does not invalidate it, at least where the defendant does not complain of it; and as against a stranger resisting the claims of the execution purchaser the defect may be cured and the judgment identified by parol evidence.—Elliott v. Hart, 45 Mich. 234.

§ 168. Alias or renewed writs.

¶ 706. Under How. St., § 6975, a justice of the peace has no authority to issue a second execution until the first writ has been returned unsatisfied, in whole or in part.—Fryer v. McNaughton, 110 Mich. 22.

¶ 707. R. S. 1838, p. 395, authorized the renewal of a justice's execution returned unsatisfied. The Justices' Act of 1841 did not authorize such renewals, but repealed

the former law, with this proviso: "The repeal shall not effect any act done, or any right accruing or accrued, or established, or any suit or proceeding commenced, in any civil case," etc. Held, that an execution issued before the repeal could not be renewed afterwards.—Jackson v. Sheldon, 2 D. 154.

¶ 708. Under Comp. L. 1871, § 5410, How. St., § 6975, an execution on a justice's judgment may, after being returned unsatisfied, be renewed at any time when a new one could be legally issued, and the renewed writ would have the same force as a new writ for sixty days after the renewal.—Bigalow v. Barre, 30 Mich. 1.

¶ 709. A justice's judgment is barred in six years by Comp. L. 1857, § 5361, How. St., § 8713, and execution cannot thereafter issue on a statutory proceeding to renew an execution.—Jerome v. Williams, 13 Mich. 521.

§ 169. Stay and security for stay.

Stay of execution prevented by filing transcript, see post ¶ 767.
Right to appeal after stay of execution, see post § 187.
Issuance of execution where proceedings for appeal undertaken but return fees not paid, see post ¶ 861.
Operation of appeal as stay, see post § 208.
General law as to stay of proceedings, see Stay of Proceedings.
Liability of client for act of attorney in issuing execution after appeal taken, see also Executions ¶ 322.
Operation of certiorari to effect stay, see Jud. Act, chap. LXXVIII, § 30; Comp. L. 1915, § 14430.

¶ 710. Stay of execution cannot be entered with justice of the peace after transcript of judgment has been filed in the circuit court under How. St. § 6949.—Hitchcock v. Wayne Circuit Judge, 96 Mich. 297.

¶ 711. Where the entry of a judgment on a justice's docket was followed immediately by entry of a stay of execution in the same case, each separately dated as of the same day, with the justice's signature below the latter, it was held a sufficient signing for both.—Hollister v. Giddings, 24 Mich. 501.

¶ 712. A paper is sufficient in form as a stay of execution on a justice's judgment under How. St., § 6963, which provides for a stay on "giving" the party and "filing with the justice * * * security in writing," said paper being entitled in the case and before the justice, reciting judgment for $188.00 and undertaking as surety to pay the same at or before the expiration of six months, signed and sealed by the obligor, bearing the justice's signature beneath an attestation clause, the approval of the justice, and the sworn justification of the surety; the fact that the form is not that prescribed in the statute (How. St., § 6965), for undertakings entered on the justice's docket is not an objection.—Lustfield v. Ball, 103 Mich. 17, impliedly distinguishing Cox v. Crippen, 13 Mich. 502.

¶ 713. A security to stay a justice's execution need not follow precisely the form given in Comp. L. 1857, § 3804, How. St., § 6965, but is sufficient if in substance the same, and omitting nothing that the statute makes a requisite.—Cox v. Crippen, 13 Mich. 502.

¶ 714. The undertaking of one who becomes surety for stay of execution is in the nature of a confession of judgment; and to render it obligatory upon the surety it must be executed in the presence of the justice and be witnessed by him. The approval of the stay entered by the justice in his docket, but not showing his presence when the stay was entered into, cannot be regarded as an attestation.—Cox v. Crippen, 13 Mich. 502.

¶ 715. A stay of execution having been taken by a justice for six months, where the statute only authorized it to be taken for three, it was held that an execution issued thereon against the surety after the expiration of the six months was void.—Shadbolt v. Bronson, 1 Mich. 85.

¶ 716. One became surety for stay of execution upon a justice's judgment. Executions were issued upon the judgment and returned unsatisfied. Some years afterwards a transcript of the judgment was filed in the office of the county clerk. More than four years after the filing of the transcript, and when more than six years had intervened since the return of the last execution on the stay, the original stay was filed in the office of the county clerk, and the circuit court, on the application of the judgment creditor, ordered a new execution against both the judgment debtor and the surety. Held, that as to the surety the order was erroneous.—Jerome v. Williams, 13 Mich. 521.

§ 170. Levy of execution and release or abandonment of same.

¶ 717. Whether Comp. L. 1871, § 5507, How. St., § 7074, authorizing the justice, on plaintiff's request, to empower a person to serve process can apply to executions, quære.—Harvey v. McAdams, 32 Mich. 472.

¶ 718. A constable levied upon wheat on the ground, on the farm of C., in the township of Dover, which farm was then occupied by the defendant in the execution, and made a correct indorsement of the levy on the execution, except that by mistake the name of the township was stated as Madison. The mistake was held not to vitiate the levy.—Perkins v. Spaulding, 2 Mich. 157.

¶ 719. Where a constable levies a justice's execution upon mortgaged property he must levy on the whole and sell it in one parcel subject to the mortgage; and if he does not find it all together, he must have time after levying on part to find and levy on the remainder, if within his bailiwick.—Baldwin v. Talbot, 46 Mich. 19.

¶ 720 A levy under execution which is within How. St., § 7685, forbidding the sale on execution of a growing crop until it ripens, and extending the life of the execution until such time, is not abandoned by the mere delivery of the writ, indorsed with the levy by the officer, to the justice who issued it, and by the issue of a second execution; especially where the acts attending the issue of the second writ show an intention to retain the benefits of the original levy.—Friyer v. McNaughton, 110 Mich. 22.

¶ 721. Where a constable has levied execution under a justice's judgment, the rights acquired by the levy are not lost by his delay in advertising the sale of the property taken, if requested not to do so by a mortgagee who intends to replevy it, or by some one authorized to represent the mortgagee.—Baldwin v. Talbot, 46 Mich. 19.

§ 171. Execution sale.

¶ 722. A constable's notice of sale need not state whose property it is that is advertised, nor who is the defendant in the execution.—Perkins v. Spaulding, 2 Mich. 157.

¶ 723. Semble, that How. St., § 6980, requiring a constable's notice of an execution sale to contain the names of the parties to the suit, is directory merely, and that an omission to comply with it does not render the sale void.—Ganong v. Green, 64 Mich. 488.

¶ 724. A house erected upon the land by one who holds under a contract of purchase cannot, being part of the realty, be sold at constable's sale under execution from a justice's court.—Hogsett v. Ellis, 17 Mich. 351.

§ 172. Return on execution.

Return of justice's process generally, see ante § 89.

Alias writs upon return of original unsatisfied, see ante § 168.

Return of execution unsatisfied as prerequisite to transcript, see post ¶¶ 744, 745.

¶ 725. Where a constable's return on execution shows that property was sold for a certain amount, it must be inferred therefrom that the sale was completed, and that the title of the judgment debtor levied upon was transferred by him to the purchaser.—Munger v. Sanford, 144 Mich. 323.

¶ 726. A constable's return on an execution that the property was sold for a named amount means either that the property was turned over or that the amount bid was paid, in either case the constable is bound to account for the sum.—Munger v. Sanford, 144 Mich. 323.

§ 173. Docket entries as to execution.

See also post ¶ 731.

Justice's docket entries generally, see ante §§ 139-146.

¶ 727. It is not necessary that a justice's docket should show that an execution was issued at the request of a plaintiff, as that is always to be presumed.—Peck v. Cavell, 16 Mich. 9.

¶ 728. It is not necessary that the evidence required upon application for execution be set out in the docket. A mere statement of the result of the evidence will suffice.—Rash v. Whitney, 4 Mich. 495.

¶ 729. The failure of a justice of the peace to note on his docket the time of issuing an execution, and to whom delivered, or the fact that it was issued, as provided in How. St., § 7053, subds. 12, 13, will not necessarily vitiate an execution actually and properly issued by the justice, and delivered to the sheriff.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

§ 174. Defects, errors and irregularities in execution.

Liability of justice for wrongful issuance of execution, see ante § 8.

¶ 730. It seems that the justice's error in issuing execution upon insufficient evidence would not render it void, but only voidable; and whether such execution could be collaterally attacked, quære.—Rash v. Whitney, 4 Mich. 495.

¶ 731. Where the docket showed judgment rendered and execution issued on the same day, it was held that it must be presumed that execution was awarded at the same time that judgment was rendered, in which case no notice was required by R. S. 1846, chap. 93, § 113 (How. St., § 6962).—Rash v. Whitney, 4 Mich. 495.

¶ 732. A mortgagee who at the time of an execution sale objects thereto on the ground of his mortgage cannot, in trover against the purchaser, raise the objection that the constable's notice of sale did not contain the names of the parties.—Ganong v. Green, 64 Mich. 488.

§ 175. Transcripts of judgments in general.

Issuance and return of execution as prerequisite to transcript, see post ¶¶ 744, 745.

Right to appeal to circuit court after taking transcript there, see post § 187.

Record of judgment on appeal, see post § 201.

Reviewableness of entry of transcript or refusal to vacate same, see Appeal ¶ 85.

Intervention by creditor in corporate dissolution on justice's judgment without transcript to circuit court, see Corporation ¶ 945.

Provisions as to transcript, see Jud. Act, chap. LXXI, §§ 10-16; Comp. L. 1915, §§ 14281-14287.

¶ 733. All the proceedings relating to transcripts are statutory, and the statute must be strictly followed.—Jewett v. Bennett, 3 Mich. 198; O'Brien v. O'Brien, 42 Mich. 15; Doty v. Dexter, 61 Mich. 348.

§ 176. ——Affidavit or execution and other prerequisites.

Want of signature to affidavit for transcript as ground for collateral attack, see post ¶ 770.

¶ 734. The affidavit required to be filed with a justice of the peace to obtain a transcript of a judgment may be made by any duly authorized attorney who may swear to his authority in said affidavit.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 735. An affidavit by "the attorney of the plaintiff" for a transcript of a judgment recovered by "Thomas Bortz for James B. Bortz" means that affiant is the attorney of Thomas Bortz, who is the plaintiff of record.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 736. The affidavit required by Comp. L. 1871 § 5383, How. St., § 6947, of insufficiency of goods and chattels need not state the amount due upon the judgment; but it may do so.—Smith v. St. Joseph Circuit Judge, 46 Mich. 338.

¶ 737. The affiant's signature to the affidavit of insufficiency of goods, etc., is not necessary to its validity, if it is actually sworn to.—Merrick v. Mayhue, 40 Mich. 196.

¶ 738. The affidavit for a transcript is jurisdictional, and it cannot be made by the administrator of the party in whose favor the judgment was rendered; nor can it be made by the attorney who obtained the judgment, for his authority was revoked by his client's death.—Doty v. Dexter, 61 Mich. 348.

¶ 739. It is immaterial that the middle initials of parties' names in a transcript of judgment and affidavit therefor vary.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 740. An affidavit for a transcript of a justice's judgment filed under How. St., § 6947, is insufficient where it identifies the judgment set forth in the transcript only by the title of the cause and court in which it was rendered and where it gives a different date of rendition and does not state the amount but merely what is "now due."—Denver v. Connolly, 92 Mich. 549.

¶ 741. A transcript judgment is not void because the attorney making the affidavit stated that the judgment was rendered in favor of "deponent" instead of "plaintiff," where this was clearly a clerical error, the affidavit being properly entitled so as to show who the plaintiff was and in whose favor the judgment must have been rendered.—Frolich v. Mitchell, 132 Mich. 432.

¶ 742. Judgment in justice's court was in favor of plaintiffs, copartners. The affidavit in a transcript of the judgment taken to the circuit court was made by one of the two plaintiffs in whose favor judgment was rendered. Held, that the omission to state that the judgment was in favor of both plaintiffs was not misleading and not a fatal defect.—Hawkins v. Castenholz, 171 Mich. 85.

¶ 743. The affidavit in a transcript of a judgment of a justice of the peace taken to the circuit court was as follows: "In Justice Court, Before Patrick A. Murphy, One of the Justices of the Peace in and for the County of Muskegon, State of Michigan." Held, that the above amounted to sufficient venue.—Hawkins v. Castenholz, 171 Mich. 85.

¶ 744. The issue and return unsatisfied of a justice's execution is not necessary before taking out a transcript.—Udell v. Kahn, 31 Mich. 195.

¶ 745. Under Comp. L. 1897, § 845, a transcript of a judgment in a justice's court may be taken to the circuit court without having an execution issued in the justice's court.—Shepard v. Schrutt, 163 Mich. 485.

§ 177. ——Form and sufficiency of transcript.

¶ 746. If the transcript is a correct copy from the docket entries it will be sufficient.—Udell v. Kahn, 31 Mich. 195.

¶ 747. In making out the transcript the justice corrected the docket entry of the judgment so as to follow the summons, which ran against Peter Mayhue, instead of Peter Mayo, as the judgment entry had it. Held, that the transcript was good, there being no question of identity.—Merrick v. Mayhue, 40 Mich. 196.

§ 178. ——Signing and certifying.

Certification of judgment transcripts for evidence, see Evidence §§ 562, 563.

¶ 748. The transcript must be officially signed by the justice; his name appearing in the body of the judgment is not sufficient.—Bigelow v. Booth, 39 Mich. 622.

¶ 749. The transcript must be certified by the justice.—Peck v. Cavell, 16 Mich. 9.

¶ 750. Where a transcript was authenticated by a certificate of the justice in this form, "I hereby certify that the above is a true transcript of the above judgment, and

of the subsequent proceedings thereon," the certificate was insufficient to authorize the filing of the transcript and issuing execution thereon.—Jewett v. Bennett, 3 Mich. 198.

§ 179. Entering and docketing transcript in circuit court.

See also post ¶ 769.

¶ 751. The omission by the clerk of the circuit court to enter the transcript in a book will not avoid an execution where there are no intervening interests of third persons; and such entry may be rectified by proper steps so as to relate back to the filing.—Udell v. Kahn, 31 Mich. 195.

§ 180. ——Affidavit of amount due.

¶ 752. An affidavit of the amount due at the time of filing the transcript is necessary to authorize the clerk to enter and docket the judgment.—Peck v. Cavell, 16 Mich. 9; Monaghan v. McKimmie, 32 Mich. 40; Bigelow v. Booth, 39 Mich. 622.

¶ 752a. The affidavit of the amount due is a necessary jurisdictional fact in order to give the clerk any authority to act in the matter.—Smith v. St. Joseph Circuit Judge, 46 Mich. 338.

¶ 752b. Where there has been no substantial delay in preparing and filing the transcript, and the affidavit for the transcript contains a statement of the amount due, the transcript is not void for want of a separate affidavit of the amount due, and an execution issued on the transcript from the circuit is valid.—Udell v. Kahn, 31 Mich. 195; Smith v. St. Joseph Circuit Judge, 46 Mich. 338.

¶ 753. Where the affidavit required by Comp. L. 1897, § 845, to entitle one to a transcript to the circuit court of a judgment in a justice's court, states the amount due and is promptly filed with the transcript in the clerk's office, it is not necessary to file the separate affidavit provided for in Comp. L. 1897, § 846.—Shepard v. Schrutt, 163 Mich. 485.

¶ 754. Where there was a delay of eight days in filing the transcript after the affidavit of insufficiency of goods, etc., was made, it was held that a statement therein of the amount due would not obviate the necessity of making a separate affidavit.—Bigelow v. Booth, 39 Mich. 622.

¶ 755. An affidavit of amount due is good if filed without such delay as would give rise to a presumption that payment had been made since it was sworn to, and it is generally good if filed on the day after it was made.—Smith v. St. Joseph Circuit Judge, 46 Mich. 338.

¶ 756. Where eleven days intervene between the making of an affidavit for a transcript of a justice's judgment and the filing of such transcript with the county clerk, another affidavit of the amount due upon said judgment is necessary.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 757. An affidavit which states the amount due and unpaid upon the judgment, "exclusive of costs," to be a certain sum, not stating whether there were any costs, does not authorize the clerk to enter judgment for any costs, the presumption being that they were paid or waived.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 758. Where the affidavits required to be filed on the removal of a justice's judgment by transcript to the circuit court are defective, that court has no power to allow sufficient ones to be filed nunc pro tunc.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 759. A transcript judgment is not void because the affidavit upon which it was based stated that the amount due was due to "deponent" who was the attorney for plaintiff, since the statute (Comp. L. 1897, § 846) does not require more than that the amount shall be stated and hence the statement that it was due to "deponent" may be disregarded.—Frolich v. Mitchell, 132 Mich. 432.

§ 181. ——Time to file or docket.

¶ 760. A transcript cannot be made and filed in the circuit court until the time when execution would be, under Comp. L. 1871, § 5395, issuable by the justice on the judgment; a transcript made before five days after rendition of judgment in a case where execution could not issue earlier is void.—O'Brien v. O'Brien, 42 Mich. 15; Vroman v. Thompson, 42 Mich. 145.

¶ 761. A transcript of a judgment in justice's court was filed in the county clerk's office January 15, 1908. The affidavit of amount due accompanying it was made January 13, 1908. Held, the filing was seasonable.—Shepard v. Schrutt, 163 Mich. 485.

§ 182. Operation and effect of transcript and proceedings thereon.

Allowance of appeal after filing transcript, see post § 187.

Limitation of action on transcript judgment, see Limitations, II.

Invalidity of transcript as cloud upon sale at execution on the judgment, see Quieting Title, II.

Provisions as to executions on judgments transcribed and filed in circuit clerk's office, see Jud. Act, chap. XXIII, § 2; Comp. L. 1915, § 12817.

Provisions as to effect of judgment entered upon transcript, see Jud. Act, chap. LXXI, §§ 12, 16; Comp. L. 1915, §§ 14283, 14287.

¶ 762. A transcript properly certified and docketed renders the judgment a judgment of a court of record from the time of such

filing and docketing; thus changing in some degree its nature, and very materially the rights, powers and liabilities of the parties to it.—Jewett v. Bennett, 3 Mich. 198.

¶ 763. A justice's judgment duly docketed in the circuit court has the same effect as a judgment rendered in that court, and is to be enforced, discharged, canceled, or affected by the statute of limitations in the same way.—Arnold v. Thompson, 19 Mich. 333.

¶ 763a. The ten years within which a justice's judgment docketed upon transcript in the circuit court remains in force run from the date when the justice rendered the judgment, not from the time when the transcript was filed.—Wilcox v. Lantz, 107 Mich. 1.

¶ 764. While for certain purposes a transcript of a justice's judgment has the effect of a circuit court judgment, it is not "a judgment rendered in a circuit court" within the meaning of the statute permitting garnishment to be based on a judgment so rendered.—Weimeister v. Singer, 44 Mich. 406.

¶ 765. The transcript of a justice's judgment, when properly filed in the circuit court, is, for certain purposes, given the force and effect of a judgment of that court.—Wedel v. Green, 70 Mich. 642.

¶ 766. Invalid proceedings upon a transcript of a justice's judgment, leave the original judgment in full force.—Goebel Brewing Co. v. Medbury, 153 Mich. 49.

¶ 767. Under How. St., §§ 6947-6949, 6993, filing of the transcript in circuit court divests justice of jurisdiction and prevents party against whom judgment was rendered from entering thereafter a stay with justice.—Hitchcock v. Wayne Circuit Judge, 96 Mich. 297.

¶ 768. Where the transcript of a justice's judgment filed in the circuit court fails to show, in a case where defendant did not appear, that there was any proper service of process, or whether plaintiff appeared and took judgment before or at the time the writ was returnable, it does not disclose that the justice had jurisdiction to render the judgment, and parol proof cannot supply the defect.—Wedel v. Green, 70 Mich. 642.

¶ 769. Quære, whether a judgment transcript and proper affidavit filed with the clerk of the circuit court, but not entered and docketed as a judgment, according to Comp. L. 1897, § 846, is a circuit court judgment.—Wilson v. Henry, 137 Mich. 675.

§ 183. ——Irregularities in transcript.

¶ 770. A judgment of a justice docketed in the circuit court is not collaterally assailable for want of a signature to the affidavit for a transcript of the judgment.—Mayhew v. Snell, 33 Mich. 182.

¶ 771. The question whether a transcript of the judgment of a justice of the peace filed in the circuit court was a true transcript, cannot be raised in a collateral proceeding.—Cole v. Potter, 135 Mich. 326.

¶ 772. The clerk of the circuit court in docketing a transcript of a judgment in a justice's court, followed the transcript instead of the affidavit, in making the entries of the amount due. The amount in the transcript corresponded with the amount due as set forth in the affidavit. Held, execution issued on such transcript was not rendered void by the clerk's action.—Shepard v. Schrutt, 163 Mich. 485.

§ 184. ——Vacating or striking from files.

¶ 773. Where pending a motion for a new trial, a transcript of a judgment in a justice's court has been taken under Comp. L. 1897, § 845, to the circuit court, and later an appeal from the judgment is then taken, an order may be made vacating the transcript.—Pattinson v. Flayer, 158 Mich. 56.

¶ 774. The fact that a notary who administered the oath in an affidavit for a transcript from a judgment in justice court to the circuit court was employed by the attorneys of record and conducted all the proceedings in justice court does not show that he was still interested in the case within the meaning of Comp. L. 1897, § 2640, so as to entitle the defendant to have the transcript stricken from the files.—Thomas E. Lynch Co. v. Wayne Circuit Judge, 129 Mich. 110.

V. APPEALS IN CIVIL CASES.

A. JURISDICTION, RIGHT AND GROUNDS OF APPEAL.

§ 185. In general; decisions reviewable.

Appeal or certiorari as appropriate remedy, see post § 251.

Decisions and proceedings reviewable by certiorari, see post § 252 et seq.

General law as to appeal and error, see Appeal.

Power of courts to make rules regulating appeals, see Courts, III.

Appeals in criminal cases, see Indictment § 662 et seq.

Appeal in fraudulent debtor proceedings, see also Civil Arrest § 36.

Provisions as to appeals from justices' courts, see Jud. Act, chap. LXXVIII, §§ 1-21; Comp. L. 1915, §§ 14401-14421.

¶ 775. A judgment of nonsuit for failure to appear could not be appealed from under the statute of 1841, which authorized an appeal from any final judgment.—Bowne v. Johnson, 1 D. 185.

¶ 776. Where a justice refuses to proceed in a cause on the adjourned day, the refusal

may be treated as a judgment of nonsuit, and an appeal will lie therefrom.—Pattridge, v. Lott, 15 Mich. 251.

¶ 777. Where, on motion, a justice dismisses a suit for want of jurisdiction, because of an alleged defect in the summons, it is equivalent to a judgment of nonsuit, and is appealable.—People ex rel. Comstock v. Wayne Circuit Judge, 30 Mich. 98.

¶ 778. Under Comp. L. 1897, § 902, providing that a plaintiff may appeal where a judgment of nonsuit has been rendered, voluntary nonsuits are excluded; and a nonsuit suffered by a plaintiff in justice court by his failure to prosecute is treated as voluntary and no appeal lies.—Schulte v. Kelly, 124 Mich. 330.

¶ 779. A judgment for nonsuit rendered in a justice's court on failure of plaintiff to file security for costs, as directed, is not appealable because voluntary.—Walmsley v. Bowman, 151 Mich. 553.

¶ 780. Appeal lies from the dismissal of a writ of replevin for defects in the affidavit; being in effect a judgment of nonsuit.—Stall v. Diamond, 37 Mich. 429.

¶ 781. Where a writ of replevin in justice's court is dismissed for defects in the affidavit, and defendant, waiving return, has an assessment for the value, he may appeal from the judgment thereon. On an assessment of damages in replevin there is always an issue between the parties, whether expressed in words or not.—Stall v. Diamond, 37 Mich. 429.

¶ 782. A judgment for damages and costs on waiver of a return in replevin is final and appealable.—Stall v. Diamond, 37 Mich. 429.

¶ 783. Garnishee cases being made appealable by the statute, the circuit court has jurisdiction to hear and determine the appeal. Newell v. Blair, 7 Mich. 103.

§ 186. Appealable amount involved.

See also post ¶¶ 823, 824.

¶ 784. A judgment for costs, of less than $4, against the plaintiff, might be appealed under the statute of 1845.—Wilson v. Davis, 1 Mich. 156.

¶ 785. Under the charter of the city of Port Huron providing that no appeal shall be taken to the circuit court from a justice court except when such justice shall disallow any claim in favor of plaintiff or defendant in whole or part in the amount of $50 or when such justice shall render a judgment to the amount of $50 exclusive of costs, in either of which cases the party agreed may appeal, the jurisdiction of the circuit court to determine the appeal depends upon whether the record discloses either a judgment for $50 or the allowance or disallowance of a claim asserted by either party to the amount of $50, the aggrieved party in the second case having alone the right to appeal.—American Boat Co. v. St. Clair Circuit Judge, 194 Mich. 146.

¶ 786. The charter of the city of Port Huron providing that no appeal shall be taken to the circuit court from a justice's court, except when the justice shall disallow any claim in favor of any plaintiff or defendant in whole or part in the amount of $50 or when such justice shall render a judgment to the amount of $50 exclusive of costs, in either of which cases the party agreed may appeal, applies to all cases, whether tried by a justice or by a jury.—American Boat Co. v. St. Clair Circuit Judge, 194 Mich 146.

§ 187. Right to appeal and waiver or estoppel.

Appeal or certiorari as appropriate remedy, see post § 251.

Waiver of special appeal by going to trial on merits, see post § 229.

¶ 787. Appeal not precluded by oral admission before justice made as evidence merely.—Morrison v. Riker, 26 Mich. 385.

¶ 788. Appeal does not lie after stay of execution.—People ex rel. Reynolds v. Macomb Circuit Judges, 1 Mich. 134.

¶ 789. After a transcript of the judgment has been legally filed in the circuit court under the statute, it is not in the power of that court to allow an appeal to be taken.—Davison v. Elliott, 9 Mich. 252.

¶ 790. The taking of a transcript of the judgment of a justice's court to the circuit court, under Comp. L. 1897, § 845, does not cut off the right of appeal from the judgment of the justice's court taken under Act No. 475, Local Acts 1903.—Pattinson v. Flayer, 158 Mich. 56.

§ 188. Propriety and scope of special appeal.

Certiorari or special appeal as appropriate remedy, see post § 251.

Effect of appearance on special appeal, see post § 211.

Waiver of special appeal by going to trial on merits of general appeal, see post § 229.

Matters available on special appeal, see post § 232.

Special appeal not maintainable where record shows jurisdiction in the justice, see also post ¶ 1036.

Judgment on special appeal, see post § 239.

¶ 791. Special appeal lies to review jurisdictional questions.—Deitz v. Groesbeck, 32 Mich. 303; Fowler v. Hyland, 48 Mich. 179; Rosevelt v. Hanold, 65 Mich. 414; Sager v. Shutts, 53 Mich. 116.

¶ 792. Special appeal does not lie to review mere irregularities in the proceedings before the justice.—Deitz v. Groesbeck, 32 Mich. 303.

¶ 793. A special appeal from a justice's judgment does not lie where there is no question of jurisdiction, and the case is in condition to be retried on the merits.—Benjamin v. Dodge, 50 Mich. 41.

¶ 794. The objection that the attorney for plaintiff in a justice's court did not prove his authority is properly raised by special appeal.—Woodbridge v. Robinson, 49 Mich. 228.

¶ 795. A special appeal for want of due service of summons will not be favored where the summons was actually brought to respondent's attention in due season.—Lymburner v. Jenkinson, 50 Mich. 488.

¶ 796. Special appeals will not lie to review a justice's errors in admitting evidence not competent under the declaration.—Dalton v. Laudahn, 30 Mich. 349; Webster v. Williams, 69 Mich. 135.

¶ 797. An objection that the justice erred in holding, against defendant's objection, that plaintiff's declaration was sufficient in law, cannot be raised by special appeal.—Stevens v. Harris, 99 Mich. 230.

¶ 798. It seems that a special appeal is not the proper proceeding for reviewing errors of fact; as where the error assigned was that the constable's return of personal service was false, and the justice, in his return to the special appeal, stated that it was in due form, and he had not known of any untruthfulness in it. But where this error was brought up by special appeal, and the case was submitted on the affidavit for the appeal and the return thereto, it was proper to overrule the special appeal and order the case to stand for hearing on the merits.—Lymburner v. Jenkinson, 50 Mich. 488.

§ 189. Appellate jurisdiction and powers.

Action on appeal same as in justice's court, see post ¶ 884.
Jurisdiction to entertain belated appeal, see post § 191.
Return as prerequisite to circuit court's jurisdiction, see also post § 201 et seq.
Jurisdiction to compel return on appeal, see post § 203.
Appearance and submission to jurisdiction, see post § 211.
Dismissal of appeal for want of jurisdiction, see post § 223.
Hearing and scope of review on appeal, see post § 231.
Jurisdiction to award costs, see post ¶ 1045.
Want of jurisdiction in superior courts to entertain appeals from justices, see Municipal Courts § 11.
Provisions as to powers and jurisdiction of the appellate court, see Jud. Act, chap. LXXVIII, § 17; Comp. L. 1915, § 14417.

¶ 799. The jurisdiction upon an appeal from a justice is purely appellate.—Cross v. Eaton, 48 Mich. 184.

¶ 800. Appeal does not lie to the Superior Court of Grand Rapids.—Allen v. Kent Circuit Judge, 37 Mich. 474.

B. TAKING AND PERFECTING APPEAL.

§ 190. In general; parties to the appeal.

Parties on appeal, see post § 212.
Waiver of objection that appeal taken by one judgment defendant only, see post ¶ 974.
Procedure to obtain appeal generally, see Appeal, VI.
Constitutional power to grant or deny appeal, see Constitutional Law § 191.
Applicability of Stamp Tax Law to appeal papers in justice appeals, see Internal Revenue ¶ 3.

¶ 801. One of several plaintiffs or defendants can carry a case heard before a justice of the peace to the circuit court on appeal, and the refusal of his coparties to unite with him in an appeal cannot preclude him from taking it on his own behalf.—People ex rel. Keal v. Wayne Circuit Judge, 36 Mich. 331.

§ 191. Time to take and perfect.

Right of parties to enlarge the time, see post § 192.
Allowance of appeal after expiration of statutory period, see post §§ 193, 194.
Dismissal of belated appeal, see also post § 223.
Computation of time, see Time.

¶ 802. When a statute fixes absolutely the time within which an appeal must be taken, the appellate court has no power to enlarge it, and its jurisdiction to entertain the appeal depends upon a compliance with the statute.—Climie v. Odell, 20 Mich. 12.

¶ 803. The circuit court obtains no jurisdiction by an appeal from a justice's court if taken after the statutory period of five days allowed for taking it.—Franks v. Smith, 45 Mich. 326.

¶ 804. An appeal from judgments rendered by justices of the peace must be made five days after the rendition of the judgment, unless under Comp. L. 1897, § 909, it is authorized by the circuit court, or by the circuit judge at chambers after the expiration of five days when the party making the appeal has been prevented from taking the same by circumstances not under his control.—Stock v. Wayne Circuit Judge, 143 Mich. 389.

§ 192. Stipulations extending time for appeal.

General law as to stipulations, see Stipulations.

¶ 805. The parties may by stipulation enlarge the time for taking an appeal, beyond the period fixed by the statute, in cases where by statute the court upon cause shown might allow an appeal.—Climie v. Odell, 20 Mich. 12.

§ 193. Power of court to allow belated appeal.

Practice on application for special leave to appeal after time, see 1916 C. C. Rule 47.

Power of circuit court to allow belated appeal, see Jud. Act, chap. LXXVIII, § 8; Comp. L. 1915, § 14408.

¶ 806. Comp. L. 1857, § 3842, How. St. § 7005, does not give a general discretion to the circuit court to allow appeals in cases where it would be merely equitable, but only where by reason of circumstances beyond the party's control he is prevented from appealing within the prescribed time.—Draper v. Tooker, 16 Mich. 74.

¶ 807. Where the justice, when the cause was submitted, informed the parties he should take time for consideration, without stating how much, and rendered judgment the next day, and the defendant, supposing he could not render judgment until the fourth day, made no inquiry until the fifth day after the expiration of said four days, when the time for taking appeal had expired, held, that the circuit court had no power to permit a special appeal.—Draper v. Tooker, 16 Mich. 74.

¶ 808. Local Acts of 1895, No. 460, § 10, limiting the absolute right of appeal from justices' judgments in the city of Detroit to cases where the amount involved is not less than $50, but providing that an appeal may be authorized by the circuit court when a party has been prevented from making a defense upon the merits by circumstances not under his control, or "when justice requires that such appeal should be authorized," does not give the court discretionary power to allow a dilatory appeal after the lapse of the five days prescribed by the general statute for taking appeals.—Goldhamer v. Wayne Circuit Judge, 107 Mich. 259.

¶ 809. The circuit court for the county of Wayne has no authority to make an order more than five days after the rendition of judgment by a justice of the peace of the city of Detroit allowing an appeal where the showing required by Comp. L. 1897, § 909, was not made out, and such an order may be vacated by mandamus.—Stock v. Wayne Circuit Judge, 143 Mich. 339.

¶ 810. Comp. L. 1897, § 909, providing relief to parties who have been prevented from taking appeals by circumstances not within their control must be considered as a remedial statute, and no construction thereof should be adopted which does not take into account the evident intention of the legislature to require prompt action by the defeated party if he would appeal.—Pickell v. Coates, 147 Mich. 53.

§ 194. ——Necessity of excusing delay and sufficiency of showing.

¶ 811. An unexcused delay of nearly three months after learning that a judgment had been rendered against him will prevent an appellant from taking advantage of Comp. L. 1897, § 909, providing relief to parties who have been prevented from taking appeals by circumstances not under their control.—Pickell v. Coates, 147 Mich. 53.

¶ 812. How. St. § 7005, permits appeals to be authorized after the statutory time for taking them has expired, if the party seeking to appeal was prevented from doing so by "circumstances not under his control." Held, that these include his serious illness or that of a member of his family; and the rule applies where the party is the agent of a corporation.—Braastad v. Dey Iron Min. Co., 54 Mich. 258.

¶ 813. An appeal from a justice may properly be allowed where the beaten party relied on his attorneys and they were honestly mistaken about the date of an adjournment, so that judgment was taken by default and they did not hear of it until the time for appealing had gone by (How. St. § 7005).—Capwell v. Baxter, 58 Mich. 571.

¶ 814. One who applies for leave to appeal from a justice's judgment on the ground that he was prevented from taking his appeal within the five days by circumstances not under his control, does not bring himself within the statute (How. St. §§ 7005, 7006) if, when the only obstacle to his perfecting the appeal by service of affidavit and bond was the justice's absence, he failed to comply with the statutory provision that such affidavit and bond, in case of the justice's absence from his home, may be served upon any member of his family of suitable age.—Combs v. Saginaw Circuit Judge, 99 Mich. 234.

¶ 815. The claim that appellant could not have complied fully with How. St. §§ 7005, 7006, allowing appeals on leave given, and permitting the payment of fees to a member of the justice's family, because he had already paid costs and fees to the justice, is not well taken, inasmuch as there is no occasion to pay costs and fees to a member of the justice's family if they have already been paid to the justice.—Combs v. Saginaw Circuit Judge, 99 Mich. 234.

¶ 816. Under How. St. § 7005, providing that appeals may be authorized by the circuit court or the judge at chambers after the expiration of five days, where the appeal-

ing party has been prevented from appealing by circumstances not under his control, an appeal was properly allowed to one of two defendants by a justice after five days, upon a showing that such defendant was misled by his codefendant into believing that he would pay the costs and perfect the appeal, and took immediate steps towards effecting the appeal upon learning the facts.—Potter v. Lapeer Circuit Judge, 119 Mich. 522.

¶ 817. A delay of six weeks after obtaining knowledge of the rendition of a judgment in justice court, before making application for an appeal, did not destroy such right of appeal, where it appeared from such application that defendant was a nonresident when she heard of the judgment and that from the time of her learning of the rendition of such judgment she had been endeavoring to obtain exact information as to such judgment.—Jackson v. Jackson, 135 Mich. 549.

¶ 818. One desiring to appeal from the Justice's Court of the city of Detroit must make payment to the clerk of the necessary fees and costs, and present the bond and affidavit to the justice who tried the case, and if he cannot be found leave them at his residence in compliance with the general law (Comp. L. 1897, § 903 et seq.); and where relator on the last day fixed for an appeal tendered the papers and costs to the only deputy who was in the office, it being after office hours, and he refused to receive them as being unauthorized to do so, and relator still had several hours within which to find the clerk and pay the money to him and present his affidavit and bond to the justice, but made no effort to do so, but the next morning made a similar tender to the clerk, who refused to receive them on the ground that the time for appeal had passed, relator was not entitled to leave to take a special appeal under the general law (Comp. L. 1897, § 909).—Graham v. Wayne Circuit Judge, 143 Mich. 360.

¶ 819. An appeal from a judgment of a justice of the peace of Detroit more than five days after its rendition was held properly to have been disallowed by the Circuit Court of Wayne County under Local Acts 1905, No. 475, section 22, where it was shown that all of the directors of defendant corporation had notice that an action was pending; that no appearance was entered before the justice on the return day of the summons or upon the day to which the action was adjourned, although the summons was served on defendant's secretary who turned it over to a bookkeeper with instructions to call it to the attention of the president, the bookkeeper having failed to do so.—Huddleston v. Charles Amos & Co., 180 Mich. 253.

¶ 820. Where plaintiff instituted principal and garnishment actions before a justice of the peace of the city of Detroit, upon return day in which the garnishee disclosed an indebtedness to the defendant exceeding the amount of plaintiff's claim, but no service was had upon defendant, a nonresident, and plaintiff's attorneys thereupon notified defendant by letter of such actions and the successful garnishment and that judgment would be taken for the amount of the claim and costs unless they should hear from defendant on or before return day, to which defendant's attorney replied by letter asking for information of date of return day and offering a settlement, but plaintiff's attorneys did not answer defendant's attorney, who wrote them again without reply and also the garnishee, whose attorney informed defendant's attorney that judgment had been regularly taken in the actions, and defendant took no further action until more than five days after the actions had regularly proceeded to judgment, when he applied for, and was allowed leave to perfect, a special appeal, which he perfected accordingly, held, under Local Acts 1903, No. 475, § 22, providing that appeals from such court may be authorized by the Circuit Court of Wayne county when the party appealing has been prevented from making a defense upon the merits of the case by circumstances not under his control, and also when justice requires that such appeal be authorized, but that no appeal shall be allowed or authorized after five days from the rendition of judgment, except as therein otherwise provided, that a special appeal was not authorized by the facts shown.—Anderson v. Wartenberg, 196 Mich. 529.

§ 195. Application for leave and notice thereof.

Method of reviewing refusal of leave to appeal, see Appeal ¶¶ 28, 29.

¶ 821. Notice of motion for leave to appeal cannot be served by mail. C. C. Rule 103, allowing these notices to be the same as on special motions, relates to the time, not to the manner, of service.—McCaslin v. Camp, 26 Mich. 390.

¶ 822. Prior to the amendment of How. St. § 7005, by Laws of 1891, Act No. 73, service of notice of application for leave to appeal from justice's court, made upon the opposite party without this state, conferred no jurisdiction upon the circuit judge to allow the appeal, nor was the requirement waived by an acceptance of service outside of the state.—Danville Stove & Mfg. Co. v. Kent Circuit Judge, 88 Mich. 244.

¶ 823. Under Local Acts 1895, No. 460, § 10, limiting the absolute right of appeal from justice's judgments in the city of Detroit to cases where the amount involved is not less than $50, but providing that an appeal may be authorized by the circuit court when justice requires it, and further providing that, in all cases where the party against whom such appeal is sought has appeared in

justice's court by an attorney, it shall be sufficient to serve such attorney with notice of subsequent proceedings, it is necessary that the opposite party or his attorney have notice of an application for an appeal, and have an opportunity to be heard before the same is allowed.—Scranton Lumber Co. v. Wayne Circuit Judge, 111 Mich. 614.

¶ 824. Since the statute enabling the circuit court to authorize an appeal from a justice in Detroit where the amount involved is less than $50, and also providing for notice in such action where the party has appeared by attorney (Local Acts, 1895, No. 460, § 10) does not specify the length of time of such notice, the notice required will be governed by the circuit court rules relating to special motions.—Scranton Lumber Co. v. Wayne Circuit Judge, 111 Mich. 614.

¶ 825. In applications for leave to appeal from a justice's judgment, an order to show cause is the better practice, so that the court can see that the hearing shall be put forward long enough to give the judgment creditor ample time to prepare to show cause against the motion. Where a judgment is to be disturbed, the utmost fairness should be required of the party complaining of it.—McCaslin v. Camp, 26 Mich. 390.

§ 196. Affidavit for appeal.

Inability to serve affidavit because of justice's absence as ground for allowance of belated appeal, see ante ¶¶ 814, 815.
Appearance as waiver of defects in affidavit, see post § 211.
Defects in affidavit as ground for dismissal of appeal, see post § 223.
Affidavit as affecting scope of review, see post § 228.
Presumptions as to matters stated in affidavit, see post § 233.
Affidavit as evidence, see post §§ 235, 236.
Affidavits for certiorari, see post § 256.
Affidavit for appeal in forcible entry or summary proceedings, see Forcible Entry § 51.
Service of affidavit when justice absent, see Jud. Act, chap. LXXVIII, § 9; Comp. L. 1915, § 14409.

¶ 826. Where a plaintiff appealed, under the statute of 1845, from a judgment of costs against him, no affidavit was necessary.—Wilson v. Davis, 1 Mich. 156.

¶ 827. Where defendant appealed, under the statute of 1845, and the affidavit was made by his attorney, and stated that the plaintiff recovered $5 more than was justly and honestly due him, as the deponent believed from the facts and evidence in the cause, which were fully communicated to him, it was held sufficient.—Austin v. Strong, 1 Mich. 259.

¶ 828. The affidavit for appeal, being required by the statute on the ground of public policy, cannot be waived or dispensed with by the appellee.—Smart v. Howe, 3 Mich. 590.

¶ 829. The appeal affidavit in replevin proceedings removed from before a justice to the circuit court is jurisdictional, and should appear in the record upon review in the supreme court. But its absence therefrom was not fatal where error was not assigned on the action of the circuit court in reversal.—Sterner v. Hodgson, 63 Mich. 419.

¶ 830. An affidavit for appeal, if properly sworn to, is valid, though not subscribed by the affiant.—People ex rel. Dickinson v. Simondson, 25 Mich. 113.

¶ 831. An affidavit for appeal, sworn to before any other officer than the justice, is of no avail unless the jurat be signed by such officer; but where sworn to before the justice, the latter's neglect to sign the jurat cannot prejudice the rights of an appellant.—People ex rel. Dickinson v. Simondson, 25 Mich. 113.

¶ 832. An affidavit for an appeal from a justice, sworn to before a notary who was an attorney in the cause, was held to be a "defective affidavit" within the meaning of Pub. L., 1877, p. 3 (How. St. § 7020).—Bradley v. Andrews, 51 Mich. 100.

§ 197. ——Supplying and amending affidavits for appeal.

See also post ¶ 954.
Amendment of bond, see post § 199.
Amendments of pleadings, see post §§ 213-221.
Replevin bond not superseded by appeal bond, see ante ¶ 337.

¶ 833. The defective affidavit which How. St. § 7020, allows a party to supplant is one which is fatally defective; any other would be sufficient.—Bradley v. Andrews, 51 Mich. 100; Hamilton v. Wayne Circuit Judge, 52 Mich. 409.

¶ 834. On appeal from a justice's court, where it appeared that the affidavit for appeal had been mislaid or lost, it was held proper under Comp. L. 1897, § 10276 et seq., to allow a new affidavit to be filed on showing that the lost affidavit had actually been filed with the justice.—Hyman v. Kadrovach, 180 Mich. 370.

§ 198. Bond, recognizance or undertaking.

Release of attachment lien by giving appeal bond, see ante § 65.
Persons upon whom bond to be served where justice absent, see also ante ¶¶ 814, 815.
Want of or defects in appeal bond as ground for dismissal of appeal, see post § 223.
Liabilities and actions on bond, see post § 248 et seq.
Bond on certiorari, see post § 257.

Bond on appeal in forcible entry or summary proceedings, see Forcible Entry § 52.
Provisions as to bond or undertaking on appeal, see Jud. Act, chap. LXXVIII, §§ 3-5; Comp. L. 1915, §§ 14403-14405.
Service of bond or recognizance when justice absent, see Jud. Act, chap. LXXVIII, § 9; Comp. L. 1915, § 14409.

¶ 835. Under the statute of 1845 the recognizance could only be entered into before the justice by whom the cause was tried.—Austin v. Strong, 1 Mich. 259.

¶ 836. Under the statute of 1845, which provided that, "if any party shall appeal," "such party, his agent or attorney, shall enter into a recognizance," it was held that the appeal might be taken, and the recognizance entered into by the party for whose use the suit was brought.—Wilson v. Davis, 1 Mich. 156.

¶ 837. On an appeal taken by a corporation a bond executed by two individual obligors is sufficient, if otherwise in regular form, although one of the obligors is named in the bond as principal instead of surety.—People ex rel. Detroit & B. Plank Road Co. v. Wayne Circuit Judge, 27 Mich. 303.

¶ 838. Where an affidavit for appeal is made by one of two joint defendants in behalf of both, if the other does not execute the bond and no surety signs for him, the judgment as to him is not affected by the appeal, and he is not entitled to enter his appearance in the circuit or to notice of trial there.—Jopp v. Kegel, 83 Mich. 50.

¶ 839. An appeal bond, executed on an appeal from a justice's court to the circuit court, in an action of assumpsit for work and labor, where the sole controversy is whether the claim is entitled to a preference under Pub. Acts 1887, No. 94 (How. St. § 8749m et seq.), which bond only requires the obligors to pay the judgment if the preference is sustained, does not comply with the general statute (How. St. § 7000), providing for a bond to pay the judgment rendered in the circuit court, and as there is no provision for an appeal in the first cited statute as to preferences, appeals being purely statutory, the appeal with an insufficient bond will be dismissed, unless a valid bond is filed.—Wineman v. Wayne Circuit Judge, 121 Mich. 601.

§ 199. ——Supplying and amending bond.

See also post ¶¶ 954, 955.
Power of appellate court to order new bonds, see Jud. Act, chap. LXXVIII, § 17; Comp. L. 1915, § 14417.

¶ 840. A bond given on appeal from a justice's judgment, though insufficient in amount, operates as a stay of proceedings; and the appellant has the right, under How. St. § 7018, which provides that no appeal shall be dismissed on account of any informality or imperfection in the appeal bond, if the appellant and his sureties consent to amend the same, or if another sufficient bond, to be approved by the court, shall be filed, to amend the bond or file a new one.—Hascall v. Brooks, 105 Mich. 383.

¶ 841. Where on appeal from justice's court objection was made that the surety on the appeal bond had failed to justify his pecuniary responsibility in writing and under oath, it was held that such bond could be amended under Comp. L. 1897, § 922.—Hyman v. Kadrovach, 180 Mich. 370.

§ 200. Payment of fees as condition to appeal.

Costs and fees in general, see ante IV, G.
Jury fees, see ante § 123.
Fees of justices of the peace, see ante § 4.
Justice's fees for making return, see post § 205.
Nonpayment of fees as ground for dismissal, see post § 223.
Reinstatement of appeal after dismissal for nonpayment of entry fee, see post ¶ 970.
Jurisdiction of circuit court to ascertain whether fees and costs have been paid, see post ¶ 850.
Provisions as to fees upon appeal, see Jud. Act, chap. LXXVIII, § 6; Comp. L. 1915, § 14406.

¶ 842. The statute (How. St. § 7003), which provides that, on appeal from a justice's judgment, the appellant shall pay to the justice the costs of the judgment, together with the sum of one dollar for making his return, and the further sum of three dollars as clerk and entry fee, requires the payment of jury fees as a condition to such appeal.—Swarthout v. Saginaw Circuit Judge, 99 Mich. 347.

§ 201. Return or record, contents and sufficiency.

Docket entries and sufficiency thereof, see ante § 139 et seq.
Neglect to make return as precluding suit on appeal bond, see post ¶ 1073.
Statement in lieu of return, see post ¶ 860.
Jurisdiction of circuit court to compel a return, see post § 203.
Requiring further return, see post § 203.
Fees for making return, see post § 205.
Presumptions upon return and record, see post § 233.
Verity, conclusiveness and effect of return, see post § 234.
Return to certiorari, see post § 259.
Record on appeal generally, see Appeal, VI, D.
Provisions as to return of justice to appeal, see Jud. Act, chap. LXXVIII, §§ 11-17; Comp. L. 1915, §§ 14411-14417.

¶ 843. The return to the appeal, in which the name of the justice only appears in the caption, is sufficiently signed; and the court can as well take notice that the name there is written by the justice himself as if it

appeared at the end of the return.—Smart v. Howe, 3 Mich. 590.

¶ 844. Facts coming to the knowledge of the justice after the trial cannot properly constitute a part of his return, and must be rejected by the appellate court.—Savier v. Chipman, 1 Mich. 116.

¶ 845. On appeal from the overruling by a justice of the peace of a defendant's objection to the jurisdiction, the jurisdictional facts must appear on the justice's record; in order that the presumption in favor of regularity may obtain there must be some showing.—Gadsby v. Stimer, 79 Mich. 260.

¶ 846. The return of a justice, in a cause appealed to the circuit court, that plaintiff declared in a plea of trespass on the case, that defendant pleaded the general issue, and that judgment was rendered for the plaintiff, is sufficient to confer jurisdiction, though the declaration is missing from the return and in lieu thereof is an affidavit by the justice that the declaration was lost and that a declaration attached to the affidavit was the same as the one filed in the justice's court.—Carver v. Smith, 113 Mich. 207.

¶ 847. Where the return of a justice in an appeal case fails to show any jurisdiction over the defendant or to set out a cause of action, the defendant, who did not plead below, is not bound to plead or make any defense at the circuit, and any judgment rendered against him is fatally defective on error, if not void on its face.—Moore v. Hansen, 75 Mich. 564.

¶ 848. Where the record of a proceeding in justice's court does not show affirmatively that plaintiff appeared on the return day, it works a discontinuance of the case and ousts the court of jurisdiction, since Comp. L. 1879, § 957, requires that the time of appearance of the parties be entered and in the absence of any entry it must be assumed that no one appeared.—Purdy v. Law, 132 Mich. 622.

§ 202. ——Objections and waiver.

Objections available on appeal, see post § 228.

¶ 849. A justice's return to a special appeal is assumed to contain all that took place before him; if defective a further return should be required, and if a party goes to hearing upon it without objection he is presumed to have none.—Maxwell v. Deens, 46 Mich. 35.

§ 203. ——Amendment, completion or perfection.

Supplemental return setting forth time and place of adjournment, see ante ¶ 610.
Requiring further return, see also ante ¶ 849.
Appearance in circuit court as waiver of right to further amended returns, see post ¶ 987.
Verity and conclusiveness of return, see also post § 234.
Provisions as to amending return, see Jud. Act, chap. LXXVIII, § 15; Comp. L. 1915, § 14415.

¶ 850. Until a return is made to an appeal from a justice's court the circuit gets no jurisdiction over the cause itself, and cannot try it; but it has jurisdiction to inquire into the facts to ascertain whether the fees and costs have been paid, and the appeal duly taken, and if so to compel a return.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 851. Where a justice has sent up with his return an affidavit for appeal, without signing the jurat, the proper practice is to allow him to attach his jurat nunc pro tunc, if he voluntarily appears and wishes to do so, or if not to order a further return requiring him officially to certify whether the affidavit has been duly sworn to before him.—People ex rel. Dickinson v. Simondson, 25 Mich. 113.

¶ 852. Where a justice's judgment is rendered within the time that would ordinarily be proper, it cannot on appeal be assumed without proof that he has exceeded his jurisdiction by delaying judgment while the defendant was in custody; and if he in fact did so, an order to compel a further return should be applied for to show it.—Barker v. Wheeler, 44 Mich. 176.

¶ 853. A change of style in appealing a criminal prosecution so that the case on appeal shall appear to be a civil suit introduces a fatal contradiction in the record. The statute of amendments does not apply to such matters.—Webster v. City of Lansing, 47 Mich. 192.

¶ 854. Where on appeal it appears that the declaration was lost from the files of the justice it is proper to allow plaintiff to file a copy thereof to complete the record.—Bauer v. Wasson, 60 Mich. 194.

¶ 855. A defendant when appealing has the right to rely upon the justice's return as made, and a change therein which vitally alters the situation of the parties cannot be made except upon a proper application and showing and an opportunity to be heard on the motion.—Moore v. Hansen, 75 Mich. 564.

¶ 856. Defendants who take a special appeal from a justice's judgment, alleging as error that the docket entry, "judgment against defendant," does not indicate against which of the defendants judgment was rendered, are bound by an amended return, made at their request, whereby it appears that the judgment was against both.—Hinkle v. Collins, 113 Mich. 105.

¶ 857. On appeal from taxation of costs in justice court, the circuit court could neither

disregard nor amend the judgment.—Schmidt v. Wayne Circuit Judge, 136 Mich. 658.

¶ 858. In appeals from a justice's court, the return of the justice is the record from which the nature of the proceedings is determined when the pleadings are oral, and the practice does not permit the return to be amended after verdict by stipulation of the parties.—Applebaum v. Goldman, 155 Mich. 369.

¶ 859. A judgment in a justice's court was had against a foreign corporation by service of process upon the insurance commissioner, as provided by Act No. 321, Pub. Acts 1907. No proof was offered that the corporation had appointed the commissioner to act as its attorney in accepting legal service. Held, in a special appeal to the circuit court to test the justice's jurisdiction, no amendment of the return could be allowed to prove the said appointment by evidence not put in before the justice.—Wells v. United States Fidelity & Guaranty Co. of Baltimore, Md., 160 Mich. 218.

§ 204. ——Statement in lieu of return.

¶ 860. The proper practice, where it is claimed an appeal has been duly taken from a justice's court, and the justice has failed to make his return, is to call on the justice, on cause shown by affidavit, to state the facts; his official statement will be conclusive as to the facts therein stated, although it will be construed in reference to the affidavits in answer to which it is made.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

§ 205. ——Fees for making return.

Payment of fees as condition to appeal, see also ante § 200.

¶ 861. While payment to a justice of the fee for making return to an appeal is not necessarily a strictly jurisdictional fact, and when waived and return is made will be conclusively presumed, it is still a condition precedent to the appellant's right to maintain his appeal; unless payment is made or waived the justice need make no return; no court can compel it, and he may proceed to issue execution as if no appeal had been attempted.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 862. One who appeals from a justice's judgment is entitled to the whole of the day on which the return is filed to pay the entry fee, and his right to appeal does not depend on the payment of a fee to the opposing attorney in addition to the entry fee.—Grand Rapids & I. R. Co. v. Wright, 32 Mich. 491.

¶ 863. A justice's receipt for "ten dollars as fees and costs on appeal of case" so binds him that he must make return to the appeal even though the fee for making it has not in fact been paid. The appellant has a right to rely on the receipt and cannot be deprived of his appeal by a misunderstanding with the justice.—Stevenson v. Kent Circuit Judge, 44 Mich. 162.

§ 206. Objections and exceptions below, and saving same for review.

Objections before justice as to process or service, see ante §§ 50-58.
Objection for first time that short summons issued where long one prescribed, see ante ¶ 214.
Objections to pleading, see ante §§ 94, 100.
Objections in attachment proceedings, see ante § 64.
Objections to jurisdiction in replevin, see ante § 82.
Objections to continuances or adjournments, see ante § 115.
Waiver of security for costs by going to trial on merits, see ante § 164.
Objections available on the hearing, see also post § 228 et seq.
Consideration on special appeal of objections not made before the justice, see post § 232.
Necessity of taking proper objection in circuit court on appeal to save question for review on error in supreme court, see Saving Questions.

¶ 864. A defendant in justice's court moved for a nonsuit on the ground of variance between the declaration and the proofs in the matter of the assignment of the paper sued upon. Held, that an appellate court would not regard other variances to which the justice's attention had not been called.—Wilcox v. Toledo & A. A. R. Co., 45 Mich. 280.

¶ 865. A person arrested on justice's warrant for trespass on land made no objection to the sufficiency of the affidavit on which the warrant was issued, nor to the regularity of his arrest, but pleaded the general issue with notice that the land was his own freehold, and went to trial. Held, that he could not, on special appeal, object for the first time to the sufficiency of the affidavit, even though no right of arrest could be founded on it.—Maxwell v. Deens, 46 Mich. 35.

¶ 866. Replevin was brought in justice's court designating defendant by his surname and by the initials of his Christian name. No misnomer was pleaded, and judgment, which was rendered for plaintiff, was appealed by defendant in his full name, after pleading to the merits below. Held, that the informality was no longer material.—Baldwin v. Talbot, 43 Mich. 11.

¶ 867. A justice's jurisdiction of an action against an administrator cannot be questioned where defendant is not named as such and does not plead in abatement, but pleads the general issue and goes to trial on the merits.—Singer Mfg. Co. v. Benjamin, 55 Mich. 330.

¶ 868. Where one sued in justice's court as "John Doe" is served personally, and appears and defends in his own name, thus appealing to the circuit court and thence to the supreme court, failure to amend formally is not fatal on a record showing his true identity.—Moore v. Lewis, 76 Mich. 300.

¶ 869. The failure to object to the jurisdiction of a justice of the peace on the ground that he issued an attachment in favor of an infant plaintiff in a log-lien suit without appointing a next friend, as required by How. St. § 6864, or the appointment of such next friend on plaintiff's motion, is a sufficient answer to such objection when made for the first time on special appeal.—Dillon v. Howe, 98 Mich. 168.

¶ 870. The summons in a suit upon a promissory note payable to the order of the "Evangelical Church of Vicksburg, Michigan," described the plaintiffs as "Trustees of the Salem Church of the Evangelical Church of North America, a corporation, at Vicksburg, Michigan." The name specified in the certificate of incorporation was the "Salem Church of the Evangelical Association of North America, in Kalamazoo County, State of Michigan," being the county in which Vicksburg is situated. Plaintiffs declared orally on a certain promissory note made and executed by defendant to the "Evangelical Church of Vicksburg, Michigan," and averred that said note was intended for the "Salem Church of the Evangelical Association of North America, of Vicksburg, Michigan," to which declaration defendant pleaded the general issue. Held, that defendant's objection, made on the trial of an appeal from the justice's judgment, that the suit was not brought in the name of the corporation as expressed in the certificate of incorporation, not having been taken before the justice, was waived.—Stoffiet v. Strome, 101 Mich. 197.

¶ 871. A defense whereby a defendant seeks to set-off or recoup damages for breach of contract, in an action by an assignee of a contract for goods furnished, is admissible where the case begins in a justice's court, where the pleadings are presumably oral, and where the defendant's plea consists of, "the general issue, notice of set-off and recoupment," as the plea though not sufficiently definite, is amendable. On an appeal it cannot be contended that the defense was not admissible under the pleadings, as an amendment would have been allowed if objection had been made.—Bacon v. Reich, 121 Mich. 480.

¶ 872. A general objection in justice's court is not sufficient to raise the question that an oral declaration in an action to recover the statutory penalty for selling liquor to a minor, will not support the judgment for plaintiff because it failed to specify the statute.—Carmer v. Hubbard, 123 Mich. 333.

¶ 873. A notice appended to the plea of the general issue that "defendant will give in evidence and insist on as a defense, fraud, and misrepresentation used in securing the subscription" is sufficient in an action begun in justice's court when no objection was raised until proof was offered in the circuit court.—Chicago Building & Mfg. Co. v. Yell, 129 Mich. 517.

¶ 874. Defendant waived his right to object to the jurisdiction of the justice's court on the ground that the amount sued for exceeded $300 (Comp. L. 1897, § 103), where the declaration in such court claimed $300 on a special count of breach of contract and $300 on the common counts in assumpsit, and such defendant, after trying the matter upon the merits in the justice's court, took a general appeal to the circuit court, and there participated in the selection of a jury and permitted a witness to be examined before raising the jurisdictional question.—Thayer v. Gibbs, 140 Mich. 60.

¶ 875. Where, on a special appeal from a judgment of a justice's court, under Comp. L. 1897, § 903, it was contended that the court had no jurisdiction because a short summons should have issued instead of a long summons on account of the nonresidence of the defendant, it was error for the circuit court to reverse the justice's court when the record on appeal affirmatively showed that the fact of nonresidence had never been raised nor passed upon.—Courtis v. Garrison, 148 Mich. 226.

¶ 876. On an appeal from the justice's court to the circuit court the respondent cannot raise the objection that the court erred in compelling the justice of the peace to render a second and third amended return without his being paid therefor; this objection can only be raised by the justice of the peace and must be raised before making the return.—Marr v. Cook, 147 Mich. 425.

¶ 877. On an appeal from a judgment by a justice on the ground that the service was defective, the alleged defects will not be considered where it appears from the record that the defendant's acts amounted to a general appearance.—Priest v. American Ins. Union, 171 Mich. 321.

¶ 878. In an action on an injunction bond commenced in justice court, defendant cannot on appeal to the circuit court object to the dclaration as being insufficient under Comp. L. 1897, § 10378, How. Ann. St. 2nd Ed., § 13092, since the objection should have been made in the justice court where the declaration could have been amended.—Millspaugh v. Schultz, 180 Mich. 310.

¶ 879. Where, both parties consenting, the justice consults with another justice as to the practice of opening a case after both parties have rested (the question being presented by defendant's request for such open-

ing), defendant cannot afterwards object to such consultation.—Chivers v. Lytle, 97 Mich. 477.

¶ 880. In an action by a nonresident in the justice's court on the return day after the plaintiff had declared orally, the defendant moved for security for costs which was denied, whereupon the defendant pleaded the general issue and proceeded to trial upon the merits, and then took a special appeal on the ground that the justice erred in overruling his motion. In the circuit court the defendant moved to dismiss the case because the justice had no jurisdiction to try the case, and the motion being denied the case went to trial before a jury. Held, the proper practice to raise the question as to security for costs would have been to move therefor in the circuit court.—Lacomb v. Godkin, 143 Mich. 198.

§ 207. Assignments and specifications of errors.

Assignments of errors on appeals generally, see Appeal, XI, C.

¶ 881. On a special appeal from a justice, under Comp. L. 1897, § 903, allegations in general terms that he had no jurisdiction, that he should have issued a short summons, etc., will not be considered as raising any objection.—Courtis v. Garrison, 148 Mich. 226.

¶ 882. Mere general allegations of error in a special appeal that the justice had no jurisdiction of the persons of defendants, and that he erred in deciding he had jurisdiction in the cause, are too indefinite to be reviewed by the upper court.—Osborne v. Osborne, 156 Mich. 413.

¶ 883. In an action for breach of contract brought in a justice's court, judgment for defendant will not be reversed on appeal where plaintiff was not entitled to more than nominal damages, and error is not assigned as to the refusal of the justice to render judgment for nominal damages.—International Textbook Co. v. Schulte, 151 Mich. 149.

§ 208. Effect of appeal, transfer and stay.

Release of attachment lien by giving appeal bond, see ante § 65.

Operation of bond insufficient in amount, see ante ¶ 840.

Appearance and submission to jurisdiction, see post § 211.

Effect to preclude certiorari, see post § 253.

Right to make return to certiorari after appeal perfected, see post ¶ 963.

Provisions as to release of property when appeal taken, see Jud. Act, chap. LXXVIII, § 10; Comp. L. 1915, § 14410.

¶ 884. The action on appeal is still the same action that was in justice's court.—Brabon v. Pierce, 34 Mich. 39.

§ 209. ——In garnishment cases.

Garnishment in justices' courts, see ante §§ 68-76.

Right to certiorari after appeal taken, see post § 253.

¶ 885. Under How. St. § 8041, which provides that the recovery of judgment by the principal defendant in a suit in justice's court shall be deemed a discontinuance of all proceedings against the garnishee defendant, and in view of other statutes on the subject, the latter is not released from liability where plaintiff appeals from said judgment, until the final determination of said appeal in favor of the appellee.—Erickson v. Duluth, S. S. & A. R. Co., 105 Mich. 415.

¶ 886. The garnishee defendant will not be entitled, under Laws 1891, Act No. 178, § 28 (which provides that, in all cases where defendant prevails or takes an appeal in the principal suit, the court shall make an order releasing the moneys garnished) to said order on the recovery of judgment by the principal defendant, until the final determination of plaintiff's appeal against the appellant.—Erickson v. Duluth, S. S. & A. R. Co., 105 Mich. 415.

¶ 887. An appeal by plaintiff from a judgment in justice's court in favor of the principal defendant will not bring up with it garnishment proceedings pending before the justice, in which the garnishee has disclosed a money liability to the principal defendant, so as to enable the circuit court, on rendering judgment in plaintiff's favor, also to render judgment against the garnishee defendant.—Erickson v. Duluth, S. S. & A. R. Co., 105 Mich. 415.

¶ 888. The statute contemplates in case of appeal by plaintiff in a garnishment suit against the main defendant that the action in justice's court against the garnishee shall remain in abeyance pending said appeal; and the proper practice is for the justice, after the rendition of final judgment against the principal defendant on the appeal, to issue a summons to show cause against the garnishee defendant, whereupon issue can be joined, and proof of the circuit court judgment furnishes the foundation for a judgment against the garnishee.—Erickson v. Duluth, S. S. & A. R. Co., 105 Mich. 415.

C. PROCEDURE AND REVIEW ON APPEAL.

Appellate procedure in forcible entry and summary proceedings, see Forcible Entry § 51 et seq.

§ 210. Change of venue and transfer of cause.

Transfer of cause in justice's court, see ante § 29.

¶ 889. Pub. Acts 1905, No. 309, providing for a change of venue applies to any civil

action pending in the circuit court, and includes cases appealed from the justice's court which were pending at the time of the passage of the act.—Moreland v. Lenawee Circuit Judge, 144 Mich. 329.

¶ 890. Comp. L. 1897, § 638, providing for the removal of causes pending before the circuit court of the county of Kent to the superior court on motion of either party and for the removal of cases subsequently instituted on motion of the defendant, does not apply to appeals from justice's court.—Pruyn v. Kent Circuit Judge, 126 Mich. 244.

§ 211. Appearance and submission to jurisdiction.

See also post §§ 223, 228.
Appearance by codefendant who fails to execute appeal bond, see ante ¶ 838.
Judgment upon nonappearance of plaintiff, see post §§ 222, 238.
Judgment against surety where plaintiff fails to appear on appeal in replevin, see post ¶ 1038.
General appearance on appeal in circuit as admission of jurisdiction, see also Appearance ¶ 46.

¶ 891. Taking an appeal is not such an appearance in the cause as waives an objection to the jurisdiction of the court over the appellant's person.—Shaw v. Moser, 3 Mich. 71.

¶ 892. The appeal, as such, does not give the circuit court jurisdiction where the justice had none.—Wells v. Scott, 4 Mich. 347.

¶ 893. Plaintiff below who appears for the purpose of applying to have proceedings allowing an appeal from a justice set aside for want of jurisdiction waives nothing by such appearance.—McCaslin v. Camp, 26 Mich. 390.

¶ 894. A general entry of appearance by an appellee before motion to dismiss gives the circuit court jurisdiction.—McCombs v. Johnson, 47 Mich. 592.

¶ 895. Where an unsworn affidavit had been filed for an appeal from a justice's court, the defect was waived if the appellee appeared and noticed the case for trial.—Hamilton v. Wayne Circuit Judge, 52 Mich. 409.

¶ 896. Entry of appearance in circuit court on special appeal after denial by justice of motion to quash made on special appearance is not a submission to court's jurisdiction.—Freer v. White, 91 Mich. 74.

¶ 897. Where, after the denial of a motion to quash attachment proceedings in justice's court because of a fatal defect in the affidavit, defendant, who had appeared specially for the purposes of the motion, removes the case to the circuit court by special appeal, assigning as error such refusal, the entry by his attorney of his appearance in the circuit court will not be treated as a submission to the jurisdiction of the court.—Freer v. White, 91 Mich. 74.

¶ 898. A general appearance by the apellee gives jurisdiction of the appeal.—Sherwood v. Ionia Circuit Judge, 107 Mich. 136.

¶ 899. An appeal from justice's court should not be dismissed because of appellant's failure to file affidavit and bond within five days as required by statute, where appellee had appeared generally and served notice of trial and note of issue, since such appearance waived the defect and gave the circuit court jurisdiction.—Goodin v. Van Haaften, 130 Mich. 386.

¶ 900. A defendant in the justice's court who has taken a special appeal, by his general appearance in the circuit court does not enlarge the jurisdiction of the court or change his relation to the court or to the cause in any manner.—Marr v. Cook, 147 Mich. 425.

§ 212. Parties.

Parties to appeal, see ante § 190.
General law as to parties, see Parties.

¶ 901. The purpose of Act No. 137, Pub. Acts 1903, was to make the practice in cases appealed from a justice's court conform to the practice in cases commenced in the circuit court, as laid down by C. C. Rule 27c, whereby a plaintiff may sue jointly on several promises made by different parties.—Hillman v. Hulett, 149 Mich. 289.

¶ 902. On appeal from a judgment of a justice of the peace in favor of a mother and her infant daughter, the former may properly be appointed next friend of the latter, whose infancy is then for the first time brought to the court's attention.—McDonald v. Weir, 76 Mich. 243.

§ 213. Pleadings; declaration.

Pleadings below, see ante § 87 et seq.
Necessity of pleading where justice's return insufficient, see also ante § 201.
Amendments of pleadings on appeal, see post § 216.
General law as to pleading, see Pleading.
Review of grant or denial of leave to plead anew on appeal to circuit, see Appeal § 399.

¶ 903. On appeal from a justice's judgment a statement of the cause of action is sufficient if it would have sustained a recovery before a justice.—Soper v. Mills, 50 Mich. 75.

¶ 904. On special appeal for want of jurisdiction to the circuit from a justice of the peace where the filing of a declaration had been waived by treating an affidavit for

arrest as a declaration, the circuit court should permit a declaration to be filed.—Simon v. Spiro, 124 Mich. 484.

§ 214. ——Plea or notice.

Waiver by appearance and pleading to merits, see ante § 211; post §§ 228, 229.

¶ 905. A notice of special defense in an action upon a promissory note, filed with the plea in justice's court where the case was first tried, is sufficient in circuit court, where it contains, in substance, a statement of the facts upon which defendant relied in the circuit court; in view of the liberal construction applied to pleadings in justice's court.—Smith v. Nixon, 145 Mich. 593.

¶ 906. Where in an appeal from a justice, the judgment is attacked on the ground that the justice was out of the county when he gave judgment, such defense must be raised by a special notice and not in a plea puis darrein continuance.—Swantek v. Jarmoszki, 162 Mich. 617.

¶ 907. Where nearly four months had elapsed from the time an appeal was made in an action in the justice court by one broker against another to recover plaintiff's share of a commission for assisting defendant in the sale of a saloon, stock fixtures and business before plaintiff filed the notice for trial of the case in the circuit court, and nearly five months elapsed from the time the appeal was taken to the time of the trial of the case, and during such time defendant took no steps to put himself in condition for trial by the forming of an issue, the court did not abuse its discretion in refusing to allow defendant to file a plea of the general issue, with notice of failure of consideration and illegality of contract in place of a plea of the general issue only.—Dattner v. Weisz, 198 Mich. 367.

¶ 908. Under Comp. L. 1897, § 929, the court may, on appeal from a judgment against a garnishee, permit him to file a plea of the general issue and show that his disclosure was a mistaken one, the debt being owed to another party.—Gerow v. Hyde, 131 Mich. 442.

§ 215. ——Affidavits of nonexecution or special defense.

¶ 909. Where a suit on a contract for a correspondence course is appealed from a justice's to the circuit court and defendant and his attorney file affidavits that they for the first time saw the written contract in question at the time of the trial in justice's court, it is discretionary with the circuit trial judge to permit defendant to file an affidavit denying execution of said contract.—International Text-Book Co. v. Roberts, 168 Mich. 501.

§ 216. Amendments.

Amendments below, see ante §§ 42, 64, 108.

Amendments of affidavits for appeal, see ante § 197.

¶ 910. Comp. L. 1897, §§ 918, 10268, conferring power of authorizing amendments in circuit courts of cases appealed from the justice's court do not apply to orders relating to questions properly raised by special appeal, but to general appeals only where the case is to be tried upon its merits de novo.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

§ 217. ——Of declaration.

Estoppel by pleading to amended declaration, see post ¶ 975.

Principal's consent to amendment as binding upon surety, see post ¶ 1070.

¶ 911. Where the plaintiff declares in justice's court for a cause of action of which the justice has no jurisdiction, no amendment of the declaration in circuit court on appeal can save the case.—Fowler v. Hyland, 48 Mich. 179.

¶ 912. A declaration in assumpsit can be amended, on appeal, so as to show that plaintiff claims as assignee.—Donovan v. Halsey Fire Engine Co., 58 Mich. 38.

¶ 913. Where, on appeal from justice's court, the plaintiff is allowed to amend his declaration by adding thereto a count which tenders no new issue, and which is not then objected to, no error is committed to defendant's prejudice.—Kennedy v. Brown, 50 Mich. 336.

¶ 914. Where, after the death of one of two partners, suit was commenced in names of both, an amendment on appeal so as to allow the remaining plaintiff to declare as surviving partner is proper.—O'Connell v. Schwanabeck, 76 Mich. 517.

¶ 915. The amendment of a declaration in assumpsit that was oral before the justice was properly permitted.—Zeigler v. Henry, 77 Mich. 480.

¶ 916. Upon appeal from a judgment in a justice's court it is proper to allow a declaration orally made before the justice to be amended in a manner that does not change the form or cause of action.—Canal St. Gravel Road Co. v. Paas, 95 Mich. 372.

¶ 917. On appeal from justice court it is within the discretion of the circuit court to permit an amendment of a declaration averring an assignment of the claim to the plaintiff where the summons in justice court read "J. F. assignee of L. F."—Farnam v. Doyle, 128 Mich. 696.

¶ 918. In an appeal of an action in assumpsit begun in justice court the allowance of an amendment to the declaration by the circuit court in the words, "You may amend your declaration in this case by alleging in the declaration, in conformity with the summons, that the claim in this suit was as-

signed as you claim it was assigned, and as this assignment shows," is sufficient without any formal amendment to show an assignment of an antecedent debt where the plaintiff's oral claim shows the existence of such antecedent debt.—Farnam v. Doyle, 128 Mich. 696.

¶ 919. As the filing of the general issue in the circuit court upon the overruling of a special appeal from justice court, was an admission that there was a declaration, the liberal rules as to amendment applied in the circuit court, and plaintiff was permitted to specify the basis of its action.—Township of Ovid v. Haire, 133 Mich. 353.

¶ 920. Where a justice's return did not state the substance of the declaration in an action by a township for personal property taxes, and only stated that plaintiff declared verbally, but among the papers returned there was a statement by the county treasurer, of uncollected personal property taxes, showing the amount assessed against the defendant, an amendment of the declaration was permitted in the circuit court to show the basis of the claim, the general issue having been filed in the justice court.—Township of Ovid v. Haire, 133 Mich. 353.

¶¶ 921, 922. A declaration combining in one count a declaration in replevin with one in assumpsit for the balance due on a promissory note cannot be amended in the circuit after judgment had been rendered in justice's court and specially appealed because the judgment rendered thereon was void.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

¶ 923. Where a declaration in a suit on an instrument in a justice's court is defective for failure to allege an assignment to the plaintiff, and the point is raised by defendant for the first time in an appeal to the circuit court, the declaration may be amended in the circuit court.—Worden Grocer Co. v. Blanding, 161 Mich. 254.

§ 218. ——Of plea or notice, set-off or recoupment.

Pleas and notices in justice's court, see ante § 96.

Amendments introducing new defenses or cross demands, see post § 219.

¶ 924. On appeal to the circuit court from the justice's court, defendant's attorney moved for leave to amend his plea, supporting the motion with unsatisfactory affidavits, whereupon the court asked for the production of defendant, but his attorney refused to produce him, and asked for time to procure his affidavit. Held, that a denial of the motion was a reasonable exercise of the court's discretion.—Krohn v. Wayne Circuit Judge, 157 Mich. 185.

¶ 925. A suit in justice's court for goods and labor under a plumbing and heating contract, having been appealed to the circuit court, defendant gave plaintiff notice in writing that he would ask leave to amend his set-off from $150 to $271. At the beginning of the trial in the circuit court, said amendment was allowed. Plaintiff had announced himself as ready for trial on the call of the docket at the first day of the term with full knowledge that said motion had been made, and claimed no surprise and interposed no objection to proceeding to trial after said motion was granted. Held, the ruling was within the discretionary power of the trial court under Comp. L. 1897, § 10268.—Holser v. Skae, 169 Mich. 484.

¶ 926. Where on an appeal to the circuit court from a judgment of a justice of the peace in an action on a lease it appears that defendant pleaded the general issue, gave notice of recoupment and presented a bill of particulars which was presented to the justice and used, but it does not appear that the bill of particulars was used, defendant should be permitted to amend his plea, file the particulars of his recoupment nunc pro tunc and to submit evidence thereunder.—Carver v. Bielke, 177 Mich. 406.

§ 219. ——Introducing new cause of action, issues or claims.

Issues in the lower court, see ante § 104.

Issues on appeal, see post § 228.

¶ 927. The issue made before a justice cannot be substantially changed on appeal.—Hatzenbuhler v. Lewis, 51 Mich. 585; Graham v. Langston, 65 Mich. 45.

¶ 928. Neither party's claim can be enlarged upon the appeal.—Cross v. Eaton, 48 Mich. 184.

¶ 929. Though Comp. L. 1871, § 5458, How. St. § 7025, allows amendments to the pleadings on appeal, it does not warrant the introduction of a new cause of action.—Evers v. Sager, 28 Mich. 47.

¶ 930. An amendment of the declaration in the circuit court is not authorized if it would enlarge the plaintiff's claim beyond the limit of the justice's jurisdiction.—Evers v. Sager, 28 Mich. 47.

¶ 930a. A doctor, suing for professional services before a justice, filed a bill of particulars including a credit which, if true, made the account an open one, and barred by the statute of limitations. On a second appeal in the circuit court he obtained leave to amend his bill by adding another credit of later date than the last debit item. Held, that leave should not have been granted.—Hollywood v. Reed, 57 Mich. 234.

¶ 931. Suit before a justice was begun by a summons which laid the damages at a sum within his jurisdiction. The special count in the declaration did the same, but the com-

mon counts stated the damages at $500. No objection was made until, on appeal, the amount in dispute had been shown to be less than $100. Held proper for the circuit court to allow an amendment reducing the ad damnum clause.—Holloway v. Ogden School Dist. No. 9, 62 Mich. 153.

¶ 932. Since How. St., § 1375, requires an appeal in an action for failure to remove an encroachment upon a highway to be tried upon the issue joined in justice's court, an amendment of the declaration so as to make the description of the land correspond with that in the order for removal is not allowable.—Graham v. Langston, 65 Mich. 45.

¶ 933. An amendment on appeal from a justice setting out a liability under How. St., § 9044, for failing to render a particular statement of fees received and a receipt for same does not introduce a new cause of action where the original declaration was, as shown by the return, for money had and received for fees for official services and for refusing and neglecting to make and deliver a particular account of such fees and receipt for same "in accordance with the provisions of the statute," etc.—Vreeland v. Lockner, 99 Mich. 93.

¶ 934. One who in justice's court declared on the common counts for work and labor done for defendant at the latter's request will not be permitted in the circuit court on appeal to amend so as to allege breach of a contract of employment and consequent damages, since such an amendment sets up a different cause of action from that stated below.—Loranger v. Davidson, 110 Mich. 605.

¶ 935. Plaintiff, having declared on the common counts alone in justice's court, cannot amend his declaration in the circuit on appeal by adding a special count for breach of contract.—Frohlich v. Graulich, 113 Mich. 65.

¶ 936. In an action begun in the justice's court by summons "in a plea of trespass on the case upon promises, to plaintiff's damage $100 or under" the bill of particulars was "for the recovery of * * * one bedroom suit * * * $52"; a statement of account filed showed defendant's indebtedness to plaintiff to be $52, attached to which account was an affidavit that defendant was indebted in said amount, and that the consideration therefor was furniture; and the declaration was in trover for the conversion of one bedroom suit, of the value of $52, and claimed $100 damages. After defendant had pleaded the general issue plaintiff discontinued, and brought another action, in trover. Held, that this was not a change from the form of action first elected, since that was in trover, not in assumpsit, though containing language appropriate to assumpsit.—Sligh Furniture Co. v. Shannon, 113 Mich. 473.

¶ 937. A set-off described in the justice court bill of particulars as "W's note, endorsed by plaintiff" may be amended in the circuit court to read "money advanced by defendant at plaintiff's request for use and benefit of plaintiff on account of W's note endorsed," etc., as the claims relate to the same transaction and as thus amended it is a proper set-off.—Anderson Carriage Co. v. Pungs, 127 Mich. 543.

¶ 938. In an appeal from the justice court an amendment averring an assignment to the plaintiff of the claim sued on does not set up a different cause of action.—Farnam v. Doyle, 128 Mich. 696.

¶ 939. Plea of title in trespass q. c. before a justice must be entered when issue is joined, and cannot be introduced on appeal by an amendment changing the issue.—Bureau v. Marshall, 55 Mich. 234.

¶ 940. Action was brought on a note signed by a partnership and the note was filed with the justice. Defendants pleaded the general issue, but did not deny the execution of the note by affidavit, and judgment was given for plaintiff. Defendants appealed and moved for leave to amend accompanying the motion with an affidavit denying the execution of the note. The motion was denied. Held, that this was proper since issue was not taken before the justice upon the execution and delivery of the note and hence the defense offered by the amendment was inconsistent with their pleading.—Naftzker v. Lantz, 137 Mich. 441.

§ 220. ——In garnishment cases.

Garnishment proceedings below, see ante § 68 et seq.

¶ 941. An affidavit for garnishment in justice court having stated that it is based upon a judgment obtained in another justice court upon which judgment suit has been commenced, it is error upon appeal to the circuit court to permit the plaintiff to amend his affidavit by basing the garnishment upon the prior judgment without having started the second suit.—Heller v. People's Sav. Bank, 138 Mich. 192.

§ 221. ——In replevin cases.

Procedure below in replevin, see ante § 77 et seq.

¶ 942. Where in replevin before a justice's court the defendant appeared specially and moved to dismiss on various grounds and among them because the names of those forming the partnership did not appear on the writ, and the plaintiff's attorney did not ask to amend but asked for judgment on the merits upon the record whereupon judgment was given him and the defendant took a special appeal, an application to

amend at the trial in the circuit is properly denied.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

§ 222. Dismissal, discontinuance or abandonment.

See also post ¶ 1029.
Dismissal, discontinuance and nonsuit below, see ante §§ 118-120.
Special appearance to have proceedings set aside, see ante § 211.
Costs upon dismissal or discontinuance, see post § 247.
Mandamus to compel judge to vacate belated appeal, see Mandamus.
Review of order dismissing appeal, see Appeal § 404.
Writ of error as proper remedy to review dismissal of appeal, see Appeal ¶¶ 87, 88.
Dismissals of appeals and judgments on appeal in forcible entry and summary proceedings, see Forcible Entry §§ 56, 57.

¶ 943. C. C. Rule 71, allowing discontinuance against one of defendants, does not apply to cases on appeal from justices' courts.—Anderson v. Robinson, 88 Mich. 407.

¶ 944. Discontinuance may be had in the circuit court in an action brought up on appeal, as well as if begun there.—Taylor v. Dansby, 42 Mich. 82.

¶ 945. Discontinuance as to a party incapable of contracting may be had on appeal from a justice as in an original suit; if in an action on a note defendants show that one of the original promisors is an infant, the plaintiff can accept the infancy as a fact and discontinue as against him.—Taylor v. Dansby, 42 Mich. 82.

¶ 946. Plaintiff may, upon the trial, submit to a nonsuit or voluntarily discontinue before trial, in a suit brought into the circuit court by appeal from a justice, as well as is in one brought there by original writ or declaration.—French v. Weise, 112 Mich. 586.

¶ 947. Permitting an appellant from a justice to dismiss his appeal rests in the discretion of the circuit judge.—Swantek v. Jarmoszki, 162 Mich. 617.

¶ 948. A defendant who has taken a general appeal from a justice's judgment against him has not the right to dismiss his appeal and thus prevent plaintiff from taking judgment larger than before.—Peterson v. Frey, 109 Mich. 689.

§ 223. ——Grounds and occasions and propriety.

Insufficiency of bond as ground, see also ante ¶ 840.
Waiver of grounds by appearance and submission to jurisdiction, see ante § 211.
Nonpayment of costs as ground for dismissal, see Jud. Act, chap. LXXVIII, § 18; Comp. L. 1915, § 14418.

¶ 949. An appeal may be dismissed by the circuit court, on ex parte motion, for want of payment of the entrance fee; but the better practice is to make an order nisi in the first instance.—Chaffee v. Soldan, 5 Mich. 242.

¶ 950. Where the affidavit and declaration in replevin brought in justice's court stated value below $100, judgment went for plaintiff, who, testifying on appeal taken by defendant, swore that the value was over $150. Defendant moved to quash the writ and for dismissal. The court held the motion under advisement and directed the case to proceed. Defendant then introduced testimony tending to show value less than $100. Held, that it was proper to deny the motion and to render judgment for plaintiff on a finding that the property was worth less than $100.—Dinnen v. Baxter, 18 Mich. 457.

¶ 951. Comp. L. 1857, §§ 3859, 3860, authorizing the circuit court to dismiss an appeal from a justice if not prosecuted within a given time, do not apply where the appeal record has been essentially varied in the circuit court, as by the filing of a new declaration when the court had held the original deficient.—Fowler v. Pixley, 25 Mich. 513.

¶ 952. Under Comp. L. 1871, § 5455, How. St., § 7022, the circuit court may dismiss an appeal for want of prosecution only where there is a delay to prosecute within such time as shall be prescribed by the general rules of the court, and in the absence of such rules they have no general authority to dismiss at discretion.—Willis v. Gimbert, 27 Mich. 91.

¶ 953. A rule of the circuit (Calhoun Rule 100) which provides that appeals from justices' courts may be dismissed on motion where the cause has not been duly noticed for trial for some term not later than the fourth term after entry in the circuit does not apply to a case which has once been duly noticed within the time prescribed, even though it is not tried nor noticed for trial within four terms thereafter.—Willis v. Gimbert, 27 Mich. 91.

¶ 954. Under Comp. L. 1871, §§ 5451, 5453. How. St., §§ 7018, 7020, an appeal from a justice of the peace cannot be dismissed absolutely for defects and informalities in the affidavit and bond for appeal, where the appellant tenders a new and proper affidavit and bond.—People ex rel. Detroit & B. Plank Road Co. v. Wayne Circuit Judge, 27 Mich. 303.

¶ 955. The proper practice on a motion to dismiss an appeal for defects in the affidavit and appeal bond is to make an order nisi that the appeal be dismissed unless within a time specified a new and correct affidavit and bond be filed.—People ex rel. Detroit & B. Plank Road Co. v. Wayne Circuit Judge, 27 Mich. 303; Bradley v. Andrews, 51 Mich. 100.

¶ 956. A justice's judgment rendered within four days was held sufficiently regular to sustain an appeal where the parties appeared at the hearing by attorney only, and no objection to an adjournment was shown to have been made, and there was nothing to show that defendant was in custody, and that judgment ought therefore to be rendered at once.—Barker v. Wheeler, 44 Mich. 176.

¶ 957. Motion was made in the circuit court to dismiss an appeal from the judgment of a justice of the peace on the ground that it was not taken in due season, and also that the paper purporting to be a return was not made by the justice for that purpose. On these points there was room for dispute; but as it appeared that the appellees had entered their appearance in the circuit court generally, held, that the appeal ought not to be dismissed.—McCombs v. Johnson, 47 Mich. 592.

¶ 958. An appeal from justice's court will not be peremptorily dismissed on the ground that the affidavit for the appeal was sworn to before a notary who was an attorney in the case, but the defect may be cured by entering a rule nisi instead (Comp. L., 1871, § 5453).—Bradley v. Andrews, 51 Mich. 100.

¶ 959. Laws 1883, Act No. 148, requires one who takes an appeal from a Detroit justice to pay, on taking it, the fee due to the clerk of the circuit court. Held, in a case in which this was not done at that time, but where the fee was paid when the justice's return was made, that the appellate court had discretion to refuse to dismiss the case for noncompliance with the statute.—Preston v. Wayne Circuit Judge, 54 Mich. 242.

¶ 960. The statute (How. St., § 7019), which provides that no appeal shall be dismissed on the ground that the costs of the justice have not been paid, but in all cases the fact of a return having been made by a justice shall be conclusive evidence that such fees have been paid, relates to the fees of the justice, and not to the costs recovered by the appellee.—Swarthout v. Saginaw Circuit Judge, 99 Mich. 347.

¶ 961. By appearing generally the appellee waives his right to insist on a dismissal of the appeal for mere formal defects in the appeal bond. So held where, "in response" to a motion for security for costs, the appellee moved to dismiss on the ground that the justification of the sureties was taken before a notary public, instead of a justice of the peace or the county clerk, as required by How. St., §§ 7000, 7001.—Sherwood v. Ionia Circuit Judge, 107 Mich. 136.

¶ 962. Under Comp. L. 1897, § 782, providing that where title to land shall come in question in justice's court, the defendant may give notice thereof under the general issue, and section 789, providing that if judgment in the circuit court be for the defendant and the presiding judge shall certify that the title to lands did not come in question, the defendant shall not recover costs but shall pay costs to the plaintiff, it was error to dismiss for want of jurisdiction on the ground that a title was not involved, an appeal from justice court in a trover case in which the defendant had removed his case to the circuit court under this law, as the statute contemplated that a trial upon the merits should be had in that court.—Taylor v. Montcalm Circuit Judge, 122 Mich. 692.

¶ 963. Plaintiff recovered a judgment in a justice's court for an amount less than the sum he claimed. He perfected an appeal to the circuit court. Afterwards, the defendants took out a writ of certiorari, and in his return to the writ the justice stated that he had rendered judgment while outside the limits of his jurisdiction and before the day he had set down for giving his decision. Held, the justice had no jurisdiction to make the return after the appeal had been perfected, and the circuit court was in error in dismissing the plaintiff's appeal on the grounds stated in the return (1 Comp. L., 1897, § 918).—Swantek v. Jarmoszka, 159 Mich. 99.

¶ 964. Where defendants perfect an appeal to the circuit court from a judgment in the justice's court and complainant does not enter an appearance for nearly a year and then defendant promptly notices the case for trial, it is error to dismiss the appeal on motion of complainant since under C. C. Rule 13 either party may notice a case for trial and failure of one party to file notice is not sufficient ground to dismiss for want of prosecution.—Heintzen v. Gault, 174 Mich. 56.

¶ 965. C. L. 1897, § 924, providing that no appeal shall be dismissed because of a defective affidavit, has no application where there is no affidavit.—Hyman v. Kadrovach, 180 Mich. 370.

§ 224. ——Effect of dismissal or discontinuance.

See also post ¶ 1030.
Costs upon dismissal or discontinuance, see post § 247.

¶ 966. Discontinuance of a suit after appeal is not a discontinuance of the appeal within the meaning of Comp. L. 1871, § 5456, (How. St., § 7023), which provides that on the discontinuance or dismissal of an appeal a justice shall proceed as if it never had been taken.—Franks v. Fecheimer, 44 Mich. 177.

¶ 967. The discontinuance by a plaintiff in the circuit court of a suit appealed by him from justice's court, wherein defendant had judgment of no cause of action, unlike dismissal of the appeal itself, does not revive

said judgment, so as to render it a bar to a suit for the same cause of action subsequently instituted by plaintiff in the circuit court.—French v. Weise, 112 Mich. 586.

§ 225. ——Proceedings after discontinuance.

Proceedings before justice after dismissal or discontinuance, see Jud. Act, chap. LXXVIII, § 20; Comp. L. 1915, § 14420.

¶ 968. Where plaintiff in replevin, after appealing from a justice, discontinues on paying costs (How. St., § 7014, Rule 26), defendant may waive return and elect to recover the value, and, without any interlocutory judgment, may notice the cause in the circuit court for an assessment of damages by a jury (How. St., §§ 8346-8348).—Soper v. Hawkins, 56 Mich. 527.

¶ 969. If a justice's judgment is for costs only, and is not upon the merits, and does not give defendant any substantial rights, the plaintiff, after appealing from it, may discontinue his suit, and on paying the costs can begin a new suit in the circuit court if the case involves the jurisdictional sum.—Franks v. Fecheimer, 44 Mich. 177.

§ 226. ——Reinstating appeal.

¶ 970. An appeal from a justice's judgment, after being dismissed for nonpayment of the entry fee, may be reinstated in the discretion of the circuit judge upon satisfactory excuse for the default, and not withstanding the fact that a transcript of the judgment has been filed meanwhile and execution issued thereon.—Aldrich v. Clinton Circuit Judge, 49 Mich. 609.

§ 227. Calendaring cause and notice of trial.

Notice of trial below, see ante § 121.
Necessity of giving notice to one joint party who fails to execute appeal bond, see ante ¶ 838.
Failure to notice case for trial as ground for dismissal, see ante ¶ 964.
Noticing replevin cause for assessment of damages after discontinuance, see ante ¶ 968.
Calendar of causes and notice of trial in general, see Calendar.

¶ 971. Notice of trial, under R. S. 1846, where the party to be served was not a resident of the county, and appeared in the court below by agent or attorney, should be served on such agent or attorney. And where there was no agent or attorney in the case, notice must be sent to the party himself by mail, if his residence could be ascertained.—Chamberlain v. O'Keefe, 2 Mich. 357.

¶ 972. Under the statutes now in force, either party may notice an appeal for trial, and proceed to judgment in the same manner as in causes originally commenced in the circuit court.—Hoyt v. Mapes, 3 Mich. 522.

¶ 973. A party who undertakes to give notice of trial to an absentee under Circuit Court Rule 10 must show by his affidavit full compliance with every clause and condition of the rule.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

§ 228. Objections available and issues on appeal.

Issues below, see ante § 104 et seq.
Waiver of objections to improper adjournment, see ante § 115.
Objections to return or record and waiver thereof, see ante § 202.
Necessity of saving questions in justice's court, see ante § 206.
Sufficiency of assignments to raise objections, see ante § 207.
Amendments introducing new issues on appeal, see ante § 219.
Scope of hearing and review, see also post § 231.
Saving questions for review in courts of record, see Saving Questions.

¶ 974. Where one only of two defendants appealed from a judgment rendered against them by default, and afterwards both pleaded to the merits and went to trial in the appellate court, it was held that the objection that the appeal was taken by one only, if otherwise valid, was thereby waived.—Shaw v. Moser, 3 Mich. 71; Tower v. Lamb, 6 Mich. 362.

¶ 975. When, on an appeal, one pleads to a declaration purporting to be amended in pursuance of his own stipulation, he estops himself from afterward insisting that it was not an amendment in the appeal case, but the institution of a new suit.—Evers v. Sager, 28 Mich. 47.

¶ 976. The issue made before a justice cannot be substantially changed in the circuit court on appeal.—Hatzenbuhler v. Lewis, 51 Mich. 585.

¶ 977. Plaintiff in an action on the common counts is confined, on appeal from justice's court, to the particulars of his claim as stated in the justice's return.—Button v. Russell, 55 Mich. 478.

¶ 978. On appeal from a justice in an action of replevin the general issue will allow defendant to show that he defends in official character as special administrator (How. St., § 8339).—Singer Mfg. Co. v. Benjamin, 55 Mich. 330.

¶ 979. Where a cause has been tried in justice's court on an issue of fact, and an appeal is taken on an affidavit which is general, and relates only to the judgment on the merits, such appeal brings up only this issue of fact for trial; and the appellate court can take no notice of errors in the process, or erroneous decisions of the justice, in proceedings preliminary to such issue. If the appellant desire the circuit court to review the decisions of the justice on his

objections to process, pleadings or proceedings anterior to the trial, he must set forth such objections specifically in his affidavit for appeal.—Chappee v. Thomas, 5 Mich. 53.

¶ 980. An oral declaration in a justice's court on all matters provable under the common counts in assumpsit, and especially for loss and damage sustained by reason of damaged and unwholesome meats and provisions heretofore sold by the defendant to the plaintiff, amplified by a bill of particulars showing the amount and kinds of such meats, is sufficient to admit evidence in the circuit court in support of such special claim for damages.—Copas v. Anglo-American Provision Co., 73 Mich. 541.

¶ 981. Plaintiff brought assumpsit in justice's court upon a written lease, but did not file with the justice the instrument sued upon. Defendant pleaded the general issue, with notice of set-off, recoupment, and failure of consideration, and, upon his appeal from an adverse judgment, added a notice that he would insist upon the further defense that his signature to the lease, if it was in fact signed by him, was obtained without consideration. Plaintiff upon the trial offered proof of the execution of the lease, and introduced it in evidence. Held, that evidence that defendant was induced to sign by fraudulent representations as to the character of the paper was competent under the pleadings.—Bly v. Brady, 113 Mich. 176.

¶ 982. Pleading to the merits upon appeal from justice court in replevin, waived a defect in the writ consisting of its use of initials instead of the full Christian names of plaintiffs.—Stever v. Brown, 119 Mich. 196.

¶ 983. Where, in an action by a physician to recover for services, begun in a justice's court, a notice of special defense is given of recoupment for the negligent manner in which plaintiff performed his services, such notice, and testimony thereunder, places in issue the negligence of plaintiff, and defendant is entitled to have instructions given applying the evidence of negligence to the right of plaintiff to recover.—Vandenberg v. Slagh, 150 Mich. 225. (Grant and Hooker, JJ., dissenting, upon the ground that there was no evidence from which the damages might be computed with certainty.)

¶ 984. The defense of illegality of contract and want of consideration cannot be proved under a plea of the general issue in a case in the circuit court appealed from the justice court under the Judicature Act, Pub. Acts 1915, No. 78, § 17, providing that on filing the return of the justice the circuit court shall become possessed of the cause the same as if it had been originally commenced in the appellate court, and C. C. Rule 23, § 2, providing that any affirmative defense such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, illegality, that an instrument is either void or voidable, want of consideration and any defense which by other affirmative matter seeks to avoid the legal effect or defeat plaintiff's action as stated in the declaration, and any ground which, if not raised by the pleadings, would be likely to take the other party by surprise, must be set forth in notice added to defendant's plea.—Dattner v. Weisz, 198 Mich. 367.

§ 229. ——Waiver of special appeal by plea or trial to merits.

Propriety and scope of special appeal, see ante § 188.

¶ 985. Objections to the jurisdiction of a justice's court on the ground of defective service of process, were waived by filing a plea of the general issue in the circuit court, after the overruling of the special appeal.—Township of Ovid v. Haire, 133 Mich. 353.

¶ 986. By going to trial on the merits of a general appeal in the circuit, appellant waives any question brought up on special appeal assigning error in the failure of the justice to state seasonably on his docket the time and place of an adjournment, he having noted a request for adjournment without any ruling thereon and afterwards on the day requested having entered adjournment to a later day on which appellant was defaulted for nonappearance, and the circuit judge having ordered the special appeal dismissed and the case to stand for trial on the general appeal.—McCall v. Van Dusen, 141 Mich. 42.

¶ 987. A defendant in a justice's court who had taken a special appeal did not waive his right to ask for further amended returns by the justice because, before asking therefor, he had appeared generally in the circuit court.—Marr v. Cook, 147 Mich. 425.

§ 230. ——Disregard of formal defects or nonprejudicial errors.

Justices' proceedings viewed with liberality, see ante § 31.

Striking written disclosures in garnishment and compelling oral examination, see ante ¶ 301.

Irregularities in docket entries as to continuances and adjournments, see also ante § 143.

Error in allowing excessive costs, see ante § 163.

Consideration on certiorari of technical errors in proceedings before justice, see post § 273.

¶ 988. The court will overlook matters of form in proceedings before justices, and regard them according to the merits.—People v. Foote, 1 D. 102.

¶ 989. The judicial proceedings of justices should always be reviewed with some de-

gree of liberality, and their judgments should never be set aside, or reversed, for defects in mere matters of form, where it sufficiently appears that the proceedings are substantially correct.—Howard v. People, 3 Mich. 207.

§ 231. Hearing and scope of review.

See also post § 251.
Appellate jurisdiction and powers, see ante § 189.
Issues to be considered, see also ante § 228.
Hearing and scope of review on certiorari, see post § 262.
Mandamus to compel court to hear and determine the appeal, see Mandamus.
Right to review and mode of review of forcible entry and summary proceedings, see Forcible Entry § 49.

¶ 990. Plaintiff in an action on the common counts is confined, on appeal from justice's court, to the particulars of his claim as stated in the justice's return.—Button v. Russell, 55 Mich. 478.

¶ 990a. On appeal from a judgment on the merits in an attachment case it is error for the circuit court to reverse on questions raised before the justice by a motion to quash the writ without trying the merits.—Manhard v. Schott, 37 Mich. 234.

¶ 991. An appeal of one of two joint defendants in an action of assumpsit from a justice's court to the circuit court brings up the entire case for review; not merely the questions affecting the appellant's liability.—Strohschein v. Kranich, 157 Mich. 335.

¶ 992. A motion to quash a writ of attachment was overruled by a justice, and defendants went to trial on the merits and suffered judgment. On appeal the circuit court reversed this judgment for matters that fell within the motion to quash, and without trying the case on the merits. Held error; the court should have tried the case on the issue of fact.—Manhard v. Schott, 37 Mich. 234.

¶ 993. An appeal to the circuit court from proceedings before a justice under the fraudulent debtor act brings up the whole proceeding for review under How. St. § 8760.—Clark v. Mikesell, 81 Mich. 45.

§ 232. ——Matters available on special appeal.

Propriety and scope of special appeal, see ante § 188.
Objections available on special appeal, see also post § 239.
Sufficiency of assignments to raise objections, see ante § 207.

¶ 994. On a special appeal questions of the admissibility of evidence are not subject to review.—Albert v. Sutton, 28 Mich. 2.

¶ 995. Questions of evidence cannot be made a ground of special appeal for reversing a justice's judgment without a trial at the circuit.—Manhard v. Schott, 37 Mich. 234.

¶ 996. Special appeal cannot be made to cover rulings during a trial, or concerning the summoning or swearing of witnesses.—McGraw v. Sturgeon, 29 Mich. 426.

¶ 997. A justice's action in refusing to summon a second jury—the first having disagreed—and in proceeding ex parte to hear and determine the case without one, because the party demanding such second jury refused to pay the fees therefor, cannot be reviewed on special appeal.—McGraw v. Sturgeon, 29 Mich. 426.

¶ 998. Special appeal does not lie to review errors that do not involve some decision, express or implied, in the exercise of jurisdiction. Comp. L. 1871, § 5432, How. St. § 6999.—Maxwell v. Deens, 46 Mich. 35.

¶ 999. Irregular action of the justice not going to his jurisdiction cannot be reviewed on special appeal.—Webster v. Williams, 69 Mich. 135.

¶ 1000. The justice's action allowing an amended declaration to be filed after submission of the cause so as to set out an assignment to plaintiff of the debt sued on cannot be reviewed on special appeal.—Webster v. Williams, 69 Mich. 135.

¶ 1001. On special appeal the appellant is not confined to the objections made before the justice; it is sufficient if his objections are set forth in the affidavit for appeal. If the objection is one which goes to the jurisdiction the party is not obliged to appear before the justice to make it, but may bring it before the circuit court either by special appeal or by certiorari.—Wright v. Russell, 19 Mich. 346.

¶ 1002. A special appeal brings up only questions of law relating to the jurisdiction to proceed before the justice which have been passed upon by him when properly brought to his attention; and, if the objections have in any manner been waived, the circuit court cannot entertain them.—Peterson v. Fowler, 76 Mich. 258.

¶ 1003. Comp. L. 1897, § 903, permitting the appellant from judgments in justice's courts to raise by special appeal any objection to the process, pleading, or proceedings, and to the "decision of the justice thereon," which would not be allowed to be made on the trial of the appeal, limits the questions to be reviewed to those actually decided by the justice or reasonably involved in his action.—Courtis v. Garrison, 148 Mich. 226.

§ 233. ——Intendments and presumptions on record and return.

Presumptions as to return of service of attachment, see also ante § 60.
As to competency of person selected to serve summons, see ante ¶ 149.
Presumption that execution issued at request of plaintiff, see ante ¶ 727.
Contents and sufficiency of return or record, see ante § 201.

¶ 1004. An alias summons issued in an action in justice's court cannot be treated as the commencement of another action where the record, though stating the time it is returnable, fails to state when it was issued as required by statute, and a transcript judgment based thereon would be void and the defect appearing on the face of the record is available upon appeal.—Purdy v. Law, 132 Mich. 622.

¶ 1005. Upon appeal to the supreme court a presumption arises from the issuance of a long summons that defendant is a resident of the county in which the justice resides (How. St. § 6830).—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344.

¶ 1006. When the affidavit for special appeal states the time of making a motion the denial of which is complained of, and the return shows the motion, but does not specify the time when it was made, the motion will be presumed to have been made at the time stated in the affidavit.—Brown v. Kelley, 20 Mich. 27.

¶ 1007. Where a justice's return on appeal states that the cause was tried by him without a jury on the 12th, and that he rendered judgment on the 17th, it will not be presumed in support of the judgment, in the absence of any showing that such is the fact, that the cause was not finally submitted to him until the 13th.—Harrison v. Sager, 27 Mich. 476.

¶ 1008. Where, on special appeal, a justice's return shows that he had adjourned the case, but does not show that he had done so without proper application and evidence, it is presumed that the adjournment was proper.—Deitz v. Groesbeck, 32 Mich. 303.

¶ 1009. Where a justice's judgment in replevin for the defendant awarded value of goods "solely because no demand had been made upon him for it," it implied that plaintiff would have been entitled if demand had been made; and accordingly any presumption that the judgment was based on a sound ground was excluded.—Farrah v. Bursley, 100 Mich. 547.

¶ 1010. Where both parties appear in a justice's court, and the docket shows the nature of the action to be such that it could be maintained by introducing a written instrument, and then recites that the proofs and allegations of parties were heard, it will be presumed that those proofs were sufficient to justify the judgment rendered in favor of the plaintiff.—Stegeman v. Fraser, 161 Mich. 35.

¶ 1011. Where a justice's return to an appeal to the circuit court fails to show whether the pleadings before him were written or oral, it will be presumed that they were oral, since the statute (How. St. § 7008) requires him to give copies of the pleadings, if in writing.—Kerr v. Bennett, 109 Mich. 546.

§ 234. ——Verity, conclusiveness and effect of return.

Conflict between return and docket entries, see also ante ¶ 649.
Amendment or completion of return, see ante § 203.
Hearing confined to claim as stated in the return, see also ante ¶ 990.

¶ 1012. On special appeal upon all questions properly raised the justice's return must be taken as true.—Kidd v. Dougherty, 59 Mich. 240.

¶ 1013. Where a justice in his return to a special appeal states a ruling made by him without giving the ground on which it was made, it is error for the circuit court to assume that the ruling was made upon any particular and erroneous ground when another and admissible ground is equally consistent with the return.—Albert v. Sutton, 28 Mich. 2.

¶ 1014. Where a justice's return states that "plaintiff declared on * * * one accepted draft (reciting it) on file in this court," etc., it is construed merely as an allegation of the declaration, without any return as to the truth or falsehood of it, and as being no such proof that the note has been filed with the justice as will dispense with the proof of its execution.—Colbath v. Jones, 28 Mich. 280.

¶ 1015. Special assignments of error on a justice's judgment generally stand disproved if the return to the appeal shows a judgment apparently correct.—Lymburner v. Jenkinson, 50 Mich. 488.

¶ 1016. That a plaintiff in justice's court has a Christian name other than the initials by which he sues is not established, on special appeal, by the return of the justice that he has a certain name corresponding to those initials by which he sued, where there is nothing in the proceedings themselves from which the fact could be judicially ascertained to sustain his special return.—Hinkle v. Collins, 113 Mich. 105.

§ 235. ——Evidence in aid of jurisdictional showing.

Nature and construction of justice's jurisdiction and proceedings, see ante § 10.
Facts coming to justice's knowledge after trial, as part of return, see ante ¶ 844.

¶ 1017. On appeal from a justice to impeach the jurisdiction of the justice founded on an attachment against defendant as a nonresident, where a nonresident defendant claims that certain goods shipped by such defendant into this state were ordered by plaintiff for the sole purpose of attaching them and thus obtaining jurisdiction over defendant, evidence that plaintiff, after his cause of action arose, had an opportunity of attaching other goods of defendant shipped to the same point and of more value than those which were attached, is competent as having a tendency in rebuttal.—Copas v. Anglo-American Provision Co., 73 Mich. 541.

¶ 1018. Where in an action appealed to the circuit court upon a justice's judgment it appeared that the justice's summons was not served by an officer, the justice could not be permitted to testify orally that the service was by a competent person as required by How. St. § 6827, or to indorse the summons, or to amend the docket entry of judgment accordingly.—King v. Bates, 80 Mich. 367.

¶ 1019. Where the defendant in a cause appealed by him from justice's court appears in the circuit, and objects to the court's taking jurisdiction because no declaration is returned, plaintiff may be permitted to show by the affidavit of the justice, without formal motion, that the original declaration has been lost, and that a declaration attached to the affidavit is, to the best of affiant's knowledge and belief, the same as that filed in justice's court.—Carver v. Smith, 113 Mich. 207.

§ 236. ——Evidence on merits.

Evidence below, see ante §§ 126, 127.
Presumption that justice had sufficient evidence where appeal is from circuit, see Appeal ¶ 1580.
Admissibility on appeal of testimony of witness before justice where witness has since died, see Evidence § 338.
Discretion to control cross-examination on appeal as to matters occurring before justice, see Examination of Witnesses § 38, ¶ 192.

¶ 1020. It is improper to show to a jury trying an appeal case by the testimony of the justice how the trial was conducted in the justice court, especially where his testimony does not tend to prove or disprove any issue on trial.—Salmer v. Hicks, 188 Mich. 391.

¶ 1021. A jury trying an appeal case should not consider or be influenced by the previous trial and its result in the court from which the appeal was taken.—Salmer v. Hicks, 188 Mich. 391.

¶ 1022. The affidavit for a special appeal from a justice's court is to bring the case into the circuit court and indicate the questions for consideration there, and it is not evidence for any other purpose than to secure a return.—Lymburner v. Jenkinson, 50 Mich. 488.

¶ 1023. On the trial of an appeal from justice's court it is not error to refuse to permit the return on appeal to be introduced in evidence; for the judgment below is not evidence of what plaintiff claims.—Ockenfels v. Moeller, 79 Mich. 314.

¶ 1024. An oral admission made in a justice's court after issue joined, and without mistake or misapprehension, is conclusive against the party making it for the purposes of that particular trial, but it does not preclude an appeal, on the trial of which it would be the subject of evidence like an oral confession anywhere else.—Morrison v. Riker, 26 Mich. 385.

¶ 1025. The disclosure in garnishment taken before the justice and reduced to writing is competent evidence on the appeal. Further evidence may be taken in the circuit court in corroboration of the garnishee's statement before the justice, but no contradictory evidence is allowed. The garnishee may be examined on appeal for a fuller disclosure, and may there make corrections in his statements before the justice.—Newell v. Blair, 7 Mich. 10.

¶ 1026. Where the garnishee, on his examination before the justice, admitted that he had in his hands moneys collected for defendant, but stated that he had been informed that these moneys had been assigned before service of the garnishee process, he was entitled, on appeal, to introduce evidence to prove the assignment.—Newell v. Blair, 7 Mich. 10.

¶ 1027. A garnishee's disclosure filed in justice's court, or the justice's written minutes of his disclosure (How. St. § 8036), cannot be contradicted upon appeal by the oral testimony of the justice or of any one else as to what he disclosed; nor can it be so supplemented as to increase the liability admitted thereby.—Isabelle v. Iron Cliffs Co., 57 Mich. 120.

§ 237. Instructions.

See also ante ¶ 983.
General law as to instructions, see Instructions.
Instruction as to right to nominal damages where costs depend thereon, see Damages §§ 415, 417.

¶ 1028. In a suit for work and labor where one defendant admitted liability, and the suit was based upon a joint liability, the court erred in not instructing that if the jury found no joint liability they must render a verdict for defendants; 1897 C. C. Rule 27 (c), to prevent abatement for misjoinder has no application to cases originating in justices' courts.—Wright v. Reinelt, 118 Mich. 638.

§ 238. Decision and judgment.

Reversal of judgment on note where presentment and notice of nonpayment not alleged, see ante ¶ 377.
Excessive costs as ground for reversal, see ante § 163.
Failure to file security for costs as ground for reversal, see ante § 164.
Validity of judgment where return on appeal insufficient, see also ante § 201.
Dismissal or nonsuit on appeal, see ante § 222 et seq.
Inclusion of costs in judgment, see post § 243.
In forcible entry, see Forcible Entry §§ 56, 57.
Appeal from judgment, see Appeal.
Regarding amendments as made on review of circuit judgment in supreme court, see Appeal § 369.
Record proper [judgment roll] on appeal from circuit, see Appeal § 100.
Certiorari to review action of the circuit, see Certiorari § 13.

¶ 1029. Where a case has been tried before a justice and judgment rendered for defendant for the excess of his set-off above plaintiff's demand, and plaintiff, having appealed, fails to appear and bring the cause to trial in the circuit court, defendant cannot have the cause tried in the circuit, and can take in the circuit a judgment only of nonsuit or of discontinuance; he cannot have a judgment for his set-off.—People ex rel. Stange v. Wayne Circuit Judge, 22 Mich. 408.

¶ 1030. An appeal from a justice was dismissed for being taken too late. A special appeal was then allowed on a showing that the judgment had been fraudulently antedated, and as it appeared on this appeal that the judgment itself was void for being entered more than four days after the hearing, a perpetual stay of proceedings was granted; approved.—Hall v. Howard, 39 Mich. 219.

¶ 1031. An appeal by the defendant in a justice's court from a judgment in an action which the justice had no right to entertain does not give the circuit court jurisdiction to render judgment for the plaintiff. —Sheldon v. Sullivan, 45 Mich. 324.

¶ 1032. On appeal from a justice's judgment rendered under Comp. L. 1871, § 5822, How. St. § 6887 (where balance of set-off exceeds $300), the circuit court can render no other or different form of judgment than the justice could have done; nor can the supreme court.—Cross v. Eaton, 48 Mich. 184.

¶ 1033. On appeal from a judgment rendered where balance of set-off exceeds $300, Comp. L. 1871, § 5322 (How. St., § 6887), judgment must be such as the justice could have given.—Cross v. Eaton, 48 Mich. 184.

¶ 1034. Reversal of a justice's judgment for reasons appearing in the affidavit for appeal is not substantially different from reversal for errors in the action of the justice, since the errors must be averred in the affidavit.—Sager v. Shutts, 53 Mich. 116.

¶ 1035. Although the circuit court is limited to the justice's jurisdiction so far as the amount of the original claim is concerned, interest from the date of the judgment below is recoverable, and this without amending the ad damnum clause.—Stanley v. Anderson, 107 Mich. 384.

§ 239. ——Upon special appeal.

Propriety and scope of special appeal, see ante § 188.

¶ 1036. Where the record shows jurisdiction in the justice, the court properly overrules a special appeal.—Rock Island Plow Co. v. Smith, 162 Mich. 180.

¶ 1037. The fact that plaintiff's attorney did not prove his authority is ground for reversing a justice's judgment for plaintiff, if neither party appeared, and the objection may be taken by special appeal.—Woodbridge v. Robinson, 49 Mich. 228.

§ 240. ——On appeal in replevin.

Judgment below in replevin, see ante § 83.
Imprisonment of judgment defendant, see also ante ¶ 359.

¶ 1038. Where a replevin suit appealed from a justice's court is regularly reached on the trial call in the circuit court, and plaintiff does not appear, the statutes, Comp. L. 1897, §§ 10675, 10680, and Act No. 246, Pub. Acts 1899, are not unconstitutional as depriving plaintiff's surety of his property without due process of law by reason of the fact that they permit defendant to recover judgment against the surety for his special lien and interest in the property.—Anderson v. Henderson, 167 Mich. 425.

¶ 1039. Where a replevin suit is appealed from a justice's court, and is regularly noticed for trial and placed on the calendar of the circuit court, and plaintiff does not appear upon the call of said case, the defendant may take judgment against the plaintiff's surety for his special lien and interest in the property without giving a four-

teen-day notice to plaintiff of assessment of damages, section 10681, Comp. L. 1897, notwithstanding.—Anderson v. Henderson, 167 Mich. 425.

¶ 1040. Where a replevin suit appealed from a justice court has been regularly noticed for trial in the circuit court, and placed on the calendar, and plaintiff fails to appear when said case is called, the defendant can take judgment against the surety for his special lien and interest in said property under Comp. L. 1897, §§ 10675, 10680, and Act 246, Pub. Acts 1899.—Anderson v. Henderson, 167 Mich. 425.

¶ 1041. A surety signed plaintiff's bond in a replevin suit. A writ was issued and returned without service. Thereafter a new affidavit was made and a new writ issued, the old bond being amended by inserting new dates therein. Plaintiff had judgment in the justice's court. Upon appeal by defendant to the circuit court plaintiff did not appear, and judgment was given for defendant for his special lien and interest in the property involved. The trial court was unable to find whether the surety consented to the use of the old bond in the new suit, but did find from the affidavits that the surety knew before the cause was determined in the justice's court and after judgment was rendered there, that the cause was proceeding in reliance upon the bond filed. Held, the surety was estopped to assert his nonliability on the bond.—Anderson v. Henderson, 167 Mich. 425.

¶ 1042. Jurisdiction of appeal in replevin holds, though evidence on appeal shows value above $100, where affidavit for the writ stated value below that sum.—Dinnen v. Baxter, 18 Mich. 457.

¶ 1042a. A defendant in replevin in justice court who obtained judgment for a return of the property and for damages for its detention, had the right upon appeal by plaintiff to the circuit court, to waive a return of the property and obtain a judgment for its value.—McCabe v. Loonsfoot, 119 Mich. 323.

§ 241. ——Judgment against sureties on appeal bond for costs.

Liability and actions on appeal bonds, see post V, D.
Liability on certiorari bonds, see post § 278.
Costs upon appeal, see post § 243 et seq.
Including surety in judgment for costs on certiorari, see post § 272.

¶ 1043. A surety for costs in justice's court may be included in the judgment rendered on appeal against his principal (Comp. L. 1871, § 6133, How. St. § 7663).—Boatz v. Berg, 51 Mich. 8.

§ 242. ——Conclusiveness and effect.

Reviewableness of decision of circuit court rendered on appeal or certiorari, see Appeal § 25.
Finality of circuit judgment on appeal or certiorari for purpose of writ of error, see Appeal § 33.

¶ 1044. In trover against two defendants in justice court, a judgment on directed verdict on appeal against one of the defendants did not discharge the other, as in trover judgment may pass against one or more defendants.—Cunningham v. O'Connor, 136 Mich. 293.

§ 243. Costs on appeal and inclusion in judgment.

Costs below, see ante § 159 et seq.
Replevin bond as covering costs recovered on appeal, see ante § 85.
Power of circuit court to require security for costs, see Jud. Act, chap. LXXVIII, § 17; Comp. L. 1915, § 14417.

¶ 1045. Costs of appeal are to be determined in view of the facts appearing on the trial, and none but the judge who tried the appeal can award them.—Steinhauser v. Wayne Circuit Judge, 42 Mich. 463.

¶ 1046. It seems to be error to render distinct judgments for damages and costs on the merits, and for costs on special appeal.—Lymburner v. Jenkinson, 50 Mich. 488.

¶ 1047. On appeal from taxation of costs in justice court, it was not the duty of the clerk to disregard the judgment as to costs, but it was his duty to tax them in accordance with such judgment.—Schmidt v. Wayne Circuit Judge, 136 Mich. 658.

§ 244. ——Parties entitled or liable.

Judgment against surety for costs, see ante § 241.
Liability in circuit for costs dependent on title to land having been involved, see Costs § 16.

¶ 1048. The provisions of Laws 1867, Act No. 58, in regard to costs in appealed cases, to the "prevailing party," do not change the law as to who may have costs.—Dewey v. Johnson, 16 Mich. 490.

¶ 1049. Under the statute costs in appeal cases from justices are not necessarily given to defendant where plaintiff recovers nominal damages.—Wyatt v. Herring, 90 Mich. 581.

¶ 1050. In case of appeal the security for costs in a justice's court is liable for the costs in the appellate court.—Dunn v. Sutliff, 1 Mich. 24.

¶ 1051. On reversal in circuit of justice's judgment against a garnishee the latter has costs.—Lorman v. Phoenix Ins. Co., 33 Mich. 65.

¶ 1052. Where the assignee of the principal debtor, having been called upon to maintain his right to money alleged to be due from the garnishees to the principal defendant, successfully appeals from an adverse decision by the justice, costs cannot be taxed against him in the circuit court.—Winne v. Lenawee Circuit Judge, 74 Mich. 329.

§ 245. ——Discretion of judge.

¶ 1053. The question of costs on appeal from justices' courts is largely within the discretion of the circuit court.—Peterson v. Fowler, 76 Mich. 258; Wyatt v. Herring, 90 Mich. 581.

¶ 1054. Costs on appeals from justices' courts are awarded in the discretion of the circuit court under the statutes, and such discretion is not reviewable.—Mitchell v. Shuert, 16 Mich. 444; Hewitt v. Ingham Circuit Judge, 44 Mich. 153; Pettibone v. Maclem, 45 Mich. 381; Smith v. Hubbard, 46 Mich. 306.

¶ 1055. Comp. L. 1871, § 5479 (How. St. § 7045), permitting a judge to give or withhold costs in his discretion on the partial reversal of a judgment, does not apply where the full amount due had been tendered before suit.—Wilcox v. Lafiin & Rand Powder Co., 44 Mich. 35.

¶ 1056. Costs on special appeal from a justice's judgment are discretionary, though the judgment is set aside for jurisdictional errors averred in the affidavit.—Sager v. Shutts, 53 Mich. 116.

¶ 1057. The costs which are in the discretion of the court under How. St. § 7026, which gives it power in appeal cases to award the costs, in whole or in part, to either party, as it may deem just, have reference to the costs allowed the prevailing party by How. St. § 9004.—Galbraith v. McCollum, 98 Mich. 219.

¶ 1058. Under Comp. L. 1897, § 930, the circuit court has discretion in awarding costs on a trial held before him in a case which had originated in the justice's court but which had been reversed by the supreme court.—Fowles v. Rupert, 143 Mich. 246.

¶ 1059. The award of costs in cases originating in justices' courts being discretionary, costs were not allowed either party upon the affirmance, in favor of a mutual benefit insurance company, of a judgment in a case originally begun against it before a justice, where the company's conduct in relation to showing its by-laws had not been just.—Russell v. North American Ben. Ass'n, 116 Mich. 699.

§ 246. ——Amount and items.

Scope of motion to retax costs allowed on appeal from justice, see Costs § 76.

¶ 1060. The costs that may be awarded on appeal are not governed by Comp. L. 1871, § 7388, limiting, in certain cases, recovery of costs to the damages; but by section 5459.—Evers v. Sager, 28 Mich. 47.

¶ 1061. On an appeal in an action for assault and battery, where plaintiff recovers less than $50, the court may award him full costs.—Evers v. Sager, 28 Mich. 47.

¶ 1062. The allowance of taxable costs, including an attorney fee of $20 on the reduction of a judgment in favor of a plaintiff in replevin from $70 to $48, will not warrant interference by the supreme court.—Peterson v. Fowler, 76 Mich. 258.

¶ 1063. The court has power under How. St. § 7026, to include, as a part of the costs which it is authorized to award to either of the parties to a case appealed from justice's court, the attorney's fee of $10 allowed the prevailing party by How. St. § 9004, for proceedings before notice of trial.—Galbraith v. McCollum, 98 Mich. 219.

§ 247. ——Costs upon dismissal or discontinuance.

See also ante ¶¶ 968, 969.

Dismissal, discontinuance or abandonment of appeal, see ante § 222 et seq.

Right to costs on discontinuance in circuit after appeal taken, see also Costs ¶ 75.

¶ 1064. On granting mandamus to compel dismissal of an appeal from a justice who had no jurisdiction, the circuit court was directed to dismiss without costs to defendant, who did not raise a jurisdictional question until after appeal to the circuit court. Bostwick v. Wayne Circuit Judge, 115 Mich. 363.

¶ 1065. Under How. St. § 7021, providing that upon dismissal or discontinuance of an appeal from justice's court, judgment shall be entered in appellee's favor for costs, an order permitting appellant to discontinue upon payment of part only of the costs is unauthorized; it not appearing that appellee consented to it; but the proper procedure is to move to set it aside, and not in the first instance to move for the full costs allowable by statute.—Swegles v. Wayne Circuit Judge, 110 Mich. 631.

D. LIABILITIES ON APPEAL BONDS.

§ 248. In general.

Liability and actions on attachment bonds, see ante § 67.

Judgment against sureties on appeal bonds, see ante § 241.

Liability on certiorari bonds, see post § 278.

Liability on appeal bonds generally, see Appeal, XVI.

¶ 1066. The surety on an appeal bond is not liable beyond the bond's penalty.—Zeigler v. Henry, 77 Mich. 480.

¶ 1067. A judgment against a surety in a bond given on an appeal from justice's court cannot exceed the penalty of the bond.—Vreeland v. Loeckner, 99 Mich. 98.

¶ 1068. The liability of a surety in a bond on appeal from justice's court cannot be extended by a circuit judge by a stay of execution made for that express purpose and upon his own motion.—Gilderaleeve v. Kent Circuit Judge, 97 Mich. 606.

¶ 1069. Unreasonable delay on the appellee's part to the surety's prejudice would protect the latter from an action on a bond on appeal.—Weiss v. Wayne Circuit Judge, 50 Mich. 158.

¶ 1070. Sureties in an appeal bond are not bound by their principal's consent to an amendment increasing the ad damnum clause in the declaration, and are discharged by such a radical change made in the case without their consent.—Evers v. Sager, 28 Mich. 47.

¶ 1071. The surety on the appeal bond is not released by a discontinuance which the circuit court may allow; it is contemplated by the bond.—Taylor v. Dansby, 42 Mich. 82.

¶ 1072. A levy on real estate in case of a return of nulla bona upon an execution from justice's court is not prerequisite to a suit upon the appeal bond.—Nowlin v. Tibbits, 44 Mich. 77.

¶ 1073. A justice's neglect to make return within ten days after an appeal is perfected does not preclude a remedy on the appeal bond; the default in prosecuting the appeal is that of the appellant and not of the appellee.—Nowlin v. Tibbits, 44 Mich. 77.

¶ 1074. A surety in a joint appeal bond is released by a judgment rendered on the appeal against one only of the joint defendants, unless the other was an infant, or otherwise incapable, so that his undertaking was regarded as a mere nullity.—Post v. Shafer, 63 Mich. 85.

¶ 1075. A justice's judgment against a husband and wife on a joint note was appealed by them jointly, and on the appeal judgment was rendered in the wife's favor for costs, and against the husband alone for damages. The record did not show that the obligation sued on was one the wife could not make. Held, that an action on the appeal bond against the husband and a surety could not be maintained.—Post v. Shafer, 63 Mich. 85.

¶ 1076. On appeal from a justice's judgment, the penalty of the appeal bond was for the same amount as the judgment. On motion of the appellee, an order was made in the circuit court that the appeal be dismissed unless a new and sufficient bond be filed within ten days. The order was not complied with, and the appeal was dismissed. After an execution, issued on the justice's judgment, had been returned unsatisfied, the appellee brought suit on the appeal bond. Held, that the appellee, in moving to dismiss the appeal in default of a new and sufficient bond, did not release his rights under the original bond until the order of the court for the filing of such new bond had been complied with, and that he was not estopped from bringing suit on the original bond.—Hascall v. Brooks, 105 Mich. 383.

§ 249. Enforcement of bond and procedure thereon.

Entry of judgment on appeal bond as part of the judgment, due process of law, see Constitutional Law § 145.

Time to prosecute bond or recognizance after appeal dismissed or discontinued, see Jud. Act, chap. LXXVIII, § 21; Comp. L. 1915, § 14421.

¶ 1077. An action of debt lies upon a bond given on appeal from before a justice, where the effect of the appeal is to release an attachment lien or to delay the levy of execution.—Bushey v. Raths, 45 Mich. 181.

¶ 1078. Until taxation of costs an execution does not become "legally issuable" within the meaning of Comp. L. 1871, § 5462 (How. St. § 7029), which forbids a levy on the property of the surety on the appeal bond unless the execution is issued within thirty days from the time when it shall be "legally issuable."—Weiss v. Wayne Circuit Judge, 50 Mich. 158.

¶ 1079. Evidence in an action in the circuit court upon a purported undertaking given to the plaintiff in an action in the justice court in which he was defendant, held sufficient to sustain the finding of the trial court that the judgment of the justice had been reversed by the circuit court upon the sole ground that no legal undertaking or security for costs had been furnished.—Patek v. Ryskewiecz, 189 Mich. 344.

VI. CERTIORARI IN CIVIL CASES.

§ 250. In general; nature and grounds.

Effect upon attachment lien of suing out certiorari, see ante § 65.

Review on certiorari to circuit court as collateral attack of justice's judgment, see ante ¶ 655.

As distinguished from writ of error, see also post ¶ 1161.

Judgments reviewable by certiorari, see post § 252.

Scope of review on certiorari, see post § 262 et seq.

Disregard of technical and harmless errors, see post § 273.

General law as to certiorari, see Certiorari.

Certiorari to review circuit court proceedings on appeal or certiorari from justice's court, see Certiorari.
Direct writ from supreme court, see Certiorari § 24.
Power of commissioners to allow certiorari to issue, see Courts § 86.
Provisions as to certiorari to justices' courts, see Jud. Act, chap. LXXVIII, §§ 22-41; Comp. L. 1915, §§ 14422-14441.

¶ 1080. Certiorari is the proper proceeding to get rid of a void judgment by a justice.—Harbour v. Eldred, 107 Mich. 95.

¶ 1081. One who resorts to certiorari for the review of a justice's judgment, does so at the risk of losing a trial on the merits if he fails to establish error.—Stoll v. Padley, 98 Mich. 13.

¶ 1082. Certiorari is not the appropriate remedy to review a judgment rendered by the justice's court in a case where the judgment was void for want of jurisdiction because process had been served on the wrong person, since the return would not disclose the true facts.—Wilcke v. Duross, 144 Mich. 243.

¶ 1083. Certiorari is the proper and direct way to raise the question of the right of a justice of the peace to hear and give judgment on a cause adjourned to a certain time without waiting one hour for the defendant to appear.—Hoban v. Citizens' Tel. Co., 176 Mich. 596.

§ 251. Appeal or certiorari as appropriate remedy.

Appeals from justices' courts, see ante V.

¶ 1084. Appeal, not certiorari, is the appropriate remedy for reviewing cases that stand upon facts, or where the defects are not substantial.—Ritter v. Daniels, 47 Mich. 617; Erie Preserving Co. v. Witherspoon, 49 Mich. 377; Howell v. Shepard, 48 Mich. 472; Westbrook v. Blood, 50 Mich. 443; Galloway v. Corbitt, 52 Mich. 460; Morrison v. Emsley, 53 Mich. 564; Gray v. Willcox, 56 Mich. 58; Mann v. Tyler, 56 Mich. 564; Garvin v. Gorman, 63 Mich. 221.

¶ 1085. Where a case before a justice is to be determined on disputed facts, the party dissatisfied with the judgment should appeal it to the circuit court for trial on the facts, instead of seeking a reversal upon certiorari on technical grounds without investigating the merits. The writ should not issue unless the defects are substantial.—Erie Preserving Co. v. Witherspoon, 49 Mich. 377; Ritter v. Daniels, 47 Mich. 617; Howell v. Shepard, 48 Mich. 472; Westbrook v. Blood, 50 Mich. 443; Galloway v. Corbitt, 52 Mich. 460; Morrison v. Emsley, 53 Mich. 564; Gray v. Willcox, 56 Mich. 58; Mann v. Tyler, 56 Mich. 564; Garvin v. Gorman, 63 Mich. 221.

¶ 1086. Certiorari and not special appeal is the proper method for reviewing mere irregularities in a justice's proceedings.—Deitz v. Groesbeck, 32 Mich. 308.

¶ 1087. If a defendant's case requires a new trial and an amendment of the pleadings, appeal, not certiorari, is the proper remedy.—Ritter v. Daniels, 47 Mich. 617.

¶ 1088. The erroneous admission of a deposition in a trial before a justice is ground for appeal rather than remedy by certiorari.—Howell v. Shepard, 48 Mich. 472.

¶ 1089. An appeal, and not a writ of certiorari, is the proper procedure for reviewing the judgment of a justice in a case in which he has excluded testimony.—Morrison v. Emsley, 53 Mich. 564.

¶ 1090. Appeal rather than certiorari is the appropriate remedy to review errors committed on the trial of the case.—Stoll v. Padley, 98 Mich. 13; Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116; Computing Scale Co. v. Tripp, 138 Mich. 602.

¶ 1091. The ruling of a justice of the peace in allowing a peremptory challenge may be reviewed by certiorari, although the remedy by appeal is ample and better in all cases where jurisdiction of the cause was obtained by the justice.—Eldridge v. Hubbell, 119 Mich. 61.

§ 252. Judgments and proceedings reviewable.

Decisions reviewable by appeal, see ante § 185.
Certiorari in criminal cases, see Indictment §§ 668, 669.

¶ 1092. The statutory writ lies only to review judgments rendered by justices in the exercise of original jurisdiction.—Warner v. Porter, 2 D. 358.

¶ 1093. Certiorari is a proper proceeding for getting rid of a justice's void judgment in garnishment.—Lake Shore & M. S. R. Co. v. Hunt, 39 Mich. 469.

¶ 1094. Garnishment proceedings may be brought up from before a justice on a writ of certiorari sued out by the defendant in the principal case, if the latter's rights are cut off without his having an opportunity for a hearing.—Wilson v. Bartholomew, 45 Mich. 41.

¶ 1095. Under How. St., § 7031, certiorari lies to review a justice's judgment dismissing a writ of replevin for want of a sufficient description of the property, and ordering a return, the description being sufficient in law and the error therefore substantial.—Proper v. Conkling, 67 Mich. 244.

§ 253. ——Effect of pendency of appeal.

Effect of appeal from justice's court generally, see ante § 208.

Jurisdiction to make return to certiorari after appeal perfected, see also ante ¶ 963.

¶ 1096. After a garnishee in justice's court has appealed from a judgment against him, certiorari will not lie at the suit of the principal defendant to review the garnishment proceedings.—Lichtenberg v. Wayne Circuit Judge, 106 Mich. 38.

¶ 1097. Where an appeal is taken from a justice to the circuit court, and the justice has filed his return, the judgment of the justice no longer exists and cannot be reviewed by certiorari.—Swantek v. Jarmoszki, 162 Mich. 617.

§ 254. Propriety of common-law certiorari.

¶ 1098. The common-law writ of certiorari will not lie to review the decision of a justice of the peace on a plea to the jurisdiction where no appeal is taken and no notice of an intention to apply for a writ of certiorari is given within five days after the rendition of the judgment as required by Comp. L. 1897, § 936, though the party had notice of the judgment in season to transfer the case by the statutory method.—Jacobs v. Wayne Circuit Judge, 132 Mich. 55.

§ 255. Procedure for writ.

¶ 1099. The statutory writ of certiorari is special, and the proceedings to obtain a review thereby must be strictly complied with.—Sherwood v. Arnold, 80 Mich. 270.

§ 256. Notice and affidavits and showing and allowance of writ.

Affidavits for appeal, see ante § 196.

Return on certiorari limited to matters specified in affidavit, see post § 259.

Review restricted to matters assigned in affidavit, see post § 264.

Conflict between return and affidavits of error, see post § 269.

Provisions as to notice and affidavits, see Jud. Act, chap. LXXVIII, §§ 23, 24; Comp. L. 1915, §§ 14423, 14424.

Service and filing of affidavit, see Jud. Act, chap. LXXVIII, § 28; Comp. L. 1915, § 14428.

¶ 1100. Certiorari is not a writ of right, and can only issue on satisfying the circuit court commissioner or circuit judge that an error has been committed (Comp. L. 1871, § 5466, How. St. § 7033).—Young v. Kelsey, 46 Mich. 414.

¶ 1101. An affidavit for certiorari made by an attorney of the court, who took charge of the proceedings throughout, is held sufficient, though it failed to state that the affiant made it as agent or attorney of the party on whose behalf it was made.—Scofield v. Cahoon, 31 Mich. 206.

¶ 1102. The party moving for certiorari must make out a clear case.—Marquette & Pacific Rolling Mill Co. v. Morgan, 41 Mich. 296; Ritter v. Daniels, 47 Mich. 617.

¶ 1103. The only question raised by a general assignment that the justice erred in rendering judgment as he did is whether there is any evidence from which the conclusion of the justice may be drawn.—Parsons v. Dickinson, 23 Mich. 56.

¶ 1104. An affidavit complaining only of the insufficiency of evidence to support the verdict, though sufficient for a general appeal, furnishes no proper basis for the writ of certiorari. Such proceedings gave the circuit court no jurisdiction to review the cause upon either facts or law, and therefore no authority to alter the justice's judgment, which should have been affirmed, or the proceedings dismissed with costs.—McGraw v. Schwab, 23 Mich. 13.

¶ 1105. Where neither the affidavit for a writ of certiorari, nor the return of the justice, the latter purporting to give all the evidence in the case, shows that any objection was taken to either evidence or proceedings on the trial, or that any question of law was raised, and the only error complained of in the affidavit is that the testimony demanded a different verdict from that rendered, though in fact it did warrant the jury in finding the verdict which they actually gave, it was held that no question of law was presented by the proceedings for the circuit court to pass upon.—McGraw v. Schwab, 23 Mich. 13.

¶ 1106. Where affidavit recites the evidence introduced, and alleges for error simply "that the justice of the peace erred in rendering judgment in said cause on the evidence introduced therein," the allegation is too indefinite as to the sufficiency of the evidence to raise any question for review.—Lake Superior Building Co. v. Thompson, 32 Mich. 298.

¶ 1107. Before the writ issues the affidavit to procure the allowance thereof, and the allowance of the same indorsed thereon, must be filed with the clerk of the circuit court (Sess. L. 1841, pp. 112, 113, How. St. § 7037); and if the writ is issued before such affidavit and allowance are filed the cause will be dismissed for want of jurisdiction.—People ex rel. Markham v. Cass Circuit Judges, 2 D. 116.

¶ 1108. In an affidavit for a certiorari errors were alleged: 1st. That the justice erred in refusing to dismiss the cause for defective service of process. 2d. That the court erred in rendering judgment in favor of plaintiff against defendant. 3d. That the judgment should have been rendered in favor of defendant. Held, that the second and third allegations of error were not suffi-

ciently specific to raise any question on the merits, and must be understood as referring only to the decision of the justice on the motion to dismiss.—Fowler v. Detroit & M. Ry. Co., 7 Mich. 79.

¶ 1109. Where plaintiff in certiorari relies upon the fact that the township clerk's certificate to the copy of a chattel mortgage offered in evidence was defective, and that for that reason the mortgage was erroneously received, he should set out the form of the certificate in his affidavit and obtain a return thereon.—Rodman v. Clark, 81 Mich. 466.

¶ 1110. Certiorari will not issue to set aside a judgment in justice's court upon which a transcript has been taken to the circuit court, on the ground that defendant's attorney had promised to appeal the case, but had failed to do so, and on the claim that the judgment is void because defendant's wife was permitted to testify, contrary to Comp. L. 1897, § 10213, where the affidavit of merits does not show that the facts constituting his defense were fully and fairly stated to counsel, nor does it appear what testimony was given by the wife.—West v. Parkinson, 130 Mich. 401.

¶ 1111. Where an affidavit indorsed with allowance of certiorari has been filed and the writ issued, it cannot serve as a basis for a second writ.—Sherwood v. Arnold, 80 Mich. 270.

§ 257. Bond or security.

Release of attachment lien by giving bond on certiorari, see ante § 65.
Bond on appeal, see ante § 198.
Bond as part of the return, see post ¶ 1122.
Liability on certiorari bonds, see post § 278.
Provisions as to bond, see Jud. Act, chap. LXVIII, §§ 25-27; Comp. L. 1915, §§ 14425-14427.

¶ 1112. A justice of the peace is justified in refusing to make return to certiorari under How. St., § 7038, where plaintiff fails to serve his bond on the justice within ten days after the issue of the writ as required by How. St., § 7038.—Sherwood v. Arnold, 80 Mich. 270.

§ 258. Form, sufficiency and service of writ.

Amendment of docket after allowance of writ, see ante ¶ 634.
Writ as part of the return, see post ¶ 1122.
Service of writ on Sunday, see Sunday.
Provisions as to service of writ, see Jud. Act, chap. LXXVIII, § 29; Comp. L. 1915, § 14429.

¶ 1113. The fact that a writ of certiorari to a justice of the peace was made in duplicate, one copy being served on the justice and one being filed in the clerk's office, does not make the proceeding invalid.—Monroe v. Reynells, 131 Mich. 259.

¶ 1114. A writ of certiorari that is to be served within ten days is ineffective if ten days pass between the day of its issue and the date of its service (How. St., § 7038).—Morrison v. Emsley, 53 Mich. 564.

§ 259. Return and contents thereof.

Return or record on appeal, see ante § 201.
Bond as prerequisite to return, see ante § 257.
Right to make return to certiorari after appeal perfected, see ante ¶ 963.
Only such errors available as are shown by the return, see post § 264.
Construction and effect of return, see post § 266 et seq.
Return not a bill of exceptions, see post ¶ 1153.
Evidence to contradict, vary or explain return, see post § 267.
Conflict between affidavits of error and return, see post § 269.
Conflict between return and docket, see post § 270.
Provisions as to return, see Jud. Act, chap. LXXVIII, §§ 31, 32; Comp. L. 1915, §§ 14431, 14432.
Fees for making return to certiorari, see Jud. Act, chap. LXXVIII, § 29; Comp. L. 1915, § 14429.

¶ 1115. A justice of the peace, in answer to a writ of certiorari, is required to make return only to the matters specified in the affidavit.—Lake Superior Building Co. v. Thompson, 32 Mich. 293.

¶ 1116. The return to a certiorari to a justice may properly show whether security for costs was filed in actions by nonresidents.—McClean v. Isbell, 44 Mich. 129.

¶ 1117. A justice's return that "the foregoing contains about all the testimony" will not justify a review of the evidence by the supreme court to see whether it sustained the judgment.—Rawson v. McElvaine, 49 Mich. 194.

¶ 1118. Plaintiff in certiorari cannot prevail upon a doubtful record.—Beam v. Reynolds, 144 Mich. 383.

¶ 1119. The absence of the summons and return from the court room on the return day does not cause a justice of the peace to lose jurisdiction, where the return to certiorari shows that both were in his possession.—Beam v. Reynolds, 144 Mich. 383.

§ 260. ——Further or amended return.

Affidavit upon which writ issued as basis for second writ, see ante ¶ 1111.
Review of ruling on motion for further return to certiorari, see Appeal § 402.
Power to require further return when case has gone up on error from circuit, see Certiorari ¶ 122.

¶ 1120. If a justice's return to a writ of certiorari is defective, the party moving for

it should call the justice's attention to it by an order for further return.—Marquette & P. Rolling Mill Co. v. Morgan, 41 Mich. 296.

¶ 1121. The circuit court has power on its own motion to order a further return by the justice when it deems the original return insufficient upon any error assigned.—Gordon v. Sibley, 59 Mich. 250.

¶ 1122. The fact that a justice, in making return to a writ of certiorari, failed to send to the county clerk the writ and bond served upon him does not invalidate the proceeding where the omission was subsequently cured and there was a full return before the motion to dismiss was made.—Monroe v. Renells, 131 Mich. 259.

¶ 1123. On certiorari the attachment of an exhibit in the circuit court without a further return by the justice is inefficient to present to the supreme court on the ensuing writ of error papers which constituted a material part of the evidence below.—Village of Wayne v. Goldsmith, 141 Mich. 528.

¶ 1124. A justice of the peace made return to the circuit court to a writ of certiorari. After the case was presented to and taken under advisement by the circuit court, the justice, at the request of the defendant and without an order from the circuit court, sent in an amended return, Held, the amended return could not be considered.—Nelson v. Hillen, 164 Mich. 507.

§ 261. Waiver or cure of errors.

¶ 1125. Where, in attachment before a justice to enforce a log lien, a person appears in court as the owner of the logs seized, and without plaintiff's objecting that he is not the owner, moves to quash for lack of jurisdiction, plaintiff cannot be permitted to urge, upon certiorari, that no proof of ownership was made.—Davison v. Davison, 99 Mich. 625.

§ 262. Hearing and scope of review in general.

Hearing and scope of review on appeal, see ante § 231 et seq.
Nature and office of certiorari, see also ante § 250.
Rehearings, see post § 277.
Mandamus to compel proper action by circuit court or to review its action in certiorari cases, see Mandamus § 61.
Provisions as to bringing on cause for argument, see Jud. Act, chap. LXXVIII, § 38; Comp. L. 1915, § 14433.

¶ 1126. The office of the writ of certiorari is to bring up the record for review on questions of law, and unless it shows an error of law the judgment must be affirmed.—Appleman v. Hahn, 149 Mich. 245.

¶ 1127. On certiorari to review a judgment of a justice of the peace the plaintiff cannot retry the question of fact on new affidavits or proof in the circuit court.—Appleman v. Hahn, 149 Mich. 245.

¶ 1128. Questions of practice will not be considered where plaintiff's own testimony negatives his right of action.—Burnham v. Van Gilder, 34 Mich. 246.

§ 263. ——Restriction to matters considered below.

See also ante ¶ 1125.
Objections below as to process, see ante § 50 et seq.
Objections to pleadings, see ante §§ 94, 100.
Objections as to continuances or adjournments, see ante § 115.
Objections in replevin cases, see ante § 82.
Objections below in attachment cases, see ante § 64.
Objection for first time that short summons issued where long one prescribed, see ante ¶ 214.
Waiver of objections to improper adjournment, see ante § 115.
Waiver of security for costs by going to trial on the merits, see ante § 164.

¶ 1129. Only such objections as are ruled upon by the justice can be taken on certiorari.—Hinman v. Eakins, 26 Mich. 80.

¶ 1130. After a disagreement of the jury in a justice's court the parties submitted the case to the justice himself on the same testimony. Held, that they could not afterwards, on certiorari, complain of his previous rulings on the trial before the jury.—Hollenburg v. Shuffert, 47 Mich. 126.

¶ 1131. On authority of Wilcox v. Toledo & A. A. R. Co., 45 Mich. 280, holding that mere irregularities will not be reviewed which were not called to the attention of the justice below, an objection to a justice's jurisdiction will not be considered on certiorari where it was not raised in justice's court.—Hopkins v. Green, 98 Mich. 394.

¶ 1132. On certiorari to review a justice's judgment, errors alleged in the affidavit for the writ, going to the jurisdiction, may be considered, although the points made were not raised before the justice.—Harbour v. Eldred, 107 Mich. 95.

¶ 1133. An objection that a justice of the peace erred in permitting a plaintiff to introduce in evidence an affidavit of account, for the reason that no preliminary service entitling him to make use of it had been made, cannot be raised for the first time on certiorari, although defendant did not appear in the suit before the justice.—Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116.

¶ 1134. Where the parties to an action in justice's court, after the disagreement and discharge of the jury, submit the case to the justice upon the proofs taken at the trial, stipulating that all questions raised upon the

trial shall be saved to the parties, an objection to the exclusion of testimony is available on certiorari.—Drovers' Nat. Bank v. Blue, 110 Mich. 81.

¶ 1135. The dictum in Lock v. Farley, 41 Mich. 405, that a defendant who did not appear in justice's court could on certiorari raise objection to evidence offered at the trial below that did not go to the court's jurisdiction, corrected.—Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116.

¶ 1136. Where an action of replevin pending before a justice of the peace was by stipulation of the parties transferred to a justice of the peace of another township, before whom the parties appeared and went to trial without objection, held that the question was one affecting only the jurisdiction of the parties, and, had there been no consent and objection had been timely made, the justice to whom such transfer was made would have had no jurisdiction, but objection not having been made in that proceeding, and the record showing consent of the parties, the question was waived.—Peterson v. Harrington, 197 Mich. 611.

§ 264. ——Restriction to matters specifically assigned and presented in return.

See also ante ¶ 1082.
Necessity and sufficiency of affidavit, see ante § 256.
Contents and sufficiency of return, see ante § 259.
Construction and effect of the return, see post §§ 266-270.
Grounds for reversal, see also post § 273.

¶ 1137. On certiorari to a justice the court cannot take notice of errors that were not assigned in the affidavit for the writ, or presume errors that were not affirmatively shown by the return.—Witherspoon v. Clegg, 42 Mich. 484; Westbrook v. Blood, 50 Mich. 443.

¶ 1138. On certiorari to a justice, only those allegations of error will be considered that are affirmatively supported by the return.—Stoll v. Padley, 98 Mich. 13; Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116.

¶ 1139. One who resorts to certiorari to obtain a review of a justice's judgment must make his allegations of error specific, and is confined to the precise points raised.—Matthews v. Forslund, 113 Mich. 416.

¶ 1140. Errors assigned in the affidavit for writ of certiorari to review the judgment of a justice of the peace, are the only errors for which the circuit court can reverse the judgment of the justice.—Drake v. International Harvester Co. of America, 150 Mich. 561.

¶ 1141. On certiorari to the judgment of a justice in assumpsit for village taxes an assignment that there was no evidence to support a judgment for the village cannot be considered where the return and the record neither contain the tax roll, the return roll of delinquent taxes, nor the extension of the treasurer's warrant, although the return states that it comprises "all the testimony given on the said trial."—Village of Wayne v. Goldsmith, 141 Mich. 528.

§ 265. ——Rulings on evidence and sufficiency thereof.

See also ante § 251.
See also ante ¶ 1117.
Admissibility and sufficiency of evidence below, see ante §§ 126, 127.
Appeal or certiorari as proper method of reviewing questions as to evidence, see ante § 251.
Affidavit for certiorari complaining only of insufficiency of evidence, see ante § 256.
Sufficiency of evidence as a matter of law, see also post § 271.
Disregard of errors relating to admission of evidence, see also post § 273.

¶ 1142. The writ of certiorari is not favored as a remedy for errors occurring in the rejection or admission of testimony by the justice.—O'Hara v. Mernan, 79 Mich. 222.

¶ 1143. Where a charge was proved, without objection, by showing entries in business books, but without swearing the person who made the original entry, it was proper on certiorari to refuse to consider objections to the character of evidence.—Garvin v. Gorman, 63 Mich. 221.

¶ 1144. The erroneous rejection by a justice of the peace of evidence offered by defendant, which, if received and believed, ought to have changed the result before him, authorizes a reversal on certiorari.—Whittle v. Bailes, 65 Mich. 640.

¶ 1145. The action of a justice of the peace in excluding testimony not of a conclusive character, cannot be reviewed by certiorari.—Foster v. Watson, 153 Mich. 400. (Montgomery, Hooker and Moore, JJ., dissenting.)

¶ 1146. Where, in an action upon a written instrument, a justice of the peace decided that the instrument was negotiable, and therefore excluded evidence offered by defendant tending to prove a failure of consideration, his ruling as to such evidence is not reviewable by certiorari.—Foster v. Watson, 153 Mich. 400. (Montgomery, Hooker and Moore, JJ., dissenting.)

¶ 1147. In determining upon rulings excluding evidence of defendant, which are reviewable by certiorari, a distinction must be drawn between cases where plaintiff has entirely failed to prove his cause of action and cases where testimony not of a conclusive character is excluded.—Foster v. Watson, 153 Mich. 400.

¶ 1148. The dictum in Elliott v. Whitmore, 5 Mich. 532, based on Herring v. Hock, 1 Mich. 501, to the effect that the circuit court on certiorari has power to inquire into the evidence exhibited in the justice's court, and should give judgment as the right of the matter may appear, is erroneous. It can only inquire whether there is any evidence to sustain the judgment.—Berry v. Lowe, 10 Mich. 9.

¶ 1149. The office of the writ of certiorari is to try questions of law; and the circuit court, therefore, has no authority, on certiorari to a justice of the peace, to reverse a judgment which is supported by competent testimony, merely because it arrives at a different conclusion upon the facts.—Crawford v. Byrnes, 112 Mich. 599.

¶ 1150. An affidavit to an account upon which suit was brought stated that affiant, between two days named, "worked for O. O., C. F. B., and J. G., in their mill at * * *, under an agreement with them through their foreman." Held, that this was some evidence of the partnership of defendants, so as to prevent reversal of a finding on certiorari of the existence of a partnership.—Mero v. Button, 116 Mich. 680.

¶ 1151. Where the testimony conflicted it was held error to reduce a justice's judgment on the ground of a recoupment of which the justice had not refused to receive evidence, and which he had not allowed on the facts.—Overpack v. Ruggles, 27 Mich. 65.

¶ 1152. A justice's finding of fact, in a case tried without a jury, cannot be disputed on certiorari, where there was testimony on both sides.—Garvin v. Gorman, 63 Mich. 221.

§ 266. Construction and effect of return.

Necessity and sufficiency of the return, see ante § 259.

Review limited to matters presented in return, see ante § 264.

¶ 1153. The justice's return to a certiorari is not to be treated as a bill of exceptions, but as more in the nature of a case to set aside a verdict or a report of referees; and the court will examine the whole case, and if they can see that substantial justice has been done, notwithstanding the alleged error, they will not interfere.—Aldrich v. Maitland, 4 Mich. 205.

¶ 1154. A justice's return to certiorari cannot sustain his judgment, based on evidence lacking in a material particular, by reciting that the fact was well known to him personally because shown in other cases tried before him.—Bullock v. Ueberroth, 121 Mich. 293.

¶ 1155. In certiorari to review a judgment for the plaintiff in an action in justice court for damages, the claim of the defendant that there was no evidence in support of the plaintiff's assertion that his horse stepped in a hole in the road is negatived by the defendant's affidavit for certiorari in which he sets out the plaintiff's testimony asserting that fact.—Carver v. Detroit & Saline Plank Road Co., 126 Mich. 458.

¶ 1156. A return to certiorari by the justice of the peace stating that a second adjournment was had against objection implies the presence of the defendant.—Beam v. Reynolds, 144 Mich. 383.

¶ 1157. Upon certiorari to the circuit court to review a justice's judgment, the case is to be heard exclusively on the justice's return, and in such a case the affidavits used to obtain the allowance of the writ are inadmissible for the purpose of establishing error.—Henika v. Brown, 155 Mich. 559.

¶ 1158. The failure of a justice's return to a petition in certiorari to review his judgment to specifically deny the allegation in the affidavit that it contained all material evidence does not necessitate that the affidavit be taken as true, where the return shows that other evidence was introduced before the justice which was not set out in the affidavit and which could not be returned because not taken down.—Computing Scale Co. v. Tripp, 138 Mich. 602.

§ 267. ——Conclusiveness of return; evidence to contradict, vary or explain.

¶ 1159. The return is conclusive as to facts.—Young v. Kelsey, 46 Mich. 414; People v. Hobson, 48 Mich. 27; Rawson v. McElvaine, 49 Mich. 194; Galloway v. Corbitt, 52 Mich. 460; Mann v. Tyler, 56 Mich. 564; People v. Hux, 68 Mich. 477; Wilder v. Chicago & W. M. R. Co., 70 Mich. 382.

¶ 1160. Where there is appended to a justice's return to a writ of certiorari a statement of what purports to be further testimony in the case, signed by the justice, but not dated, and not purporting to be part of the return, but inconsistent with and contradicting it, and not appearing, either, to have been made in obedience to any order for a further return, and there being nothing to show how it came to be made, such a statement will not be considered as part of the record.—Powers v. Russell, 26 Mich. 179.

¶ 1161. Certiorari to a justice does not have the force of a writ of error; and it only brings up such matters as appear by the return to have been known to the justice officially. And nothing can be added to the return by testimony.—Alt v. Lalone, 54 Mich. 302.

¶ 1162. Affidavits of third parties in answer to facts set up in a petition for certiorari cannot be received as part of the return.—North v. Joslin, 59 Mich. 624.

¶ 1163. On certiorari to a justice of the peace, an amplification of the return, duly signed, accompanying the return proper and in no way inconsistent therewith, purporting to contain a minute of proofs offered and excluded, is entitled to the same consideration as if incorporated in the return.—McDougall v. Lamb, 113 Mich. 69.

¶ 1164. A justice's return to a writ of certiorari is conclusive if it is responsive to and covers the points in the affidavit.—Hinchman v. Spaulding, 137 Mich. 655.

¶ 1165. The return of a justice of the peace to a writ of certiorari must be regarded as conclusive.—Wetmore v. Dean, 139 Mich. 627.

¶ 1166. The affidavits of jurors cannot be used to contradict, alter or vary the return of a justice to a writ of certiorari.—Ringelberg v. Peterson, 76 Mich. 107.

§ 268. ——Presumptions and burden of proof.

Presumptions and burden of proof below, see ante § 126.

Presumptions as to return of service of attachment, see also ante § 60.

Conclusiveness of justice's return, see ante § 267.

¶ 1167. The return of a justice of the peace to a certiorari showed that the suit was commenced by writ of attachment, but it did not appear therefrom that any affidavit was filed, or any bond executed, as required by the statute, before the writ was issued. Held, that these facts could not be presumed, as they were necessary to give the justice jurisdiction in the case, and that the judgment of the justice for the plaintiff must, therefore, be reversed.—Wight v. Warner, 1 D. 384.

¶ 1168. It will be presumed that there was evidence to sustain the finding though none appears, unless the return expressly shows that the whole of the testimony in the case is returned.—Gaines v. Betts, 2 D. 98.

¶ 1169. Where the return did not show that the whole of the testimony was returned it was held that it was to be presumed that there was evidence in the court below to sustain the finding.—Snow v. Perkins, 2 Mich. 238.

¶ 1170. Where the justice certified as follows: "I do certify the following to have been the evidence before me in the above-entitled cause," and the objection taken before him was that certain necessary facts had not been proved, it was held that it must be presumed that the whole evidence was returned.—Cicotte v. Morse, 8 Mich. 424.

¶ 1171. On certiorari a magistrate having acquired jurisdiction is thereafter presumed to have acted in accordance with official duty.—Saunders v. Tioga Mfg. Co., 27 Mich. 520.

¶ 1172. When the jurisdiction of a justice of the peace is once shown, and the question is whether he has lost jurisdiction to determine the amount of costs, it must be presumed, in support of the judgment, that the justice acted regularly and that his proceedings were valid, unless the record shows the contrary.—Saunders v. Tioga Mfg. Co., 27 Mich. 520.

¶ 1173. On certiorari to a justice it cannot be presumed that he did not have evidence on all essential points, unless the evidence is all returned, or unless the return affirmatively shows that on some essential points it was lacking.—Marquette & P. Rolling Mill Co. v. Morgan, 41 Mich. 296.

¶ 1174. Where some of the testimony in a suit before a justice has not been reduced to writing, and no request has been made that it should be, and the justice returns that he cannot produce it, the presumption is that there was enough to support the judgment.—Gray v. Willcox, 56 Mich. 58.

¶ 1175. On certiorari to a justice's judgment adverse to a plea of set-off made by notice with an affidavit verifying an account filed as a bill of particulars, it cannot be presumed that the service of a copy of the account and affidavit, required by How. St., § 7525, was made, if the record is silent thereon; it must appear or be presumed not to have been served.—McGowan v. Lamb, 66 Mich. 615, affirming judgment below by equal division on other points.

¶ 1176. Where there is no specific allegation that no showing on oath was made as a basis of an application for adjournment of a cause in justice's court, and where the return shows that the adjournment was duly applied for, the presumption is that the showing was legally made, and upon sufficient grounds.—Hatch v. Christmas, 68 Mich. 84.

¶ 1177. On certiorari with a record not containing any testimony, the value stated in an affidavit for a writ of replevin in justice's court is presumptively the real value of the property until shown to be erroneous in subsequent proceedings.—Peterson v. Fowler, 76 Mich. 258.

¶ 1178. In certiorari nothing will be taken by intendment in favor of errors assigned upon the rejection or admission of testimony.—O'Hara v. Mernan, 79 Mich. 222.

¶ 1179. Where a justice's return to a certiorari in a log-lien case does not contain the evidence taken before him, which was not reduced to writing, but states that plaintiff was sworn in his own behalf, and that after listening to the testimony and after due deliberation he gave judgment for plaintiff, it

cannot be presumed that there was no evidence to support the judgment.—Sullivan v. Hall, 86 Mich. 7.

¶ 1180. In the absence of a return by a justice of the peace to a writ of certiorari whether the authority of plaintiff's attorney to appear was shown, the circuit judge is not justified in assuming that such showing was not made, such fact not being required to be entered on the justice's docket.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 1181. Where the return of a justice of the peace to a writ of certiorari shows that the case was held open from 9 o'clock a. m. of the return-day until the following day at the same hour, and that counsel for plaintiff in certiorari was present, and made no objection, although objecting to the jurisdiction of the justice on other grounds, and that no suggestion of a want of power to hold the case open was made until the next morning, when it was suggested that the justice had lost jurisdiction, it will be presumed that sufficient and valid reasons existed for holding the case open.—Stoll v. Padley, 98 Mich. 13.

¶ 1182. On certiorari to review the judgment of a justice of the peace, a reversal will not be granted because the justice failed to require security for costs from a nonresident plaintiff upon motion therefor made after plaintiff's evidence was all in, there being no showing to excuse the delay in making the motion, since in such case it must be presumed that the justice found the motion unseasonable.—Harris v. Doyle, 130 Mich. 470.

¶ 1183. Upon certiorari where it is alleged that an agent appearing for plaintiff was without authority, it is incumbent upon defendant to show that no evidence of authority was produced and to require a return of the justice thereon, and hence in the absence of such showing and return, it will be presumed that his authority was proved.—Brown v. Knop, 137 Mich. 234.

¶ 1184. On return to certiorari containing a long summons a presumption arises from the issuance of a long summons that the defendant is a resident of the county.—Henika v. Brown, 155 Mich. 559.

¶ 1185. It cannot be said that a justice trying a case without a jury clearly erred in striking out evidence as immaterial where he returns the facts truly for review, since he may have regarded it as unimportant.—Mann v. Tyler, 56 Mich. 564.

§ 269. ——Conflict between return and affidavits of error.

See also ante ¶¶ 1157, 1158.

¶ 1186. An allegation that plaintiff's attorney did not sufficiently prove his authority to appear, and that it appeared upon his examination that his authority was in writing, and that no writing was produced before the justice, is not sustained by a return that the attorney, on the return-day, proved his authority to appear, and that he not only made such proof orally, but, when sworn as a witness in the case, produced other documentary proof.—Stoll v. Padley, 98 Mich. 13.

§ 270. ——Conflict between return and docket entries.

See also ante § 149.

Conclusiveness and effect of docket, see ante § 148.

As to day of return of writ of attachment, see also post ¶ 1210.

¶ 1187. A justice's return to a certiorari cannot contradict his docket so as to give him jurisdiction that does not appear on the docket's face.—Noyes v. Hillier, 65 Mich. 636; Toliver v. Brownell, 94 Mich. 577; Holmes v. Cole, 95 Mich. 272.

¶ 1188. A justice's return to certiorari cannot aid his docket or remove the presumption from the language of its entries.—Noyes v. Hillier, 65 Mich. 636.

¶ 1189. Where a justice's return varies from his docket entries it is conclusive only as to such matters as are not required to be entered on the docket; but as to required entries the docket controls.—Weaver v. Lammon, 62 Mich. 366.

§ 271. Judgment on certiorari.

Costs on certiorari, see post § 276.

Review of findings on error to certiorari, see Appeal § 458.

Power of supreme court on error to correct judgment rendered in circuit on certiorari, see Appeal § 528.

Judgment on certiorari in forcible entry and summary proceedings, see Forcible Entry § 57.

Computation of interest on judgment of circuit rendered on certiorari, see Judgments ¶ 85b.

Provisions as to judgment on certiorari, see Jud. Act, chap. LXXVIII, §§ 34-36; Comp. L. 1915, §§ 14434-14436.

¶ 1190. Comp. L. 1897, § 948, providing that on certiorari, the court may give judgment as right may appear without regarding technicalities in proceedings before a justice of the peace, does not prevent the circuit court rendering judgment for the defendant where the justice's docket omitted to state the place to which a cause of action was adjourned.—Mitts v. Harvey, 125 Mich. 354.

¶ 1191. On certiorari to a justice's court, where the error alleged is that there is absolutely no evidence of negligence of the defendant, the circuit court may review the evidence to see whether such contention is

correct, and, if correct, it may reverse the judgment; otherwise it must affirm the judgment.—Massachusetts Bonding & Ins. Co. v. Park, 197 Mich. 142.

¶ 1192. Comp. L. 1897, § 948, providing for judgments in certiorari cases apparently contemplates that the circuit court will enter a new judgment on which execution may issue, upon the original cause of action, unless it be where the writ does not confer jurisdiction to review, when perhaps a judgment of dismissal may be proper.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 1193. On certiorari to the justice's court, where the circuit judge heard the case and took it under advisement, prepared and signed an opinion concluding with the statement that he thought "this covered all objections made, and * * * none being well taken the writ may be dismissed," this while not a formal judgment on which execution might issue was equivalent to determining the cause against the plaintiff in certiorari and directing a judgment in favor of the defendant in certiorari, and was a valid compliance with the statutes providing for the rendition of judgments, and filing findings (Comp. L. 1897, §§ 10260, 10261, 10264).—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 1194. Where in a case originating in the justice's court the circuit court on a writ of certiorari heard and decided all points raised and concluded with a direction dismissing the writ (a judgment not authorized by the statute) and the clerk did not enter the judgment according to Comp. L. 1897, § 10260, the defendant in certiorari could apply to the circuit court to obtain the entry of such a judgment as the decision warranted, and such application may be made to his successor in office where he has since ceased to be a judge.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 1195. Where, in affirming on certiorari a justice's judgment for damages and costs, the circuit court, instead of a simple judgment of affirmance, ordered a judgment for the aggregate of such damages and costs, with costs of the court above, the error is merely formal, and is not ground for reversal.—Rodman v. Clark, 81 Mich. 466.

¶ 1196. Where, on a common-law certiorari issued by the circuit court, it appears that the inferior tribunal had no jurisdiction, or that there was no cause of action, the judgment for plaintiff should be reversed with costs to plaintiff in error.—Thompson v. Crockery School District No. 7, 25 Mich. 488.

¶ 1197. A circuit court judge who has heard a certiorari proceeding on a case originating in the justice's court, and who has dismissed the writ, but entered a judgment not authorized by the statute, may on application enter the proper judgment, which may include all that was awarded by the justice of the peace, and should take the form of a judgment for the aggregate of the damages, costs, and interest.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

¶ 1198. Where defendants sued in their firm name in justice's court pleaded and were allowed to recover upon a set-off in such name, a judgment in their favor on certiorari was affirmed by a divided court.—McGowan v. Lamb, 66 Mich. 615.

¶ 1199. Where the result in the circuit court on certiorari is the same as below, the judgment should be a simple affirmance, with or without costs; it is formal error to render a new judgment for damages and costs, enforceable by execution from the circuit court.—Dooley v. Eilbert, 47 Mich. 615.

¶ 1200. Replevin in justice's court. The court found a part of the property to be in the plaintiff, and gave him judgment therefor, with costs, and awarded a return of the remainder. On certiorari the circuit court reversed the judgment as to a part of the articles awarded to the plaintiff, and gave judgment therefor to the defendant, and also rendered judgment in favor of the defendant (plaintiff in error) for his costs before the justice. Held, that this judgment for costs, not being an affirmance or reversal of the justice's judgment, or any part thereof, was beyond the power of the circuit court.—Berry v. Lowe, 10 Mich. 9.

§ 272. ——Inclusion of judgment against sureties.

Judgment against sureties on appeal bond for costs, see ante § 241.

¶ 1201. Certiorari to a justice is in the nature of an appeal so far as to allow the circuit judge to include the surety in the judgment for costs against his principal.—McLean v. Isbell, 44 Mich. 129; Boatz v. Berg, 51 Mich. 8.

¶ 1202. Where a case is removed from a justice's court by certiorari, and the circuit court approves the justice's judgment, the sureties of the plaintiff in certiorari are included in it by entering judgment against all, adding interest to the date thereof, and giving judgment anew for the gross sum.—McDermid v. Redpath, 39 Mich. 372.

¶ 1203. Comp. L. 1871, § 6133 (How. St. § 7663), providing that final judgment for costs may be rendered against the surety for costs as well as against his principal, applies to a case where a justice's judgment for plaintiff is reversed in the circuit on certiorari.—McLean v. Isbell, 44 Mich. 129.

¶ 1204. Where, after a judgment for plaintiff in justice's court had been reversed on

a certiorari the bond for which was conditioned simply to pay any judgment recovered against defendant in the circuit court, such justice's judgment was affirmed in the supreme court with costs of both courts, the liability of the surety on said bond could not be extended by construction so as to permit judgment to be entered against him on motion.—Stoll v. Padley, 100 Mich. 404.

¶¶ 1205, 1206. The Justice's Act of 1855, How. St. § 7029, providing for entering judgment against both principal and surety, is valid.—Chappee v. Thomas, 5 Mich. 53.

§ 273. Grounds for reversal or quashal; technical and harmless errors.

Necessity that justice's proceedings appear to be within powers conferred, see ante § 10.
Proceedings in justices' courts viewed with liberality, see ante § 31.
Participation of justice in jury's deliberations, see ante ¶ 532.
Improper allowance of costs and fees as ground, see also ante ¶ 691.
Dismissal of writ issued before affidavit filed, see ante ¶ 1107.
Only for errors assigned in the affidavit and presented by the return, see also ante § 264.
Judgment of dismissal, see also ante § 271.
Failure of justice's docket to state place of adjournment, see ante ¶ 1190.
General law as to harmless error, see Harmless Error.
Causes for which reversal not allowed, see Jud. Act, chap. LXXVIII, § 36; Comp. L. 1915, § 14436.

¶ 1207. Objections that are merely technical should not be given any weight on certiorari unless there is reason to believe they tended to a wrong result.—Cheney v. Russell, 44 Mich. 620; Hart v. Township of Port Huron, 46 Mich. 428.

¶ 1208. Whether a circuit court should reverse the judgment of a justice of the peace on certiorari because the judgment rendered exceeds the amount claimed in the ad damnum clause of the declaration, quære.—Pew v. Yoare, 12 Mich. 16.

¶ 1209. A justice acquires jurisdiction when proper service is made or defendant appears. But the fact of actual notice without any appearance will not give it, and is no reason for refusing or dismissing a certiorari to bring up the proceedings.—Vliet v. Westenhaver, 42 Mich. 593.

¶ 1210. Where a justice of the peace in his return to a writ of certiorari to bring up for review his proceedings in an attachment suit states that the officer's return of service of the attachment was not in fact made until the return day, the fact that such return of service was not dated, or that the justice had erroneously entered in his docket a minute that the writ was returned on a different day, will be disregarded.—Nicolls v. Lawrence, 30 Mich. 395.

¶ 1211. A justice's judgment is not to be reversed on certiorari except for matters of substance affecting the justice of the cause.—Burt v. Addison, 74 Mich. 730.

¶ 1212. Trivial questions relating to the admission of evidence before a justice should not have weight on certiorari.—Grand Trunk R. Co. v. Russ, 47 Mich. 500.

¶ 1213. On certiorari all technical omissions or defects in the proceedings below will be disregarded, and judgment will be entered on the merits (How. St. § 7044).—Gray v. Willcox, 56 Mich. 58.

¶ 1214. A judgment will not be reversed on certiorari on the ground of the admission of improper evidence to establish a fact that is clearly proved by other testimony of a competent character.—Aldrich v. Maitland, 4 Mich. 205.

¶ 1215. A justice's judgment on the merits should not be reversed on certiorari for the admission or rejection of evidence, unless it clearly appears that the party against whom judgment was given was injured by such ruling.—Whaley v. Gale, 48 Mich. 193.

¶ 1216. Under statutory certiorari on a justice's judgment there can be no reversal, unless for errors affecting the merits as the case finally stands; and when, in an action on contract, the error complained of was the overruling of a plea in abatement for nonjoinder, whereas the only contract shown was sole, such ruling was immaterial.—Hinman v. Eakins, 26 Mich. 80.

¶ 1217. Comp. L. 1897, § 948, providing that a court on certiorari to a justice of the peace may render judgment in accordance with the right of the matter cannot be applied to a case where one erroneously sued in assumpsit when he should have declared in tort.—Plefka v. Detroit United Ry., 147 Mich. 641.

¶ 1218. Comp. L. 1897, § 948, How. 2nd Ed., § 12394, directing the court in certiorari cases to give judgment "as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice which did not affect the merits," does not apply where there has been no trial on the merits.—Moore v. Frederick, 197 Mich. 573.

¶ 1219. On certiorari from a justice's judgment in plaintiff's favor without naming him, in a suit brought in the interest of an infant, as the record shows, but in which defendant was commanded in the summons "to answer to A. K., as next friend to E. F.," the circuit court should render judgment for the amount found by the justice to be due in

favor of the infant plaintiff, under How. St. § 7044, which provides that the court shall proceed to give judgment as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice, which did not affect the merits.—Kees v. Maxim, 99 Mich. 493.

¶ 1220. Comp. L. 1871, § 5479 (How. St. § 7046), forbidding reversal of a justice's judgment for an improper allowance of fees, does not cover a case expressly governed by a statute regulating costs generally, and where the question is not as to particular allowances, which the justice has failed to consider.—Wilcox v. Laflin & Rand Powder Co., 44 Mich. 35.

§ 274. Conclusiveness and effect of judgment on certiorari.

Appeal from judgment, see Appeal.
Certiorari to review the judgment, see Certiorari.
Finality of judgment of circuit court on certiorari for purpose of writ of error, see Appeal § 33.
Assignments and specification of errors on certiorari taken on error to Supreme Court, see Appeal § 201.
Restriction of review of circuit judgment on certiorari to questions made by the affidavit, see Appeal § 274.
Propriety of certiorari to review action of circuit, see Certiorari § 13.
Effect on justice's judgment of dismissal of certiorari, see Certiorari ¶ 234.

¶ 1221. A judgment of a justice of the peace, after affirmance by the circuit court on certiorari, is not open to the objection that it leaves the justice's judgment in full force and effect, thus creating two judgments; the justice's judgment being simply affirmed and merged.—Ringelberg v. Peterson, 76 Mich. 107.

¶ 1222. Where, during pendency before a justice of a suit in replevin, possession has been awarded to one of the parties, he is entitled to it as against the other while the suit is pending, subject only to interruption by service of a precept to return the property; and if the suit is decided against him and he gives due notice of his intention to remove the cause, as by certiorari, he has still the right to retain possession after completing the remaining steps required by law for such removal. The completion of such steps suspends the further operation of the justice's judgment and leaves the writ by which the suit was begun in legal force. And where one had surrendered the property upon a precept issued after he had declared his intention to remove the cause, it was held that he was thereafter at liberty to regain possession by his own act, if he could do so peaceably and without personal interference. And held, also, that, for his protection, the proceedings for removal and the judgment for reversal in the higher court related back to the time of giving notice, and that in a suit in cross-replevin no plea puis darrein continuance was needed to support evidence of such judgment of reversal, though granted after the last continuance.—Clark v. West, 23 Mich. 242.

§ 275. Rights and remedies of parties upon reversal.

¶ 1223. Where plaintiff recovered judgment before a justice, which was reversed by the circuit court on certiorari, and plaintiff in error afterwards moved for an order that a jury be impaneled to assess his damages, it was held that the circuit court, under the statutes of 1838, had no such power; but that under §§ 135, 170 of the Justice's Act of 1841, it had power to award a restitution of the property.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302.

§ 276. Costs on certiorari.

See also ante § 271.
Including surety in judgment for costs, see ante § 272.
Denial of certiorari costs in case taken improperly or needlessly to supreme court, see Costs § 141.
Provisions as to costs on certiorari, see Jud. Act, chap. LXXVIII, § 35; Comp. L. 1915, § 14435.

¶ 1224. The circuit court has no power on certiorari to render judgment in favor of the defendant in certiorari for costs before the justice.—Berry v. Lowe, 10 Mich. 9.

¶ 1225. In cases before justices of the peace, when tender is pleaded, costs accruing after the tender must go to defendant under Comp. L. 1871, §§ 6180, 6181 (How. St., §§ 7764, 7765).—Wilcox v. Laflin & Rand Powder Co., 44 Mich. 35.

§ 277. Rehearings.

¶ 1226. The power of a court to grant new trials, etc., as provided in C. C. Rule 21 includes a rehearing upon certiorari to a justice of the peace.—Hirsh v. Fisher, 138 Mich. 95.

§ 278. Certiorari bonds and liability thereon.

See also ante § 272.
Judgment against sureties on appeal bonds, see ante § 241.
Necessity of bond, see ante § 257.

¶ 1227. Comp. L. 1897, § 933, providing for entry of judgment on appeal bond against the appellant and sureties, being applicable in certiorari as well as in appeals, it is the duty of the court on affirming the judgment to enter judgment on the bond unless on the face of the record there is something that precludes liability, or unless on application there is a showing made which requires an investigation of the surety's liability.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

VII. CRIMINAL JURISDICTION AND PROCEDURE.

§ 279. In general.
See also ante § 10.
Liability of justice for false imprisonment, see ante § 8.
Liability of justice for imposing erroneous sentence, see ante ¶ 25.
Justices' fees for services in trying criminal cases, see ante § 4.
Criminal jurisdiction, see Indictment §§ 91-98.
Prosecutions for crime before justices, see Indictment, XVIII.
Mandamus to compel entertainment of complaints for crime, see Mandamus § 57.
Existence of civil remedy for recovery of penalty as concurrent with prosecution for crime, see Indictment § 3.
Jury trials for misdemeanor and procedure to obtain jury, see Indictment § 652.
Fees in criminal cases as county charge, see counties ¶ 198.
Acquittal in justice's court as res adjudicata in civil proceeding, see Former Adjudication § 11.

JUSTIFIABLE HOMICIDE to LAND VALUES AND DAMAGES.

Cross-References.

Justifiable Homicide—
See Homicide, V.
Justification—
See specific topics treating of the act or thing to be justified, e. g., Assault §§ 6, 7, 15 et seq.; Homicide, V; False Imprisonment §§ 4-14; Libel, III; Trespass, I.
Official duty or command or process as a justification, see Officers, VI; Sheriffs, IV; False Imprisonment § 9 et seq.
Advice of counsel as justification, see Malicious Prosecution, III; False Imprisonment § 4 et seq.
Misconduct or provocation as justifying act urged as ground for divorce, see Divorce, III.
Excuse for nonperformance of contract, see Contracts, VII, C; Sales, V, C, VI, D; Building Contracts, III.
Justification of Bail or Sureties—
See Arrest, IX; Civil Arrest, IV; Estates of Decedents § 37; and see also other specific topics treating of statutory bonds and undertakings.
Juvenile Courts—
Constitutionality of acts creating, see Constitutional Law, II, B.
Juvenile Delinquents—
See Incompetents and Delinquents §§ 5-7.
Keepers—
For goods taken on levy, see Attachment, VI, C; Executions § 150.
Keeping—
Of particular thing or place as matter for regulation or as actionable wrong or crime, see specific topics and cross-reference headings descriptive of the thing, place, or occupation, e. g., Animals; Inns; Explosives; Crimes, II.
Keeping Down Damages or Loss—
See Damages, I; Insurance, VII; Indemnity.
Keeping in Repair—
See Landlord and Tenant; Life Estates, II; Tenants in Common, II.
Keeping Tender Good—
See Payment, I, B; Sales, V.
Keeping the Peace—
Proceedings for security to keep the peace, see Indictment § 660.
Kerosene—
See Explosives and Combustibles.
Use or keeping as affecting insurance, see Insurance § 166.
Keys—
As symbols for purpose of delivery of thing controlled by lock, see Gifts § 11; Sales, V; Landlord and Tenant, VI.
Kidnapping—
See Crimes, II; Indictment.
Kindred; Kinship—
See Descent; Wills, VI; Death by Wrongful Act.
Knives—
Use or possession as crime or factor in crime, see Crimes, II; Indictment; Homicide.
Employers' liability to servants using knives, see Master and Servant, III.
Knowledge—
As a factor or element in legal right or liability, see specific topic treating of the particular right or liability, e. g., Estoppel; Election; Mistake; Fraud; Agency (ratification); Partnership.
Duty and negligence dependent on knowledge, see Negligence; and specific topics treating of negligence respecting particular places, things, and occupations.
Crimes involving or dependent on knowledge, see Crimes, II; Indictment.
Element in good faith of taker, see Negotiable Instruments, XIII; Notice and Record of Title, I; Fraudulent Conveyances; Chattel Mortgages, I, D.
Imputation of one person's knowledge to another, see Agency, II, E; Corporations, XVII, E; Partnership, IV.
Presumptions and evidence, see Evidence §§ 46 et seq., 102; Indictment, VIII; and see also topics referred to above.
Labels—
Food regulations, see Food § 8.
Trade-mark and trade name rights, see Trade-Marks.

Labor—
Labor laws and regulations, see Master and Servant.
Safety regulations, see Master and Servant, III.
Workmen's Compensation Laws, see Workmen's Compensation Law.
Trade unions, see Trade Unions.
Contracts of employment, see Master and Servant, I, II.
Agreements to keep up wages as illegal combination, see Combinations § 8.
Liens for security of mechanics and laborers, see Mechanics' Liens; Public Contracts, VII.
Priority of labor claims against insolvent corporations, see Corporations § 227.
Suits to enforce labor claims against corporate stockholders, see Corporations §§ 331-337.
Liens for work on logs or forest products, see Forestry, III.
Work and labor counts, see Assumpsit; Master and Servant, II.
Implied promise to pay for work, see Implied Contracts.
Sunday labor, see Sunday.
Laches—
In general, see Equity, IV, and cross-references there collated.
Limitations of actions and doctrine of adverse possession and prescription, see Limitations; Adverse Possession; Easements.
For applications of the doctrine of bar by delay to claim or assert rights and remedies, see also the specific topics treating of the rights or remedies.
Lack of Means—
Actionable negligence as dependent on means to repair or safeguard, see Negligence, I, II; Highways, §§ 224, 225.
Excuse for nonperformance or nonpayment, see Contempt, II; Divorce, X, F.
Lake St. Clair—
Judicial knowledge of, see Evidence § 9.
Lake Superior Canal—
See Canals; Navigable Waters.
Lakes—
See Navigable Waters; Waters; Boundaries.
Land—
See Real Property; Wills, VI.
Land Marks—
See Boundaries.
Land Office—
See generally Public Lands.
Records and copies of records as evidence, see Evidence, VIII, C.
Land Owners—
Qualification as petitioners, see Drains § 14; Highways, II, B; Local Improvements, I, III.
Persons to be notified or served, see Drains, II; Highways, II, B; Eminent Domain § 70.
Land Values and Damages—
See Damages; Values; Eminent Domain, IV.

LANDLORD AND TENANT.

TREATS of contracts of leasing and of the rights and liabilities of landlords and tenants. It excludes matters pertaining to life tenants (see Life Estates) and the law of tenants in common and joint tenants (see Tenants in Common).

Analysis.

I. The relation; leases, creation and kinds of tenancies.

§ 1. In general; existence and nature of the relation.
§ 2. Implied tenancy.
§ 3. ——Occupancy incident to employment.
§ 4. ——Occupancy under farming contract.
§ 5. ——Occupancy under contract of purchase.
§ 6. ——Occupancy by grantor after conveyance.
§ 7. ——Agreements for lease.
§ 8. ——Contracts for room, board or desk space.
§ 9. Nature, requisites and validity of leases.
§ 10. ——Sufficiency of form and execution.
§ 11. ——Leases as distinguished from contracts for leases.
§ 12. ——Unrecorded leases.
§ 13. ——Change or modification of lease.
§ 14. Construction and operation of leases.
§ 15. ——Construction against perpetuity.
§ 16. ——Covenants, conditions and restrictions.

§ 17. ——Covenants or conditions for forfeiture.
§ 18. ——Implied covenants.
§ 19. Description of premises covered.
§ 20. Creation of new tenancy by attornment.
§ 21. Presumptions and burden of proof arising from occupancy.
§ 22. Evidence and proof of relation.
§ 23. Kinds of tenancies in general.
§ 24. Terms for years.
§ 25. Tenancies from year to year.
§ 26. ——Possession under oral agreement.
§ 27. Tenants at will and by sufferance.
§ 28. ——Tenancies from month to month.
§ 29. ——Tenancy at sufferance and tenants holding over.
§ 30. ——Possession under void lease.
§ 31. Leases as security for other undertakings.

II. The term, termination, renewal and holding over.

§ 32. Term and duration in general.
§ 33. ——Estoppel of lessor to question lessee's right to hold.
§ 34. ——Legal restrictions; agricultural leases.
§ 35. Termination of lease or of right of occupancy.
§ 36. ——Illegality of purpose causing termination.
§ 37. ——Tenancy by occupant incidental to employment.
§ 38. Cancellation or agreements for termination.
§ 39. Necessity, sufficiency and effect of notice to quit.
§ 40. ——Notice to quit for nonpayment of rent.
§ 41. ——Necessity for notice on expiration of term.
§ 42. ——To terminate tenancy at will or at sufferance.
§ 43. ——Sufficiency of service.
§ 44. ——Waiver or loss of right to notice.
§ 45. Breach of covenant or condition as ground for termination.
§ 46. ——Estoppel to claim termination for breach.
§ 47. Transfer or termination of landlord's estate as affecting lease.
§ 48. Injury to or destruction of premises as termination.
§ 49. Renewal of lease or tenancy.
§ 50. ——By holding over.
§ 51. ——By acceptance of rental.
§ 52. ——By laches or delay after notice to quit.
§ 53. Rights and liabilities under tenancy by holding over.

III. Landlord's title and reversionary rights.

§ 54. In general.
§ 55. Rights and powers of landlord.
§ 56. Conveyance of reversion.
§ 57. Mortgage of reversionary interest.
§ 58. Assignment by lessor of rent or of leasehold.
§ 59. ——Attornment to assignee.
§ 60. ——Conveyance or assignment to tenant or sublessee.
§ 61. Estoppel of tenant to question title or make adverse claim.
§ 62. ——Acquiring or buying in adverse title or tax title.
§ 63. ——Showing adverse title in third person.
§ 64. ——Right to dispute title upon surrender of possession.
§ 65. Attornment by tenant to third person.

IV. Mutual rights and liabilities.

A. Use and Enjoyment of Premises; Property Included.

§ 66. Rights of use and enjoyment in general.
§ 67. ——Landlord's reservations of rights.
§ 68. Covenants and conditions as to use and enjoyment.
§ 69. ——Breach of covenants and conditions.
§ 70. ——Waiver and acquiescence in breach.
§ 71. Invasion or interference with tenant's possessory rights.
§ 72. Ouster or eviction by landlord.
§ 73. Extent of demise and property included.

B. Assignment and Subletting.

§ 74. Assignments in general.
§ 75. Executory contracts to assign.
§ 76. Subletting as distinguished from assignment.
§ 77. Necessity for lessor's consent.
§ 78. Covenants against assignment, subletting or transfer.
§ 79. Forfeiture for assignment or subletting.
§ 80. Waiver of breach of covenant.
§ 81. ——By acceptance of rent from assignee or sublessee.
§ 82. Rights and liabilities of assignees.
§ 83. Subtenancy and rights and liabilities incident thereto.
§ 84. Assignment of lease as security.

C. Repairs and Improvements, Insurance, Taxes and Charges.

§ 85. Duty and covenants of landlord to repair.
§ 86. ——Waiver, release or excuse for breach of duty.
§ 87. Remedies of tenants against landlord for failure to repair.
§ 88. ——Vacation or abandonment of premises by tenant.
§ 89. Obligation and covenants of tenant to repair.
§ 90. ——Forfeiture of lease for breach of covenant.
§ 91. ——Waiver of covenant to repair.
§ 92. Credit to tenant for repairs.
§ 93. Right of lessee to make improvements or alterations.
§ 94. Tenant's rights and interest in improvements.
§ 95. ——Right to remove improvements or buildings.
§ 96. ——Right to compensation for improvements.
§ 97. Duties and penalties under public regulations.
§ 98. Covenants to rebuild.
§ 99. Covenants as to insurance.
§ 100. Covenants to pay taxes.

D. Injuries from Defective or Dangerous Conditions.

§ 101. In general.
§ 102. Injuries to tenants or occupants.
§ 103. ——Landlord's knowledge of defects.
§ 104. ——Dangerous condition caused by failure to repair.
§ 105. ——Premises used in common by several tenants.
§ 106. ——Injury to or loss of tenant's property.
§ 107. Presumptions and evidence as to liability.

E. Fixtures and Emblements, Issues and Profits.

§ 108. Title and right to fixtures in general.
§ 109. ——Right of tenant to remove or dispose of.

§ 110. ——Right of tenant to compensation for fixtures.
§ 111. Right to emblements, issues and profits.
§ 112. ——Right of tenant against grantee of lessor.
§ 113. ——Right of purchasers from tenant before default.
§ 114. ——Vacation and abandonment of premises and crops

F. Options to Buy, Renew or for Other Privileges.

§ 115. Option to purchase premises.
§ 116. ——Deductions, additions and adjustments on purchase price.
§ 117. Liability for taxes upon exercising option to buy.
§ 118. Options for renewal.
§ 119. ——Necessity and sufficiency of notice of election to renew.
§ 120. ——Terms, rights and privileges of new lease.
§ 121. ——Waiver and estoppel.

G. Rental, Use and Occupation, or Share of Produce.

§ 122. In general; nature of rent.
§ 123. Covenants and agreements to pay rent.
§ 124. ——Payment in advance.
§ 125. Particular defenses or conditions affecting rights.
§ 126. Failure of consideration.
§ 127. Injury to or destruction of premises.
§ 128. Premises untenantable or unsuitable for purpose of tenancy.
§ 129. ——Necessity of notice to landlord.
§ 130. Re-entry or eviction precluding recovery of rent.
§ 131. ——Waiver by tenant of constructive eviction.
§ 132. Disturbance or dispossession of tenant by third person.
§ 133. Vacation of premises during term or without notice.
§ 134. ——Reletting by lessor to mitigate damages.
§ 135. Persons entitled to rent.
§ 136. ——Grantees and assignees of landlord.
§ 137. Persons liable for rent.
§ 138. ——Subletting and liability of subtenants.
§ 139. Acceptance of rental as waiver of breach of conditions.
§ 140. Basis for rentals, accrual, and computation of amount due.
§ 141. ——Payments in services or board.
§ 142. Lease reserving share of produce.
§ 143. Liability for use and occupation.

H. Liens and Securities of Landlord.

§ 144. In general.
§ 145. Underwriting, guaranty or suretyship.
§ 146. Provisions in lease.
§ 147. ——Property included.

I. Right to Quit and Terminate.

§ 148. In general.
§ 149. Estoppel to assert right.

V. Mutual remedies and actions.

A. Action for Rent and Advances or for Use and Occupation.

§ 150. Right of action in general.
§ 151. ——Actions for use and occupation.

§ 152. Necessary and proper parties.
§ 153. ——Assignees or grantees.
§ 154. Declaration and other pleadings.
§ 155. Issues, proof and variance.
§ 156. Burden of proof, presumptions and evidence.
§ 157. Questions of law and fact and instructions.

B. Summary Proceedings to Oust Tenant and Recover Possession.

§ 158. In general.

C. On Other Causes of Action.

§ 159. Remedies and procedure in equity.
§ 160. Actions against tenants for breach of covenant or condition.
§ 161. Actions against landlord for breach of duty.
§ 162. ——For keeping tenant out of possession.
§ 163. ——For damages for disturbance, eviction or wrongful dispossession.
§ 164. ——For fraud or concealment in procuring tenant.

VI. Surrender and re-entry.

§ 165. Surrender in general.
§ 166. ——Surrender of tenancy at will.
§ 167. Surrender by operation of law.
§ 168. Acceptance of surrender.
§ 169. ——Estoppel to accept or enforce surrender.
§ 170. Re-entry for breach of covenant.
§ 171. ——Necessity of notice or proceedings.
§ 172. ——Right to seize crops for breach of farm lease.
§ 173. Peaceable re-entry after notice to quit.
§ 174. ——Waiver of notice and demand.
§ 175. Presumptions and evidence of surrender or re-entry.
§ 176. Questions of law and fact and instructions.

VII. Rights and liabilities towards third persons.

§ 177. Duty of landlord towards third persons.
§ 178. ——Nuisance or injury during tenant's exclusive occupancy.
§ 179. ——Effect of covenant imposing duty to repair.
§ 180. ——Expulsion of licensee.
§ 181. ——Property on demised premises belonging to third persons.
§ 182. Rights of landlord against third persons.
§ 183. Rights and liabilities of tenants towards third persons.
§ 184. ——Towards other tenants or successors in leasehold.

VIII. Crimes and penalties.

§ 185. In general.

I. THE RELATION; LEASES, CREATION AND KINDS OF TENANCIES.

§ 1. In general; existence and nature of the relation.

Implied tenancy, see post §§ 2-8.

Nature, requisites and validity of leases, see post §§ 9-13.

Construction and operation of leases, see post §§ 14-18.

Description of premises covered, see post § 19.

Creation of new tenancy by attornment, see post § 20.
Presumptions and burden of proof arising from occupancy, see post § 21.
Evidence and proof of relation, see post § 22.
Kinds of tenancies in general, see post §§ 23-30.
Leases as security for other undertakings, see post § 31.
Relation between lessee and his assignee, see post ¶ 279.
Leases of public lands, see Public Lands.
Leases of mines and minerals, see Mines, II.
Leases of railroads, see Railroads, VII.
Lease or license, see Licenses to Enter § 4.
Concessions by summer resort association, see Associations § 7.
Leasehold as subject for gift, see Gifts § 5.
Leases of water-power and flowage rights, see Waters, IV, B.
Leviability of leasehold interests, see Executions § 21.
Leasehold as personalty or realty for purpose of levying execution, see Executions § 37.
Mode of levying on and selling leaseholds on execution, see Executions §§ 37, 41-44, 63.
Necessity for recordation of leases in general, see Notice and Record of Title, II.
Necessity for recordation of mortgage of leasehold, see Notice and Record of Title, II.
Whether dower right exists in leaseholds, see Dower § 8.
Attachability of leasehold interest, see Attachment § 16, ¶ 36.
Implication of way of necessity from lease of lands otherwise inaccessible, see Easements § 10, ¶¶ 36, 37.
Rights of lessee of chattel under conditional sale contract, see Sales, XII.
Tenancy under lease void under statute of frauds, see Frauds, Statute of § 140.
Authority and power of guardian to make leases of ward's lands, see Guardianship § 54.
Change in terms of lease as discharging guarantor of payment of rent, see Guaranty § 18.
Contract to pay rent and perform covenants as one of guaranty or suretyship, see Guaranty § 1.

¶ 1. A tenancy exists where one has let real estate to another to hold of him as tenant.—Morrill v. Mackman, 24 Mich. 279.

¶ 2. The usual incidents of a tenancy are possession with right of enjoyment, and rent.—Morrill v. Mackman, 24 Mich. 279.

¶ 3. The privilege granted by deed, and for an annual compensation, to flow lands for an indefinite period creates a tenancy in them.—Morrill v. Mackman, 24 Mich. 279.

¶ 4. An agreement whereby one party lets certain land, for a year, to the other, for a certain sum, and authorizes him to enter and harvest a crop which the former agrees to put in, is a lease and not a mortgage, and gives the lessee title to the crops, so that it cannot be attached in a proceeding against the lessor.—Stadden v. Hazzard, 34 Mich. 76.

¶ 5. The relation of landlord and tenant or an implied agreement to pay rent does not exist between a county and a deputy register of deeds who, by virtue of his appointment, occupies the office furnished by the county for the register of deeds, even though he attends to private business of his own, such as furnishing abstracts of title from a set of abstract books kept in such office at the register's request.—Cass County Sup'rs v. Cowgill, 97 Mich. 448.

¶ 6. A contract to pay rent is not necessary to create the relation of landlord and tenant.—Alpine County School Dist. No. 11 v. Batsche, 106 Mich. 330.

¶ 7. Complainant made a contractual purchase of land from defendant and agreed not to sublet. He put one Doyle in possession of the premises, gave him entire control of the crops and of the division and separation of a share of the same to the complainants. Doyle was acknowledged by complainant as paying for the use of the house by looking after the place. Held, the relation of the landlord and tenant existed between complainants and Doyle, and the former had violated the contract.—Welling v. Strickland, 161 Mich. 235.

¶ 8. Where a trustee in bankruptcy did not recognize a lease from the record title holder to the bankrupt, but considered that the deed by the bankrupt to such record title holder was fraudulent and void as to creditors, and he continued in adverse possession of the property, the relation of landlord and tenant did not exist between the record title holder and the trustee.—Smith v. Haight, 188 Mich. 512.

¶ 9. A writing consisting of letters, giving use of a right of way for a logging railroad, not qualified in any way, and not purporting to give exclusive possession of any part of the premises and not reserving rent was not a lease; particularly where no consideration was paid or promised for the alleged right, which the letters called a "privilege." Nowlin Lumber Co. v. Wilson, 119 Mich. 406.

¶ 10. Where the owner joined in a request to a trustee in a mortgage for the benefit of creditors, that a third party be allowed to occupy the premises, and such party went into possession pursuant to such request, the trustee became the landlord.—Candler v. Mitchell, 119 Mich. 464.

§ 2. Implied tenancy.

Occupancy incident to employment, see post § 3.
Occupancy under farming contract, see post § 4.

Occupancy under contract of purchase, see post § 5.
Occupancy by grantor after conveyance, see post § 6.
Agreements for lease, see post § 7.
Contracts for room, board or desk space, see post § 8.
Liability for use and occupation, see post § 143.

¶ 11. The contract relation of landlord and tenant cannot impliedly exist unless the person charged as tenant has either accepted possession from the landlord, or done some other act in plain recognition of the relationship whereby he is equitably estopped from denying it.—Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536.

¶ 12. The purchaser of lumber becomes presumptively the tenant of the owner of the premises on which it is piled if he does not remove it within a reasonable time and on being notified that he must take it away; and if such notice is accompanied by a statement that a specified rent will be charged for their occupancy, he is presumed to assent to the terms if he does not remove it. —Ducey Lumber Co. v. Lane, 58 Mich. 520.

¶ 13. Where a lessee of a water-front which he had used for the storage of logs ended his lease by proper notice, and removed all his logs, no subsequent acts would operate as a renewal or continuance of the tenure, which were not equivalent to a reentry, or to the exclusion of any other possession. Merely leaving a boom there, which could be removed by the owner as well as by himself, would not operate as an assertion of continued possession.—Thomas v. Frost, 29 Mich. 336.

¶ 14. Passing rafts across the front to premises below, and closing the boom during their passage to prevent their floating into it, would not be an act of possession or tenancy unless accompanied by an assertion or design to that effect.—Thomas v. Frost, 29 Mich. 336.

¶ 15. The payment to a county by a deputy register of deeds, of rent for the use for abstract purposes of the office furnished by the county for the register of deeds during the time he was not deputy, raises no implication that the tenancy continued after his reappointment as such deputy.—Cass County Sup'rs v. Cowgill, 97 Mich. 448.

¶ 16. There can be no implied grant of possession by one who could not have put the tenant out of possession if he had refused to make an arrangement.—Fuller v. Sweet, 30 Mich. 237.

§ 3. ——Occupancy incident to employment.

Termination of tenancy incidental to employment by termination of employment, see post § 37.
Evidence of custom as bearing on right of employee to have dwelling rent free, see Customs ¶ 47.

¶ 17. The relation of landlord and tenant does not exist where an employee, by virtue of his employment and as an incident to his hiring, is permitted to occupy a dwelling house of his employer.—Lane v. Au Sable Elec. Co., 181 Mich. 26.

¶ 18. Where a janitor of an apartment building is supplied with rooms in the same as a part of his salary, he is not a tenant, and has no right to invite another to live with him without his employer's consent.—Tucker v. Burt, 152 Mich. 68.

¶ 19. The occupancy of premises by an employee for the purpose of enabling him the better to perform the service of his employer, there being no letting in terms and no rent reserved, does not create the relation of landlord and tenant between the parties, but the possession will be deemed to be that of the employer. The employee may, however, become a tenant at sufferance by holding over after the termination of his employment. So held where a teacher occupied a part of a school building as a residence by virtue of his contract with the district board to teach the school.—Alpine County School Dist. No. 11 v. Batsche, 106 Mich. 330.

§ 4. ——Occupancy under farming contract.

Lease reserving part of produce of land, see post § 142.
Right to emblements, issues and profits, see post §§ 111-114.
Right to re-enter and seize farm crops for breach of farm lease, see post § 172.
Estoppel by cropping contract to deny lien of crop mortgage, see also Estoppel ¶ 205.

¶ 20. A contract whereby one in possession of a farm agreed to pay to the owner two-thirds of the income of the farm at the time the product thereof should be sold is a lease creating relation of landlord and tenant and not merely contract making the parties tenants in common of the crops of the farm.—Cockerline v. Fisher, 140 Mich. 95.

§ 5. ——Occupancy under contract of purchase.

Actions for use and occupation, see post V, A.
Liability for use and occupation in general, see post § 143.
Rights of vendor and purchaser in general, see Vendor and Purchaser.
Rescission of contract of purchase by vendee's taking lease and occupying premises under such lease, see Vendor and Purchaser.

¶ 21. Defendant took possession of premises by permission, after having made an

oral agreement to purchase the same, which the owner failed to carry into effect. It was held that defendant was not liable for use and occupation while the negotiations were pending.—Dwight v. Cutler, 3 Mich. 566.

¶ 22. A vendee who took possession of premises by permission under an oral contract of sale which failed through fault of the vendor would be liable in an action of use and occupation if he remained in possession after all negotiations had ceased, and after being notified that he must pay rent if he did so.—Dwight v. Cutler, 3 Mich. 566.

¶ 23. Where a house was sold under a contract and the vendee waived the contract right to its completion by a certain date and was allowed to take possession in advance, it was held that the contract had been varied and that the vendee did not hold under its conditions but under the subsequent provisions and was therefore a tenant at will. —Williams v. Hodges, 41 Mich. 695.

¶ 24. One who holds land under a contract of purchase is not liable for rent while the contract remains open, and no notice to quit or pay rent, or of an intention to forfeit, has been given.—Dwight v. Cutler, 3 Mich. 566; Hogsett v. Ellis, 17 Mich. 351.

¶ 25. The relation of landlord and tenant will be held to exist where the evidence shows the purchase of land on a contract, possession by the purchaser, a small payment of money, followed by eviction some five years later, whereupon an arrangement is entered into whereby the purchaser is to pay a certain amount monthly, claimed by the seller to be rental. The conduct of the parties under such circumstances is consistent with the theory that the purchaser had become a tenant, and a new contract of sale was not entered into.—Smith v. Detroit Loan & Building Ass'n, 121 Mich. 104.

¶ 25a. Where an agreement under which certain premises were occupied was either a lease or a contract for purchase, it will be held to have been the latter where the occupant expended $15,000 in putting a mill and machinery thereon, paid the taxes but paid no rent, and stated in the pleadings in another action that the mill was placed there "in pursuance of a valid agreement" and also referred to negotiations for taking title, since such circumstances and statements are inconsistent with occupancy under lease.— Morley v. Quimby, 132 Mich. 140.

¶ 25b. The doctrine that a lessee cannot dispute his landlord's title extends to one who takes possession under a contract of purchase.—Curran v. Banks, 123 Mich. 594.

§ 6. ——Occupancy by grantor after conveyance.

¶ 26. A contract to pay rent is not to be inferred from the mere continued occupancy by a grantor after he has conveyed the premises.—Stevens v. Hulin, 53 Mich. 93.

¶ 27. The right of possession transferred to the grantee by a deed absolute on its face is not defeated by a subsequent contract to reconvey in the future upon certain conditions, which is silent upon the subject of possession; and the grantor, holding over, becomes tenant, either by sufferance or at will, of his grantee.—Bennett v. Robinson, 27 Mich. 26.

¶ 28. A. sold a house to B., reserving the possession and use thereof four months as part of the consideration of the sale, but continued to occupy it twenty days after that time without any special arrangement. Held, that B.'s consent to such occupation was implied, and that A. became a tenant at will.—Hoffman v. Clark, 63 Mich. 175.

§ 7. ——Agreements for lease.

Leases as distinguished from contracts for leases, see post § 11.

¶ 29. While a mere agreement for a lease does not create a tenancy or give the other party a right of possession, yet if the latter has possession for the purpose of putting up a building and is to continue in possession as tenant until his rent pays for the construction, his tenancy begins immediately on the completion of the building.—Billings v. Canney, 57 Mich. 425.

§ 8. ——Contracts for room, board or desk space.

¶ 30. One who rents from a tenant of an office room space therein for a desk, is not technically a tenant; but he is more to be likened to a boarder who has no interest in the real estate.—Swart v. Western Union Tel. Co., 142 Mich. 21.

§ 9. Nature, requisites and validity of leases.

Sufficiency of form and execution, see post § 10.
Leases as distinguished from contracts for leases, see post § 11.
Unrecorded leases, see post § 12.
Change or modification of lease, see post § 13.
Requisites and sufficiency of writing under statute of frauds, see Frauds, Statute of § 101.
Sufficiency under statute of frauds of part performance of agreement for lease, see Frauds, Statute of § 106.
Necessity that leases be in writing under the statute of frauds, see Frauds, Statute of § 67.
Distinction between license and lease, see Licenses to Enter § 4.
Necessity that contract for commissions for lease of real estate be in writing, see Frauds, Statute of § 33.
Reformation of leases to express intent of parties, see Reformation.

Necessity of mutuality in right to support contract, see Contracts § 2.
Completeness of assent to terms of lease, see also Contracts ¶¶ 136, 137.

¶ 31. A lease is a contract for the possession and profits of land and tenements on the one side and a recompense of rent or other income on the other.—Miles v. Shreve, 179 Mich. 671.

¶ 32. A lease is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own and for a valuable consideration, granting thereby to the lessee the possession, use and enjoyment of the portion conveyed during the period stipulated.—Minnis v. Newbro-Gallogly Co., 174 Mich. 685.

¶ 33. An instrument designated as a lease in the body thereof, and in the present tense demising and leasing with full and familiar conditions couched in legal phraseology, the premises therein described for a definite period at a stated rental with the usual covenants of quiet enjoyment, possible surrender, etc., held to constitute a lease.—Miles v. Shreve, 179 Mich. 671.

¶ 34. A lease may be made to take effect in the future, and the estate does not begin with the contract, but with the future period. —Whiting v. Ohlert, 52 Mich. 462.

¶ 35. A verbal agreement to rent premises to a tenant "for a long term of years at a rental to be afterwards agreed upon" is too vague and indefinite to be valid.—Kezeli v. River Rouge Lodge, No. 410, Independent Order of Odd Fellows, 195 Mich. 181.

¶ 36. The fact that a written agreement to make a lease for ninety-nine years does not fix a time for the payment of the annual rental mentioned, does not render the agreement incomplete or uncertain, since the rental is payable at the end of each year. —Bushman v. Faltis, 184 Mich. 172.

¶ 37. That the land at the time the lease is executed is in a third person's possession, does not of itself invalidate an oral lease for less than a year; the lease is good by way of estoppel as against the lessor.—Lewis v. Brandle, 107 Mich. 7.

§ 10. ——Sufficiency of form and execution.

Sufficiency of description of premises covered, see post § 19.
Alteration of lease and effect thereof, see Alteration of Instruments.
Power of corporate vice president to make lease incident to his official charges, see Corporations ¶ 454.

¶ 38. An agreement by a lessee, in a memorandum signed by him at the foot of the lease, constitutes a part of the lease.—Norris v. Showerman, W. 206; Norris v. Showerman, 2 D. 16.

¶ 39. A letter written by the owner of premises to the tenant as follows, "Herewith please find receipt for advance rent on room, No. 686—3rd Avenue, beginning May 1, 1900, rent $25 per month, first six months," answered by the tenant, "I received your letter. All is right. I am loading 2 cars with hay and produce and will be at Detroit as quick as I can" is held to constitute a written lease for the term of 6 months.—Baer v. Minock, 128 Mich. 676.

¶ 40. It seems that usage permits a lease to be executed by exchanging duplicates, each of which is signed only by the other party.—Campau v. Lafferty, 43 Mich. 429.

§ 11. ——Leases as distinguished from contracts for leases.

Agreements for leases as implied tenancies, see ante § 7.

¶ 41. An agreement for a lease and the lease itself are different things.—Tillman v. Fuller, 13 Mich. 113; Whiting v. Ohlert, 52 Mich. 462.

¶ 42. A contract providing for a lease of property, and specifying all the terms thereof, under which the lessee went into possession and estimated the value of merchandise in the premises, which was provided to be sold to the lessee by the contract, constitutes a lease, and not an agreement for a lease, where there was no intention of executing any further papers.—Mailhot v. Turner, 157 Mich. 167.

¶ 43. Any uncertainty in the terms of an agreement to make a lease cannot be corrected by conditions in an unexecuted lease on which the minds of the parties never met.—Bushman v. Faltis, 184 Mich. 172.

§ 12. ——Unrecorded leases.

Necessity for recordation in general, see Notice and Record of Title, II.

¶ 44. Under Comp. Laws 1897, §§ 8988, 8994, making unrecorded leases for more than three years void as against subsequent purchasers in good faith, a plaintiff purchaser of the lot upon which a building stands is not a good faith purchaser within the meaning of the statute where he knows that the building is claimed by defendant under a lease, and that defendant is in possession of it.—Baldwin v. Baldwin, 166 Mich. 157.

§ 13. ——Change or modification of lease.

Change in lease agreement amounting to novation, see Novation § 1, ¶ 6.

¶ 45. Previous oral agreements cannot be allowed to modify the terms of a written lease.—Campau v. National Film Co., 159 Mich. 169.

¶ 46. On a bill for specific performance of an oral agreement for a lease, evidence held

insufficient to sustain a finding that it was orally agreed that if complainant made certain improvements and rented additional buildings the lease would be extended for a certain period.—Charlet v. Teakle, 197 Mich. 426.

¶ 47. A written agreement to make a lease for ninety-nine years for an annual rental which does not designate a time for payment, being payable yearly, is not rendered uncertain by subsequent negotiations of the parties altering the time of payment.—Bushman v. Faltis, 184 Mich. 172.

¶ 48. An owner of land agreed to advance a specified sum, to be used in erecting an hotel on the land, which the party to whom the advances were to be made was to lease for a term of years at a fixed rental, payable quarterly in advance. After the completion of the buildings a lease was executed between the parties, by which the rent was made payable at the end of each quarter. The landlord brought suit on the original agreement to recover rent, and defendants sought to show that the change in the time of payment of rent was agreed upon between plaintiff and the tenant, and the tenant testified in support of said claim. Held, that it is apparent that the witness based his claim of a change in the agreement upon the fact that the lease contained the clause as to payment at the end of each quarter, or else that he depended upon an alleged oral agreement, made prior to the making of the original contract, contradicting said contract; that this testimony cannot be construed as tending to show that a change was agreed upon, particularly when the testimony of the attorney who prepared said original agreement and said lease, that there was no agreement for a change in the time of payment of the rent, and the testimony of plaintiff, that he never authorized any such change, are taken into account.—Stevens v. Pendleton, 105 Mich. 519.

§ 14. Construction and operation of leases.

Construction against perpetuity, see post § 15.
Covenants, conditions and restrictions, see post § 16.
Covenants or conditions for forfeiture, see post § 17.
Implied covenants, see post § 18.
Construction of clause embodying description of premises covered, see post § 19.
Construction of lease and contract for assignment executed at same time, see post ¶ 274.
Construction of lease as to time for payment of rental from method of stipulating instalments payable, see post ¶ 435.
Lease and instrument therewith as single contract, see also Contracts § 150.
Rule of practical or agreed construction by parties, see Contracts §§ 161, 162.

¶ 49. The language of the habendum clause in a lease cannot enlarge the demise in the granting clause.—Lovett v. Bermingham-Seaman-Patrick Co., 192 Mich. 372.

¶ 50. The intent of a written lease must be gathered from an examination thereof as a whole, and such a construction must be put on it, if possible, as will render all its clauses harmonious and consistent; it is against well settled rules to give it a narrow and technical interpretation based on some particular word or clause.—Harlow v. Lake Superior Iron Co., 36 Mich. 105.

¶ 51. A lease of land to a tenant, "to have and to hold, to use and control as he thinks proper, for his benefit during his natural life," is a lease without impeachment for waste.—Stevens v. Rose, 69 Mich. 259.

¶ 51a. Where a lease is unambiguous in its terms what the parties intended by the language employed is a question of law for the court.—Brown v. Schiappacasse, 115 Mich. 47.

§ 15. ——Construction against perpetuity.

Perpetuities in general, see Perpetuities.

¶ 52. A lease will not be construed as creating a perpetuity by covenant for renewal at the option of one of the parties, unless such appears from clear and unequivocal language to have been the intent.—Brush v. Beecher, 110 Mich. 597.

¶ 53. A lease for years does not contravene the statute against perpetuities.—Toms v. Williams, 41 Mich. 552.

¶ 54. A lease to the lessor's son and the son's wife for their lives, with remainder to their son living when the lease was executed, does not restrain absolute power of alienation, as forbidden by How. St. §§ 5530, 5531, since, under the terms of the conveyance, there could be no time when there were not persons in being by whom an absolute fee in possession could be conveyed.—Case v. Green, 78 Mich. 540.

§ 16. ——Covenants, conditions and restrictions.

Covenants and conditions as to use and enjoyment, see post §§ 68-70.
Covenants against subletting, assignment or transfer, see post § 78.
Covenants of landlord to repair, see post §§ 85, 86.
Covenants of tenant to repair, see post §§ 89-91.
Covenants to rebuild, see post § 98.
Covenants as to insurance, see post § 99.
Covenants as to payment of taxes, see post § 100.
Covenants to pay rent, see post §§ 123, 124.
Breach of covenant or condition as ground for termination, see post § 45.
Re-entry for breach of covenant, see post §§ 170-172.
Right of action on covenant to pay rent, see post § 150.

¶ 55. No particular form of words is necessary, in a lease from month to month, to constitute a condition precedent to the vesting of the tenant's estate, but unless the mutual intention that it shall be a condition appears from the language or circumstances, it will be treated only as a covenant.—Hilsendegen v. Scheich, 55 Mich. 468.

¶ 56. A restriction in a lease for a term of years should receive much more favorable consideration than a restriction in a deed.—Hammond v. Hibbler, 168 Mich. 66.

¶ 57. Where the lease of a mill for the purpose of sawing certain logs provides that on completion of the work the premises shall be restored in as good a condition as when received, it is not error, in an action by the lessor for a breach of the contract consisting as alleged in the negligent destruction of the mill by fire, for the court to instruct the jury that "even if the mill were turned over to the plaintiff, yet if, by reason of the carelessness and mismanagement of the defendants, fire had been taken from the mill and put into the saw-dust adjoining, it would constitute a breach of contract; and if the fire remained there without the knowledge of the plaintiff, and afterwards broke out and destroyed the mill, and it is traceable to the carelessness of the defendants, then they are liable"; such charge did not submit negligence as a tort to the jury.—Stevens v. Pantlind, 95 Mich. 145.

§ 17. ——Covenants or conditions for forfeiture.

Penalties and forfeitures in general, see Penalties.

¶ 58. Provisions concerning forfeiture are strictly construed.—Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 59. Covenants in leases creating forfeitures should be construed most strongly against the lessor, and most favorably to the lessee.—Hilsendegen v. Hartz Clothing Co., 165 Mich. 255.

¶ 60. Interpretations which create a forfeiture are not favored, and it is the policy of the law to limit so far as is reasonable the effect of a covenant in a lease by which a forfeiture is created.—Hilsendegen v. Hartz Clothing Co., 165 Mich. 255.

¶ 61. Forfeiture clauses in a lease are not favored by the courts, and their effect will be restricted as far as possible; but when the lease explicitly provides that the landlord may treat it as void upon breach of condition by the tenant, his election to do so dissolves the relation between him and his tenant.—Miller v. Havens, 51 Mich. 482.

§ 18. ——Implied covenants.

¶ 62. A lessor cannot forfeit a lease for the breach of an implied covenant.—DeGrasse v. Verona Min. Co., 185 Mich. 514.

¶ 63. The remedy of a lessor for the breach of an implied covenant is an action for the breach.—DeGrasse v. Verona Min. Co., 185 Mich. 514.

¶ 64. In the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased.—Morton v. Hanes, 162 Mich. 366.

¶ 65. Section 8959, Comp. L. 1897, § 10821, How. St. 2nd Ed., prohibits the creation of implied covenants in leases.—DeGrasse v. Verona Min. Co., 185 Mich. 514.

¶ 66. Under sub. 9 of sec. 50, Comp. L. 1897, a lease is an "interest in real estate" and comes under sec. 8959, Comp. L. 1897, prohibiting implied covenants in conveyances of real estate.—Minnis v. Newbro-Gallogly Co., 174 Mich. 635.

¶ 67. A provision in a lease that should the tenant "fail in any of the foregoing promises"—which were to pay a certain rent, pay the road-tax, keep buildings and fences in good repair, not to sublet, and at the expiration of the term to surrender possession to the lessor,—the lease should become null and void, and the lessor might re-enter, does not apply to an implied covenant that the tenant should properly farm the leased premises.—Hough v. Brown, 104 Mich. 109.

§ 19. Description of premises covered.

Extent of demise and property included, see post § 73.

¶ 68. Where a lease described the leased premises as a certain part of certain premises situated at a certain street number and the corner of a certain other street, and contained a right of purchase of "said premises," held that the premises at such number and corner to which the right of purchase related were sufficiently described.—Nowicki v. Kapelczak, 195 Mich. 678.

¶ 69. Where the description of property in a lease opens with the words, "Beginning at the southwesterly corner of" a named block of a city, and this block has, in fact, a shape diagonal to the points of the compass, the starting point to be chosen is the one that a tracing of the description therefrom will satisfy the lines given, rather than lead to their embracing nothing.—Hamilton v. Ames, 74 Mich. 298.

¶ 70. Where a mining company executed leases of the east half and of the west half respectively of a fractional forty acres of land fronting on a meandered lake, describing said forty acres as a lot according to the government description, the word "half" must be interpreted to mean half in quantity, there being nothing in the context to show that the word was used in other than a literal sense.—Hartford Iron Mining Co. v. Cambria Mining Co., 80 Mich. 491.

§ 20. Creation of new tenancy by attornment.

Attornment of tenant to third person, see post § 65.

Creation of relation of landlord and tenant between landlord and assignee of lease by acceptance of rent, see post ¶¶ 304, 305.

¶ 71. If, after a lease executed by one not in possession of the premises, the occupant attorns to the lessee, a new tenancy is created.—Lewis v. Brandle, 107 Mich. 7.

§ 21. Presumptions and burden of proof arising from occupancy.

Possession of tenant as notice of title of landlord, see Notice and Record of Title § 19.

¶ 72. Where an occupant of land was in possession as tenant merely, it is presumable that he was in as tenant under the party claiming title.—Rayner v. Lee, 20 Mich. 384.

¶ 73. The fact of A.'s occupancy of B.'s land is prima facie evidence that A. is B.'s tenant, which can only be rebutted by showing some fact or circumstance tending to rebut this inference.—Hogsett v. Ellis, 17 Mich. 351.

§ 22. Evidence and proof of relation.

Use of written lease to prove terms of oral one agreed to be on same terms, see Evidence § 208.

Best and secondary evidence of leaseholds and tenancies, see Evidence § 132.

Admissibility of evidence that occupant paid taxes and made expensive improvements on issue of existence of a tenancy, see Estates of Decedents ¶ 618a.

¶ 74. Tender of a sum of money as rent, by a party affirming the existence of an agreement for a lease to a party denying it, has no tendency to prove the agreement.—Gilbert v. Kennedy, 22 Mich. 117.

¶ 75. Testimony that at a school-district meeting a motion was made calling upon plaintiff to give the district a deed of certain land, which motion was not put to a vote, is incompetent to disprove a previous lease of the land to the district or the contents thereof.—Tisman v. St. Clair Township School District, No. 10, 90 Mich. 510.

¶ 76. Where, after a written lease for a term of years had been taken of parts of a house, a parol lease of an additional part was entered into for the rest of such term, the lessee, when summary proceedings are brought against him for the premises orally leased may put the written lease in evidence for the purpose of showing the terms of the parol one.—Brant v. Vincent, 100 Mich. 426.

§ 23. Kinds of tenancies in general.

Terms for years, see post § 24.

Tenancies from year to year, see post §§ 25, 26.

Tenants by sufferance and at will, see post §§ 27-30.

¶ 77. After the making of a lease for a term of years a subsequent agreement of lease at will for less rent is a binding contract and supersedes the former executory agreement.—Andre v. Graebner, 126 Mich. 116.

§ 24. Terms for years.

Term and duration in general, see post II.

Parol leases for more than one year, see Frauds, Statute of, I, A, and §§ 67, 101.

¶ 78. The plaintiff's husband made a lease for twenty years of his farm, to the defendant, and put it in escrow, to be delivered to defendant upon his death. At the time of the husband's death, more than twelve years remained before the expiration of the lease. Held, that the lease was void, as contravening, art. 18, § 12 of the Constitution, which forbids an agricultural lease of over twelve years.—Waldo v. Jacobs, 152 Mich. 425.

¶ 79. A lessor gave a written lease to a tenant for one year. He then wrote a letter to the tenant, giving him the right to the farm for three years, with the provision that if the lessor should sell any part of the farm tne tenant should surrender all claim to the part sold at the end of the year of the sale. Held, the lessee had a written lease to the entire farm for three years, terminable at the end of the current year as to any part sold by the lessor.—Harwood v. Williams, 161 Mich. 368.

¶ 80. Plaintiff agreed to lease premises to defendant for a term of three years, the agreement to be embodied in a written lease. Defendant went into possession, but the lease was never executed. Defendant during the first year got in arrears for rent. Plaintiff served notice to quit, but thereafter agreed to let defendant stay the year out if he would keep up the rent. Held, this agreement and the conduct of the parties gave the defendant no right to stay longer than a year.—Gault v. Gault, 162 Mich. 85.

§ 25. Tenancies from year to year.

Possession under oral agreement, see post § 26.

¶ 81. A tenancy from year to year, terminable at the expiration of one year from service of notice to quit is created by a two-year lease from executors under their statutory power.—Grady v. Warrell, 105 Mich. 310.

¶ 82. Acquiescence by the owner of premises in another's possession under an agreement to support such owner constitutes him a tenant from year to year.—Ganson v. Baldwin, 93 Mich. 217.

§ 26. ——Possession under oral agreement.

¶ 83. A tenant under an oral lease for an indefinite period, but whose rent is to be paid annually, is a tenant from year to year.—Judd v. Fairs, 53 Mich. 518.

¶ 84. A verbal agreement to rent a store for three years at a fixed annual rental payable monthly in advance, followed by occupancy, constitutes a tenancy from year to year or at least for one year, and not merely a tenancy at will.—Steketee v. Pratt, 122 Mich. 80.

¶ 85. One who enters into possession of premises under an oral agreement for a written lease for a year with the privilege of an additional term, and the payment of a yearly rental in monthly instalments, is, when the conditions are accepted and rent is paid, a tenant at will from year to year though the lease is never executed; and such a tenant cannot, without cause, abandon the premises and treat it as a surrender without giving his landlord the statutory notice of a year.—Huntington v. Parkhurst, 87 Mich. 38.

¶ 86. The owner of an undivided half of certain premises accepted a parol proposal from one who claimed as owner of a half-interest in the remainder, to rent the latter's undivided fourth at a specific rental per annum, payable quarterly in advance, without stating any period of time; held, that if this arrangement could be governed by the analogies of an ordinary lease, it was at most only a lease at will in its origin, and became after the lapse of a year no more than a lease from year to year, subject to be ended by the will of either party on notice to the other. A refusal to pay further rent under such an arrangement, and a disclaimer of tenancy, serve the purpose of a notice to terminate the tenancy.—Fuller v. Sweet, 30 Mich. 237.

¶ 87. Where land has been occupied on shares, an oral agreement that the tenant should have it three years more on shares, although within the statute of frauds, will support a holding from year to year until ended by notice.—Coan v. Mole, 39 Mich. 454.

¶ 88. An oral lease was made for two years at so much a month the first year and a higher rate the second. After the first year had expired and the rent therefore had been fully paid, a new arrangement was made and rent was received for a few months. Held, that the tenancy was from year to year, not withstanding the monthly payments.—Schneider v. Lord, 62 Mich. 141.

¶ 89. As the statute of frauds permits leases for a year to be created by parol, and as a parol lease for more than a year, and under which the lessee has been put in possession, is good as a lease from year to year, until terminated by notice, no action, except for the agreed compensation, can be maintained against one in possession under a parol agreement, without notice to quit.—Morrill v. Mackman, 24 Mich. 279.

¶ 90. When the parties agreed orally to make a written lease for twenty-one months, and, after going into possession, the lessees refused to accept a written lease, and no other contract was made, held, an indefinite holding, not a tenancy from year to year.—Huyser v. Chase, 13 Mich. 98.

¶ 91. Where one who has a written lease for five years of a hotel and of parts of the basement thereof, agrees orally with the lessor to fit up a previously unrented room in the basement in consideration of being allowed to use it during the rest of his written lease, and does fit it up and occupy it for nearly two years without objection, he is a tenant from year to year of the room, and his possession until the end of the second year is lawful.—Brant v. Vincent, 100 Mich. 426.

§ 27. Tenants at will and by sufferance.

Tenancies from month to month, see post § 28.

Tenancy at sufferance and tenants holding over, see post § 29.

Possession under void lease, see post § 30.

¶ 92. The common-law definition of a tenancy at will prevails in Michigan in the absence of a statutory definition.—Hilsendegen v. Scheich, 55 Mich. 468.

¶ 93. Tenancy at will rests on the actual or presumed consent of the owner of the premises.—Gault v. Stormont, 51 Mich. 636.

¶ 94. One who is let into the possession and use of premises under an agreement to keep off trespassers is a tenant at will; for rent may be reserved in services as well as in money.—Shaw v. Hill, 79 Mich. 86.

¶ 95. One who enters into premises under a void lease for twenty-one months, providing for a rental of $2,475 for the entire term, payable in monthly instalments of $75 for the first nine months, and of $150 for the last twelve months, does not, at the common law, become a tenant from year to year by holding over and paying rent after the expiration of the first year, but is a mere tenant at will.—McIntosh v. Hodges, 110 Mich. 319.

¶ 96. A tenant whose possession is based upon a parol lease for an indefinite term is, in the absence of a reservation of rent due at stated intervals, or of other circumstances from which an intention to create a tenancy from year to year may fairly be inferred, a tenant at will. So held where a life tenant orally leased the premises for the full term of his life, in consideration of an agreement for his support.—Barrett v. Cox, 112 Mich. 220.

¶ 97. An entry and occupation under a parol agreement creates only a tenancy at will terminable on one month's notice, where the oral agreement left some provisions of the proposed lease open and not agreed on, so that the minds of the parties never met

on all the terms of a complete lease.—Swart v. Western Union Tel. Co., 142 Mich. 21.

¶ 98. Where premises are let at a fixed monthly rent, with the understanding that the tenant shall give up possession whenever the landlord may require them for his own use, the letting creates a tenancy at will.—Woodrow v. Michael, 13 Mich. 187.

¶ 99. Where a lease is invalid by the statute of frauds, the lessee having taken possession is a tenant at will.—Huyser v. Chase, 13 Mich. 98.

¶ 100. A simple permission to occupy creates a tenancy at will, unless there are circumstances which show an intention to create a tenancy from year to year.—Barrett v. Cox, 112 Mich. 220. (The language in Ganson v. Baldwin, 93 Mich. 217, that "the agreement testified to by complainant was good for a year and while acquiesced in by her, the defendant must be considered as holding from year to year," held to be dictum and not in accord with the authorities.)

¶ 101. A tenant who is allowed to hold from year to year so long as no other tenant is found before the expiration of his term is a tenant at will (How. St., § 5774).—Le Tourneau v. Smith, 53 Mich. 473.

¶ 102. Where a house was sold under a contract and the vendee waived the contract right to its completion by a certain date, and was allowed to take possession in advance, it was held that the contract had been varied, and that the vendee did not hold under its conditions, but under the subsequent provisions, and was therefore a tenant at will.—Williams v. Hodges, 41 Mich. 695.

¶ 103. One who has moved upon another's land with his consent is a tenant at will, and entitled to notice before he can be dispossessed by a grantee of the premises.—Appleton v. Buskirk, 67 Mich. 407.

¶ 104. A divorced wife, who with her husband's consent has kept possession of lands to which he holds the legal title, is at least a tenant at will, and entitled to notice before she can be disturbed.—Wilson v. Merrill, 38 Mich. 707.

§ 28. ——Tenancies from month to month.

¶ 105. A tenancy from month to month without other limitation, and determinable at the choice of either party to the lease, is a tenancy at will, and so is a holding over pending negotiations for a renewal of the lease.—Hilsendegen v. Scheich, 55 Mich. 408.

¶ 106. A verbal agreement of lease for five years with the rent payable monthly, when fully performed is a tenancy from month to month rather than from year to year.—Barlum v. Berger, 125 Mich. 504.

¶ 107. A letting for an indefinite period by the month creates a tenancy at will.—Haines v. Beach, 90 Mich. 563.

¶ 108. In a suit to recover rent it was admitted that a fixed rental was agreed upon, payable monthly, but the parties differed as to the term of the lease, the lessor testifying that it was for one year, and the lessee that no definite time was agreed upon. The lessee further testified that he told the lessor that he could not tell how long he would keep the house, as he did not know himself, but, if it suited him, and nothing occurred, he would probably stay in that locality three or four years, as he wished his children to attend a school near by. Held, that the lessee was, upon his own showing, a tenant at will from month to month, paying rent monthly.—Holes v. Wood, 88 Mich. 435.

§ 29. ——Tenancy at sufferance and tenants holding over.

Renewal by holding over, see post § 50.
Holding over as adverse possession, see Adverse Possession § 26.
Evidence of assent to holding over as bearing on conversion by refusal to surrender, see also Conversion ¶ 172.

¶ 109. A grantor who remains in possession without any contract becomes a tenant at sufferance, and as such is not liable for rent.—Stevens v. Hulin, 53 Mich. 93.

¶ 110. One who enters under lawful title and holds over without right and by reason of his landlord's laches after the termination of his interest is a tenant by sufferance.—Kunzie v. Wixom, 39 Mich. 384; Abeel v. Hubbell, 52 Mich. 37.

¶ 111. The rule that one who comes into possession of land lawfully, and holds after the expiration of his right, becomes a tenant at sufferance, does not apply to one whose original right of occupancy is vested in him by operation of law.—Pattinson v. Dryer, 98 Mich. 564.

¶ 112. A person lawfully in possession of land, who holds over without right, becomes a tenant at sufferance, if the owner permits him to remain a sufficient length of time to imply an intentional acquiescence in the occupancy, although his previous holding was not that of a tenant.—Alpine County School Dist. No. 11 v. Batsche, 106 Mich. 330.

¶ 113. A tenant by sufferance who is allowed to continue in possession under a new arrangement becomes a tenant at will.—Ramsdell v. Maxwell, 32 Mich. 285.

¶ 114. A tenant holding over is not a tenant at will unless he holds over by the express or implied consent of his landlord.—Benfey v. Congdon, 40 Mich. 283.

¶ 115. A tenant who wrongfully holds over his lease does not acquire equities as a tenant

at will by any brief delay in proceeding against him, and is not entitled to such notice to quit as a tenant at will could claim.—Benfey v. Congdon, 40 Mich. 283.

¶ 116. A tenancy of office space terminable at will and terminated by notice to operate from the end of a given month is not continued beyond the month by reason of the occupancy of desk room within the office by one to whom the tenant had rented desk room, where no rent beyond the month was taken for such desk room by the tenant and where the renter of the desk room tendered rent to the landlord, who refused it but allowed him to remain, the tenant not being bound to evict him on surrendering the premises.—Swart v. Western Union Tel. Co., 142 Mich. 21.

§ 30. ——Possession under void lease.

¶ 117. When one who has been in possession of land under a valid lease continues under a void lease, he is a tenant at will, liable to be ousted by a three months' notice to quit.—Carney v. Mosher, 97 Mich. 554.

¶ 118. Where a tenant whose term had expired agreed orally with his lessor's grantee to clear during the ensuing spring seven acres of the land in consideration of his being allowed to occupy it two years more, and where, having cleared during the time specified only a part of the seven acres, he was sued in summary proceedings instituted on seven days' notice for such default, it was held, that he could not claim, on the ground that the oral contract was void under the statute of frauds, that he was a tenant at will and entitled to three months' notice; for it does not lie with him to say that he is not bound to pay the consideration agreed upon as a condition to his continued occupancy, even though such payment included compensation for a term which he might be compelled to resort to a court of equity to obtain, as long as the grantee was ready to perform the agreement on his part.—Smelling v. Valley, 103 Mich. 580.

§ 31. Leases as security for other undertakings.

Assignment of lease as security, see post § 84.

¶ 119. Leases to secure the payment of bonds can have no greater force than the bonds.—McKee v. Grand Rapids & R. L. St. R. Co., 41 Mich. 274.

II. THE TERM, TERMINATION, RENEWAL AND HOLDING OVER.

§ 32. Term and duration in general.

Estoppel of lessor to question lessee's right to hold, see post § 33.
Legal restrictions, agricultural leases, see post § 34.
Termination of lease or of right of occupancy, see post §§ 35-37.
Cancellation or agreements for termination, see post § 38.
Necessity, sufficiency and effect of notice to quit, see post §§ 39-44.
Breach of covenant or condition as ground for termination, see post §§ 45-46.
Transfer or termination of landlord's estate as affecting lease, see post § 47.
Injury to or destruction of premises as termination, see post § 48.
Renewal of lease or tenancy, see post §§ 50-52.
Rights and liabilities under tenancy by holding over, see post § 53.
Kinds of tenancies, see ante §§ 23-30.
Terms for years, see ante § 24.
Tenancies from year to year, see ante §§ 25, 26.
Tenants at will or by sufferance, see ante §§ 27-30.

¶ 120. An oral stipulation for rent at a specified annual rate, but without stating for how long, amounts to a lease for a year only.—Benfey v. Congdon, 40 Mich. 283.

¶ 121. Leases by the special guardian of an incompetent person do not continue of their own force beyond the ward's life-time.—Campau v. Shaw, 15 Mich. 226.

¶ 122. D. agreed by written lease dated August 12 to let M. "have possession of the building in which this business is kept till the brick store on the corner is in a proper shape for business, for the sum of fifty dollars, payable on the 1st day of January." Held, that D. could not show that the original understanding was for $100 a year, while the proposition to pay fifty dollars was conditional on the speedy completion of the corner store; also that M. was not liable for more than fifty dollars, and his tenancy continued until that store was "in proper shape for business," however distant that event might be.—D'Arcy v. Martyn, 63 Mich. 602.

¶ 123. A stipulation in a two years' lease that if the lessor sells within the first year the sale shall be subject to the lease for that year, and if afterwards, that it shall be subject to the lease for the second year or to such compromise as the parties may enter into, requires the lessee to give up possession at the end of the first year if sale is made within that period.—Jochen v. Tibbells, 50 Mich. 33.

§ 33. ——Estoppel of lessor to question lessee's right to hold.

Estoppel of tenant to question title or make adverse claim, see post §§ 61-64.
Estoppel to question that life lease passed by warranty deed, see Estoppel ¶ 19.
General principles of estoppel, see Estoppel.

¶ 124. A lessor who has received the full consideration for his lease cannot question the right of his lessee to hold; so held where it was sought to show that a lease to a school district was executed before the legal or-

ganization thereof.—Tisman v. St. Clair Township School District No. 10, 90 Mich. 510.

§ 34. ——Legal restrictions; agricultural leases.

Provision as to term of agricultural leases, see Const. art. XVI, § 10.

¶ 125. A lease of agricultural land for a term of fifty years for mining and removing ore, is not within the prohibition of sec. 12 of art. XVIII of the Constitution of 1850.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 125a. A life-lease of farming land taken back by a grantor at the time of the execution of his deed to the premises is not within the prohibition of the constitution, article XVIII, § 12, which provides that no lease of agricultural land for longer period than twelve years shall be valid; but the deed and lease must be construed as one instrument and the estate conveyed must be taken as subject to the reservation contained in the lease.—Nichols v. Nichols, 94 Mich. 569.

¶ 125b. A lease of farm lands for a period of twenty years from the date of its execution, placed in escrow for delivery upon the death of the lessor, takes effect upon the delivery in accordance with the escrow instructions and where such delivery occurs more than twelve years prior to the expiration of the lease, it is void under article XVIII, § 12, of the constitution.—Waldo v. Jacobs, 152 Mich. 425.

§ 35. Termination of lease or of right of occupancy.

Illegality of purpose causing termination, see post § 36.
Tenancy by occupant incidental to employment, see post § 37.
Necessity and sufficiency of notice to quit to terminate lease, or right of occupancy, see post §§ 39-44.
Necessity for notice on expiration of term, see post § 41.
Ouster or eviction by landlord, see post § 72.
Right of lessor to terminate lease for breach of implied covenant, see ante ¶ 62.
Ouster or eviction by landlord, see post § 72.
Right to quit and terminate lease or occupancy, see post IV, I.

¶ 126. Where the continuance of a lease depends on the result of an arbitration then pending, an adjournment by the arbitrators will not deprive the tenants of their rights or terminate the tenancy.—Abeel v. Hubbell, 52 Mich. 37.

¶ 127. Where a tenant holds a portion of a lot under a lease stipulating that he shall give up the lease if his lessor concludes to build on the premises, his tenancy is not terminated by the landlord's taking possession of another portion of the lot, not leased, for the purpose of building on that; such taking possession is not even notice of the lessor's intention to build on the leased portion.—Shaw v. Hoffman, 25 Mich. 162.

§ 36. ——Illegality of purpose causing termination.

See also ante ¶ 8.
Release from covenant to rebuild where subsequent ordinance makes such rebuilding unlawful by forbidding erection of building of class provided in covenant, see post ¶ 350.
Right of lessor to terminate and declare lease void on conviction of lessee for keeping house for gambling or prostitution, see Comp. L. 1915, § 15472.

¶ 128. Plaintiff rented premises to defendant to be used for saloon purposes, and agreed to furnish sureties for defendant's saloon bond. During the term of the lease a local option law was passed, and adopted in the town. Held, the passage of the law and its adoption put an end to the lease, and plaintiff could not recover for rent.—Hooper v. Mueller, 158 Mich. 595.

¶ 129. A lease of a building "to be occupied in conducting a retail liquor business and saloon" is not terminated by the adoption of local option in the county so as to relieve the lessee from the obligation to pay rent.—Hyatt v. Grand Rapids Brewing Co., 168 Mich. 360.

§ 37. ——Tenancy by occupant incidental to employment.

Implied tenancy from occupancy incident to employment, see ante § 3.

¶ 130. An employee, by going on a strike, ends his right to occupy a dwelling house of his employer, held by virtue of his employment, and as an incident to his contract of hiring.—Lane v. Au Sable Elec. Co., 181 Mich. 26.

¶ 131. In the absence of the use of excessive force or a forcible entry, an employer is not answerable for the eviction of an employee from a house owned by the former and occupied by the employee and his family by virtue of and as an incident to his contract of employment.—Lane v. Au Sable Elec. Co., 181 Mich. 26.

§ 38. Cancellation or agreements for termination.

Rescission of lease for misrepresentations, see Rescission.
Agreements amounting to novations, see Novation.

¶ 132. Where a lessor leaves his brother temporarily in charge of his hotel business, it cannot be presumed from this fact that the brother is authorized to terminate a lease held by a telegraph company taking space in the hotel lobby.—Chittenden v. Western U. Tel. Co., 154 Mich. 1.

§ 39. Necessity, sufficiency and effect of notice to quit.

Notice to quit for nonpayment of rent, see post § 40.
Necessity for notice on expiration of term, see post § 41.
To terminate tenancy at will or at sufferance, see post § 42.
Waiver or loss of right to notice, see post § 43.
Peaceable re-entry after notice to quit, see post § 173.
Necessity for notice to quit to mature cause of action for use and occupation, see post ¶ 540.
Notice to quit as basis for summary proceedings, see Forcible Entry §§ 10, 11.
Advice of agent to disregard notice to quit served by him, responsibility of landlord, see Agency ¶ 132.
Right of owner to ejectment without notice against tenant under void lease, see Ejectment ¶ 59.
Notice to quit as requisite to commencement of summary proceedings to oust tenant and recover possession, see Forcible Entry and Detainer § 10.
Proof of notice by copy, see Evidence § 116.
Sufficiency and effect of notice to terminate tenancy from year to year, see Comp. L. 1915, § 11812.
Notice requisite for termination of estates at will or by sufferance, see Comp. L. 1915, § 11812.

¶ 133. A notice specifying fourteen days is a good notice to quit at the end of three months, if no proceeding is instituted upon it within that time.—Hogsett v. Ellis, 17 Mich. 351.

¶ 134. Notice to quit and demand of possession operate as an assertion of the intention to forfeit as well as a notice to quit. —Hogsett v. Ellis, 17 Mich. 351.

¶ 135. A notice to quit within one month from date unless the tenant wished to remain by paying a stated sum per month in advance, left the tenant no option which he had the privilege of exercising at the time when he was to leave by the terms of the notice, but required immediate determination as to the terms, and such notice was a proper basis for summary proceedings for possession.—Candler v. Mitchell, 119 Mich. 464.

¶ 136. A lease gave the lessee a privilege of renewal unless the lessor, in case she should wish to rebuild, should give the lessee sixty days' notice of such intention, and of the termination of the lease. The lessor served a notice in due time, simply stating that she intended to terminate the lease, but saying nothing about her intention to rebuild. She did, however, state in the notice that she gave it in pursuance of the clause in the lease relating thereto. Held, that, by reference, the notice served should be interpreted as embodying the clause governing notice in the lease, and that it sufficiently stated the lessor's intention to rebuild.—Stender v. Kerreos, 156 Mich. 499. (Ostrander, Grant and Brooke, JJ., dissenting.)

¶ 137. Where the lessee in a written lease of land having three years to run orally sublets part of the leased premises at a specified monthly rental, an oral notice given April 5, requiring the sublessee to quit on or before May 6, the day after the expiration of one year from the subletting is sufficient, even if the sublease was for the unexpired term of the original lease.—Fratcher v. Smith, 104 Mich. 537.

¶ 138. Where a lessee assents to the termination of a year's lease, and continues to hold from day to day under a new arrangement, he is not entitled to a month's notice to quit.—Lane v. Ruhl, 94 Mich. 474.

¶ 139. Where the holding under a lease is from half month to half month, the terms expiring in the middle and at the end of the month, a notice to quit which fixes the expiration of the lease on the first day of a month is not materially erroneous, though it should not extend into the half month.—Detroit Sav. Bank v. Bellamy, 49 Mich. 317.

¶ 140. Under what circumstances a person holding over after foreclosure of a mortgage on the premises will be entitled to notice to quit, quære.—Allen v. Carpenter, 15 Mich. 25.

¶ 141. Where a sufficient notice to quit has been given, and the tenant has promised to leave at a fixed date, a repetition of the demand does not impair the effect of the original notice.—Moody v. Seaman, 46 Mich. 74.

¶ 142. A five years' lease containing a clause by which the lessee agrees to give up the lease if his lessor concludes to build on the premises does not create a tenancy at will strictly, but rather a tenancy upon condition; the lessee is entitled to reasonable notice of the lessor's determination to build, and of his desire that the lease should be given up under said clause; the analogy of statutory notices to terminate a tenancy at will governs in determining what is reasonable notice. Where the lessor actually seized and held possession of the premises, and began building on them, it was held, though a trespass and wholly wrongful, to be a clear notice of the lessor's wish to terminate the tenancy and have possession of the premises, and to have the same effect as notice that a formal notice given at the time would have.—Shaw v. Hoffman, 25 Mich. 162.

¶ 143. A full month's notice to quit by a tenant in possession after the expiration of his term under an arrangement for holding over until he could remove his fixtures, is sufficient.—Landsberg v. Tivoli Brewing Co., 132 Mich. 651.

¶ 144. An oral notice of the termination of the tenancy of one holding over after the expiration of his lease, is sufficient.—Landsberg v. Tivoli Brewing Co., 132 Mich. 651.

§ 40. ——Notice to quit for nonpayment of rent.

Statutory seven days' notice to quit for nonpayment of rent, see Comp. L. 1915, § 11812.

¶ 145. The tenancy, and with it the term under a lease, terminated at the expiration of the time limit given in a notice to quit for nonpayment of the rent.—Wray-Austin Machinery Co. v. Flower, 140 Mich. 452.

§ 41. ——Necessity for notice on expiration of term.

Sufficiency and effect of notice to quit in case of tenancy for years, see Comp. L. 1915, § 11812; Jud. Act, chap. XXX, § 12; Comp. L. 1915, § 13240.

¶ 146. No notice is required to entitle a lessor to the possession of demised premises on the expiration of a lease.—Delano v. Malcolmson-Houghten Co., 183 Mich. 62.

¶ 147. Where under an oral lease for two years the tenant holds over the second year, notice to quit is not necessary at the end of the second year to terminate the tenancy. —Teft v. Hinchman, 76 Mich. 672.

¶ 148. A lessee who enters upon a term for two years after the expiration of a prior lease is not entitled to one year's notice to quit at the expiration of the second term.—Ryan v. Mills, 129 Mich. 170.

§ 42. ——To terminate tenancy at will or at sufferance.

See also ante ¶ 89.

Necessity for notice to quit to mature cause of action for use and occupation, see post ¶ 540.

Waiver of notice to quit, see post ¶¶ 159, 161, 163.

Tenancy dependent upon condition subsequent, see ante ¶ 142.

Notice requisite to person holding over after foreclosure of mortgage on premises, see also ante ¶ 140.

Requisite notice to quit to terminate tenancy at will, see Comp. L. 1915, § 11812; Jud. Act, chap. XXX, § 12; Comp. L. 1915, §13240.

¶ 149. Possession under oral agreement for monthly rental creates a tenancy at will which can only be terminated by a full month's notice to quit at the end of one of the regular monthly periods.—Huyser v. Chase, 13 Mich. 98; Woodrow v. Michael, 13 Mich. 187; Le Tourneau v. Smith, 53 Mich. 473; Haines v. Beach, 90 Mich. 563.

¶ 150. A tenant at will paying rent monthly cannot vacate the premises without a month's notice as provided by How. St. § 5774.—Holmes v. Wood, 88 Mich. 435.

¶ 151. A tenant holding over pending negotiations for a renewal of a lease is entitled to notice to quit even if he holds without paying any rental (How. St. § 5774). —Hilsendegen v. Scheich, 55 Mich. 468.

¶ 152. In proceedings to obtain possession of lands, three months' notice is required whether tenancy is at will or by sufferance, so that it is immaterial, after notice given, whether the tenancy change from one form to the other.—Bennett v. Robinson, 27 Mich. 26.

¶ 153. Notice to quit, where premises are held from month to month, must be given a full month before the day on which a new holding would begin. Where such holding begins on the first of the month a notice given May 6th would not be operative until July 1st.—Hart v. Lindley, 50 Mich. 20.

¶ 154. A vendee, who waived the contract right to completion and was allowed to take possession in advance thereof so as to become a tenant at will, was entitled under (How. St. § 5774) Comp. L. 1871, § 4304, to three months' notice to quit.—Williams v. Hodges, 41 Mich. 695.

¶ 155. A grantor reserved the possession and use of the property sold four months as part of the consideration of the sale but continued to occupy it for twenty days after that time without any special arrangement. Held, that the grantor by so holding over became a tenant at will and as such was entitled to three months' notice to quit in order to have the tenancy terminated.—Hoffman v. Clark, 63 Mich. 175.

§ 43. ——Sufficiency of service.

Sufficiency of oral notice to quit where tenant holds over, see ante ¶ 144.

Effect of repetition of service of notice to quit after giving sufficient notice to quit, see also ante ¶ 141.

¶ 156. If a purchaser by contract has leased the premises and left the country, notice to quit may be served on his lessee. —Hogsett v. Ellis, 17 Mich. 351.

¶ 157. Service of notice dated May 13th, to quit within one month from date, was sufficient in a summary proceeding for possession, where the proof showed that the service was actually received on May 14th. —Candler v. Mitchell, 119 Mich. 464.

¶ 158. A tenancy from month to month growing out of a verbal lease for five years from June 1, 1894 may be terminated by notice given July 10, 1899 and proceedings brought August 10th thereafter (Comp. L. 1897, § 9257).—Barlum v. Berger, 125 Mich. 504.

§ 44. ——Waiver or loss of right to notice.

¶ 159. A tenant at will can waive notice to quit.—Moody v. Seaman, 46 Mich. 74.

¶ 160. A tenant in possession who has attorned to a stranger to the title is not entitled to notice to quit.—Steinhauser v. Kuhn, 50 Mich. 367.

¶ 161. The notice to quit to which a tenant at sufferance is entitled cannot be claimed by one who has asserted any title that directly or impliedly negatives the right to put an end to his interest.—Kunzle v. Wixom, 39 Mich. 384.

¶ 162. A notice to quit waives a previous notice.—D'Arcy v. Martyn, 63 Mich. 602.

¶ 163. A tenant whose claim to a five-year lease is denied by the landlord is not by reason of making such claim estopped to contend that he was not given the notice to quit required to be given to tenants at will under Comp. L. 1897, § 9257, since upon the theory of the landlord he was a tenant at will and entitled to receive such notice to terminate the tenancy.—Simons v. Detroit Twist Drill Co., 136 Mich. 592.

§ 45. Breach of covenant or condition as ground for termination.

Estoppel to claim termination for breach, see post § 46.
Forfeiture for assignment or subletting, see post § 79.
Forfeiture of lease for tenant's breach of covenant to repair, see post § 90.
Breach of covenant or condition as to use and enjoyment of premises, see post § 69.
Acceptance of rental as waiver of breach of conditions, see post § 139.

¶ 164. Neglect to cultivate does not authorize cancelling a lease on the ground that the lessee obtained it by the fraudulent representation that he was a skilful farmer.—Arnold v. Bright, 41 Mich. 207.

§ 46. ——Estoppel to claim termination for breach.

General principles of estoppel, see Estoppel.

¶ 165. In an action by a lessee against the lessor and the purchaser of the premises in question, for damages for ejectment from the premises, the defendants were estopped from claiming breach of a covenant against vacancy and a forfeiture of the lease, where it appeared that the vacancy in question was merely pursuant to the lessee's custom of fastening the doors and windows, leaving his furniture and permitting the summer hotel in question to be unoccupied after the close of the summer season, and where the rent for the vacancy in question had been paid, and where it was apparent that the purchaser who had assumed the risk and expense of getting possession, made the claim of vacancy as a pretext to avoid the consequence of her illegal acts.—Stoddard v. Gallagher, 133 Mich. 374.

§ 47. Transfer or termination of landlord's estate as affecting lease.

Effect of stranger entering under paramount title, see post ¶ 476.

¶ 166. A sale of the premises to a third party does not of itself determine the tenancy at will existing between the vendor and vendee in an executory contract of purchase of land; under How. St. § 5774 notice is required.—Hogsett v. Ellis, 17 Mich. 351.

¶ 167. Premises were leased for one year, the lease to be renewed "if both parties are suited (for a term of eight years, reserving the right to sell part or all)" and after six years' occupation the lessors sold the premises to their nephews and nieces for $3, and a promise to give their sympathy and good-will to the grantors. Held, that the sale terminated the lease under the reservation clause.—Wallace v. Bahlhorn, 68 Mich. 87.

§ 48. Injury to or destruction of premises as termination.

Injury to or destruction of premises as affecting right to rental, see post § 127.

¶ 168. A tenancy at will is determined by the destruction of the building tenanted, and the ouster of the tenant.—O'Brien v. Cavanaugh, 61 Mich. 368.

§ 49. Renewal of lease or tenancy.

By holding over, see post § 50.
By acceptance of rental, see post § 51.
By laches or delay after notice to quit, see post § 52.
Necessity and sufficiency of notice of renewal, see post § 119.
Terms, rights and privileges of new lease, see post § 120.
Options to renew, see post §§ 118-121.
Waiver or estoppel to exercise right of option for renewal, see post § 121.
Renewal by giving notice specified in lease, see post ¶ 414.
Officer taking lease to himself on expiration of corporate leasehold, as trustee for corporation, see Corporations § 171.

¶ 169. After a tenant has refused to pay rent until repairs are made and has been accordingly notified to quit, if the landlord subsequently agrees to make the repairs provided the tenant will stay, the tenant's acceptance of the offer makes a new agreement in lieu of the original lease.—Conkling v. Tuttle, 52 Mich. 630.

§ 50. ——By holding over.

Tenancy by holding over, see ante § 29.

¶ 170. A tenant must be presumed to intend to continue a yearly tenancy where he holds over after expiration of the term,

so that the landlord may elect to treat him either as a trespasser or as a tenant.—Hoffman v. Willits, 194 Mich. 276.

¶ 171. Where a tenant remains in possession after the expiration of a term of three years, under a lease providing for "the term of three years, with privilege of five years," he is not a tenant at will, but his holding is under the lease.—Gensler v. Nicholas, 151 Mich. 529.

¶ 172. Where a lease provides for notice by the lessee of his intention to claim the benefit of an option given him in the lease for an additional term, such notice must be given, or such intention on his part must be otherwise manifested; and a naked holding over is insufficient to warrant a finding that the lease has been extended.—Cooper v. Joy, 105 Mich. 374.

¶ 173. The right of a lessor to treat a lessee who holds over after the expiration of his term as a tenant, and not a trespasser, is not affected by the fact that the lessee had no intention of renewing his lease.—Mason v. Wierengo's Estate, 113 Mich. 151.

¶ 174. The fact that a tenant for a term of years becomes seriously ill shortly before the expiration of his term, and after removal operations have actually begun, does not deprive the landlord of his right to treat the tenant's failure to complete the removal before the lease expires as a renewal of the lease for another year.—Mason v. Wierengo's Estate, 113 Mich. 151.

¶ 175. The lessee for a term of years of two stores sublet one of the stores, and, about a month before the expiration of the lease, notified the subtenant that he did not desire to take a new lease, and, if the subtenant desired to retain possession, he had better see the lessor. The lease expired on Sunday. Prior to that time, the subtenant had commenced packing his goods preparatory to vacating the store. On the following Monday the lessor's agent came to the store, took down a sign "To Rent," which had been placed there by the lessee, and informed the subtenant that the store had been rented to the lessee. The subtenant, relying upon such statement, and thinking that the lessee did not wish immediate possession, delayed the removal of his goods for a short time. The lessee, on learning of such delay by being called upon for the payment of a month's rent, notified the subtenant, who moved out, and the keys were surrendered to the lessor on the ninth day after the termination of the lease. Held, that this was not such a holding over as would constitute a new lease by the lessee for another year.—Campau v. Michell, 103 Mich. 617.

¶ 176. A renter of desk room from a tenant of a room has no relation of tenancy to the landlord, and hence his remaining when the tenant surrenders the room does not prolong the tenancy; it is not the duty of the tenant to evict him in order to terminate the tenancy.—Swart v. Western Union Tel. Co., 142 Mich. 21.

¶ 177. The presumption that a tenant for a year intends to continue his tenancy for a like period because of his holding over has no application where the parties anticipate a holding over by the tenant beyond the term, and provide for it by agreement.—Hoffman v. Willits, 194 Mich. 276.

¶ 178. The presumptions as to a tenant holding over do not apply where a new agreement is made whereby the store building occupied by the tenant is to be moved to a new location before the expiration of the term and occupied at a reduced rental until the erection of a new building on the old location, and the landlord agrees to promptly repair the building, upon its removal.—Kezeli v. River Rouge Lodge, No. 410, Independent Order of Odd Fellows, 195 Mich. 181.

¶ 179. A tenant holding over after the expiration of the term of his written lease does not become a tenant for another year, where shortly before the expiration of the lease the lessor informed him that he could remain at an increased rental to which he replied, by telephone, that he would not stay at the increased rate but would take his fixtures out as soon as he could and the lessor answered "all right," and the premises were vacated in part within one week and in whole within six weeks.—Landsberg v. Tivoli Brewing Co., 132 Mich. 651.

§ 51. ——By acceptance of rental.

¶ 180. The inadvertent acceptance by the servant of a lessor of an advance payment of a quarter's rent after the expiration of a lease which the lessor had refused to renew, does not confer on the lessee any right to further possession.—Delano v. Malcolmson-Houghten Co., 183 Mich. 62.

¶ 181. The acceptance of a payment of money to apply on account of rent does not operate as a waiver of the tenant's default and prevent such default from terminating the lease, where the payment is properly applied to the payment of the first rent accruing leaving balance of rent in default.—Chiera v. McDonald, 121 Mich. 54.

§ 52. ——By laches or delay after notice to quit.

¶ 182. Lapse of time after a notice to quit may create a new tenancy.—D'Arcy v. Martyn, 63 Mich. 602.

§ 53. Rights and liabilities under tenancy by holding over.

¶ 183. The parties to a lease do not, as matter of law, continue subject to its terms,

where the tenant, against the landlord's will, holds over and continues in possession, and seeks to bind the landlord by provisions of the lease which have become inapplicable in consequence of changes in the premises.—Ives v. Williams, 50 Mich. 100.

¶ 184. Where a tenant holds over after the expiration of his year, and the landlord elects to treat him as a tenant, rather than as a trespasser, by demanding rent, the tenant cannot thereafter, in the course of the payment of his rent, create a different tenancy by accompanying such payment with conditions, to wit, that the holding over shall be terminable within the year.—Scott v. Beecher, 91 Mich. 590.

¶ 185. A tenant who holds over after the expiration of his lease under an agreement that his continuance in possession shall be conditional upon his landlord's making necessary repairs, is at liberty to leave without notice if the landlord fails to carry out his agreement.—Fisher v. Nergararian, 112 Mich. 327.

¶ 186. Where the lessee of a stall in a city market continues in possession after notice from the city that the lease is terminated and after the adoption of an ordinance discontinuing the market, he is not a tenant at will, and is liable thereafter only for the reasonable worth of the premises without regard to the rent provided for in the lease. —City of Detroit v. Gleason, 116 Mich. 564.

¶ 187. Plaintiff agreed to lease premises to defendant for a term of three years, the agreement to be embodied in a written lease. Defendant went into possession, but the lease was never executed. During the first and second years plaintiff several times served notice to quit or pay rent, but defendant continued in possession. Plaintiff permitted him to stay for thirty days after the beginning of the third year. Held, the agreement and conduct of the parties did not give defendant a right to stay the entire third year, and the holding over was neither a tenancy at will nor one from year to year.—Gault v. Gault, 162 Mich. 85.

¶ 188. A lease for a term of years stipulated that after the term had elapsed either party might notify the other of the selection of an appraiser to make a valuation of the property, and if the other did not select another appraiser within thirty days he might do it himself, and the appraiser so chosen might make a valuation of the property which the lessor must pay on surrender of the premises and buildings, within thirty days after such surrender, the amount of the valuation to be a lien on the premises until paid. Held, that the lessee is not entitled to remain in possession while the appraisal is in progress.—Bressler v. Darmstaetter, 57 Mich. 311.

III. LANDLORD'S TITLE AND REVERSIONARY RIGHTS.

§ 54. In general.

Rights and powers of landlord, see post § 55.
Conveyance of reversion, see post § 56.
Mortgage of reversionary interest, see post § 57.
Assignment by lessor of rent or of leasehold, see post §§ 58-60.
Estoppel of tenant to question or make adverse claim, see post §§ 61-64.
Attornment by tenant to third person, see post § 65.
Making deed for adjoining land overlapping leased land as inception of adverse holding by tenant, see Adverse Possession ¶ 103.
Tacking possession under tenant to title taken from landlord, see Adverse Possession ¶ 188.
Outstanding lease as incumbrance on lessor's title, see Covenants for Title ¶ 22.
Rights of lessees from life tenants, see Life Estates, III.

¶ 189. Where a tenant rents premises from a firm, paying rent to it as landlord and owner, the question of legal title is unimportant in determining the firm's responsibility to the tenant for what it has assumed to do as lessor in the firm name.—Williams v. Shelden, 61 Mich. 311.

§ 55. Rights and powers of landlord.

See also ante ¶ 16.
Landlord's reservations of rights as to use and enjoyment of premises, see post § 67.
Statutory provisions for protection of reversionary rights, against defaults of or recoveries against tenant for years or for life, see Jud. Act, chap. XXXIII, §§ 1-5, Comp. L. 1915, §§ 13358-13361.

¶ 190. A lessor is estopped as against a lessee from asserting ownership of a smaller interest, but not from asserting title to a larger interest than is expressed in the lease. —Houlihan v. Fogarty, 162 Mich. 492.

¶ 191. A provision in a lease providing that the lessor shall have a right of way across the demised premises, will be construed independently from an option in the lease to purchase, and it will not be necessary to determine the effect of such provision upon the bill for specific performance of the contract.—Wright v. Kaynor, 150 Mich. 7.

§ 56. Conveyance of reversion.

¶ 192. A lessor may convey the reversion with the rent, or, retaining the reversion, may assign the rent; and in either case the grantee or assignee may sue for the rent, irrespective of any formal attornment by the tenant.—Perrin v. Lepper, 34 Mich. 292.

¶ 193. A deed of land under lease conveys the landlord's rights, as against the lessee, without further ceremony.—Hansen v. Prince, 45 Mich. 519.

¶ 194. A conveyance of leased lands with the reversion, remainder, "rents, issues and profits thereof," transfers to the grantee the right to collect and sue for the rent thereafter accruing, and the tenant cannot defeat his action by refusing to attorn to him.—Perrin v. Lepper, 34 Mich. 292.

¶ 195. Past-due rents cannot be recovered by the grantee of a lessor unless his deed confers the right to them.—Pendill v. Eells, 67 Mich. 657.

¶ 196. An assignment by a wife to her husband of "all the use" of certain premises leased to other persons but held in her name, "for his use and benefit," is not specific enough to give him the right to rents under existing leases.—Spicer v. Bonker, 45 Mich. 630.

¶ 197. A vendor of land, which is turned back to him by the vendee after the latter has accepted a lease of the premises from another party is estopped to deny the title of the lessor if the absolute title passed from him upon the first conveyance, unless facts are shown to defeat the apparent estoppel.—Michigan Cent. R. Co. v. Bullard, 120 Mich. 416.

§ 57. Mortgage of reversionary interest.

¶ 198. A deed intended as a mortgage will not sustain a claim by the grantee for the rent of the premises if the grantor remains in possession.—Stevens v. Hulin, 53 Mich. 93.

¶ 199. Though a mortgagee's lessee cannot dispute the right of his landlord to make the lease to him, he can attorn to, and take a lease from, the mortgagee after foreclosure; or he may show that the landlord's title has ceased and has become vested in himself through the mortgage.—Niles v. Ransford, 1 Mich. 338.

¶ 200. The mortgagee cannot recover rent of one who has gone into possession of the land since the mortgage was given, as tenant of the mortgagor, without an attornment by the tenant to him.—Hogsett v. Ellis, 17 Mich. 351.

¶ 201. A notice by a purchaser at a mortgage foreclosure sale to a tenant of the mortgagor, of such purchase, coupled with a claim of title and statement that rent is due and payable to him, the purchaser, and that he desires to hear from the tenant, must be personally served to make it a legal foundation for any proceeding to put the tenant in responsibility.—Williams v. Shelden, 61 Mich. 311.

¶ 202. If there is a deficiency the mortgagees have a right to apply the amount of rent due from them and unpaid in satisfaction of the foreclosure decree, and an assignment by the mortgagor to a third person of his claim for rent cannot prevent this.—Storey v. Dutton, 46 Mich. 539.

¶ 203. The tenant of a mortgagee, put into possession of a part of the mortgaged land under a parol agreement with the mortgagor's grantee, cannot attorn to the latter, and a share of a crop raised by him and delivered as rent to his landlord cannot be seized by the grantee because the mortgagee begins a foreclosure.—Byers v. Byers, 65 Mich. 598.

§ 58. Assignment by lessor of rent or of leasehold.

Attornment to assignee, see post § 59.
Conveyance or assignment to tenant or sublessee, see post § 60.
Effect of assignment of rent on right of mortgagee to collect same, see also ante ¶ 202.
Mutual rights and liabilities under assignments and sublettings by lessee, see post IV, B.
Transfer or termination of landlord's estate as affecting lease, see ante § 47.
Right of grantees or assignees of landlord to rent, see post § 136.
Sale by lessor to third person who exacts additional rent as conversion of tenant's fixtures, see Conversion § 3, ¶ 11.

¶ 204. An assignment of a lease does not discharge the lessees' obligation to the lessor where no new leasing is made, where there is no understanding that the lessees shall be released, and where no acts are done whereby an intention to release can be inferred.—Wineman v. Phillips, 93 Mich. 223.

¶ 205. A lessor conveyed his interest in the leased premises, and gave an order on the lessee for the payment to the grantee of all rents and moneys in his hands due the lessor. At the time of making the lease it was agreed that the lessee should pay the lessor a certain sum of money, and should pay certain of his debts, and that the payments so made should apply on the rent account. Held, that the grantee received the deed and order subject to this agreement, whether aware of its existence or not, and that payments made thereunder by the lessee were properly chargeable against the rent account.—Hovey v. Walker, 90 Mich. 527.

¶ 206. Rents of mortgaged property may be assigned to the mortgagee to be applied upon the mortgage.—Kelly v. Bowerman, 113 Mich. 446.

§ 59. ——Attornment to assignee.

Attornment by tenant to third person, see post § 65.
Attornment to mortgagee of tenant of mortgagor, see also ante ¶ 200.
Refusal of tenant to allow landlord's vendee to remove crops as a conversion, see Conversion ¶ 18.

¶ 207. No formal attornment is necessary where the lessor assigns the lease; the lessee is then under legal obligation to pay the

rent to the assignee.—Kelly v. Bowerman, 113 Mich. 446.

§ 60. ——Conveyance or assignment to tenant or sublessee.

¶ 208. Even though the lessee of a sublessee by the purchase of the original lease becomes the sublessee's landlord he is not in position to declare a forfeiture of the sublessee's lease for nonpayment of rent without first tendering possession on payment, where he is himself in possession and has been refusing possession on other grounds to the lessee.—Murphy v. Sayles, 201 Mich. 78.

§ 61. Estoppel of tenant to question title or make adverse claim.

See also post ¶ 310.
Acquiring or buying in adverse title or tax title, see post § 62.
Showing adverse title in third person, see post § 63.
Right to dispute title upon surrender of possession, see post § 64.
Estoppel of one taking possession under contract of purchase, see also ante ¶ 25b.
Obligation to pay rent where claiming adverse title, see also post ¶ 440.
Law of adverse possession in general, see Adverse Possession.
General law of estoppel, see Estoppel.
Presumption of tenancy, see also Forcible Entry ¶ 146.
Incapacity of lessee to hold adversely to lessor, see Adverse Possession § 6.
Taking lease as breaking adverse possession, see Adverse Possession § 36.

¶ 209. A tenant is estopped from disputing his landlord's title.—Byrne v. Beeson, 1 D. 179; Falkner v. Beers, 2 D. 117; Lee v. Payne, 4 Mich. 106; Blanchard v. Tyler, 12 Mich. 339; Hogsett v. Ellis, 17 Mich. 351; Ryerson v. Eldred, 18 Mich. 12; Fuller v. Sweet, 30 Mich. 237; Bertram v. Cook, 32 Mich. 518; Nims v. Sherman, 43 Mich. 45; Campau v. Lafferty, 43 Mich. 429; Bertram v. Cook, 44 Mich. 396; Jochen v. Tibbells, 50 Mich. 33; Whitford v. Crooks, 50 Mich. 40; Henderson v. Miller, 53 Mich. 590; Morse v. Byam, 55 Mich. 594.

¶ 210. A tenant who has not been disturbed in his use of the demised premises cannot question his landlord's-right to make the lease.—Cunning v. Tittabawassee Boom Co., 88 Mich. 237.

¶ 211. Where one abandons his right to occupy under contract, and continues to occupy, his possession is that of a tenant estopped to deny his landlord's title.—Henderson v. Miller, 53 Mich. 590.

¶ 212. In the absence of indenture, estoppel against a tenant from asserting a title adverse to his landlord arises only from possession given, whereby an advantage is derived by the tenant from the landlord's act.—Fuller v. Sweet, 30 Mich. 237.

¶ 213. Where the lessor dies during the term of a lease, and the lessee's assignee before the expiration of the term takes a new lease from the lessor's executors, the tenant thereby precludes himself from claiming, after the old lease has expired, that he holds over under it, and his rights depend upon his tenure under the executor's lease.—Grady v. Warrell, 105 Mich. 310.

¶ 214. A tenant who obtained possession under an agreement with a person in possession by the consent of the owner of the premises cannot turn his holding into one of an adverse character.—Butler v. Bertrand, 97 Mich. 59.

¶ 215. A tenant at will cannot surrender his possession to strangers so as to give them any greater rights than he possesses, nor do anything to impair his landlord's right to the possession of the premises.—Shaw v. Hill, 79 Mich. 86.

¶ 216. A lessee, who has not been disturbed in the enjoyment of the rights granted under his lease, cannot, in an action by the lessor to recover the rent reserved, question the right of the lessor to make the grant.—Cunning v. Tittabawassee Boom Co., 88 Mich. 237.

¶ 217. Where a defendant in ejectment obtained possession from the executor of an estate, he is estopped, as against the estate or persons claiming thereunder, from denying their possessory right.—Whitford v. Crooks, 50 Mich. 40.

¶ 218. Where a trespasser, in whom title by adverse possession has not been perfected, accepts a lease and agrees to give up possession when it expires, he is estopped from repudiating his recognition of his landlord's title and from claiming adversely to such title.—Campau v. Lafferty, 43 Mich. 429.

¶ 219. A defendant in ejectment who has obtained possession by collusion with plaintiff's tenant is estopped for purposes of recovering possession from disputing the plaintiff's title; but the estoppel is not equivalent to an admission of his title in fee.—Bertram v. Cook, 44 Mich. 396.

¶ 220. An adverse use or holding by the party sought to be charged as tenant is incompatible with the relationship of landlord and tenant.—Ward v. Warner, 8 Mich. 508; Hogsett v. Ellis, 17 Mich. 351; Wilmarth v. Palmer, 34 Mich. 347.

¶ 221. One who goes into possession, admitting the title of the owner, cannot, after remaining quietly in possession for a long period, render his holding adverse by a mere silent determination of his own mind, so as to avoid a liability for the use of the premises.—Hogsett v. Ellis, 17 Mich. 351.

¶ 222. A tenant who has accepted his lease from several lessors jointly cannot inquire into their individual interests so long as he remains in possession undisturbed.—Hecht v. Ferris, 45 Mich. 376.

¶ 223. In ejectment against a tenant or in proceedings to recover possession from him, he cannot deny the landlord's possessory right, nor can those claiming under him. Defendants cannot, therefore, put in evidence deeds to themselves. But if plaintiff claims the premises in fee, the tenant is not estopped from denying that he has no greater right than that of possession.—Jochen v. Tibbells, 50 Mich. 33.

¶ 224. A lease made between the defendant and the complainant, pending litigation to set aside a deed from the complainant to the defendant, by which the complainant is permitted to remain in possession for the time being, does not estop the complainant from denying the defendant's title.—Sartwell v. Young, 126 Mich. 304.

¶ 225. One in possession of land who accepts a lease thereof, not under seal, may show that the lease was made under a mistake of fact and without consideration, because the title to the premises was in fact in himself.—Michigan Cent. R. Co. v. Bullard, 120 Mich. 416.

¶ 226. Complainant leased to defendant certain premises and included in the lease the frame building in question. Complainant brings a bill to restrain defendant from removing the building from the premises. Defendant answered, denying complainant's title to the building and introducing evidence to show that defendant secured the same from another party. Complainant introduced no further proof of ownership. Held, defendant was not estopped to deny complainant's title from the fact that the building was mentioned in the lease, and complainant's bill was properly dismissed for lack of evidence of ownership of the building.—Hoffman v. Nelson, 158 Mich. 573.

¶ 227. Where the lessee of premises from a sublessee enters into possession by permission solely from the lessee the relation of landlord and tenant is created, precluding the tenant from disputing the landlord's title without first surrendering possession of the premises.—Murphy v. Sayles, 201 Mich. 78.

§ 62. ——Acquiring or buying in adverse title or tax title.

Law of tax sales in general, see Taxes, XI.

¶ 228. A tenant may dispute his landlord's title by showing that it has been extinguished subsequently to the date of the lease.—Sherman v. Fisher, 138 Mich. 391.

¶ 229. A tenant cannot, by buying in a title adverse to his landlord's, relieve himself of the obligations of his tenancy; and if he does so and repudiates the tenancy the landlord can dispossess him.—Morse v. Byam, 55 Mich. 594.

¶ 230. A lessee of a mortgagor is not estopped in an action of ejectment brought against him by the mortgagor from showing, to protect his possession, that he has become assignee of the mortgagee.—Niles v. Ransford, 1 Mich. 338.

¶ 231. One who holds under a lease cannot buy in an outstanding title, or do anything inconsistent with the relation of tenant to landlord, without first yielding possession to the latter.—Bertram v. Cook, 32 Mich. 518.

¶ 231a. A tenant cannot buy tax-titles and set them up against his landlord's title, especially if they were upon improvements added by the tenant.—Williams v. Towl, 65 Mich. 204.

¶ 231b. A tenant who has covenanted to pay taxes is estopped from acquiring a tax-title to cut off his landlord's title.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

§ 63. ——Showing adverse title in third person.

¶ 232. A tenant holding over after expiration of his term cannot set up title to the premises in a third person in defense of an action by his landlord to recover the possession.—Falkner v. Beers, 2 D. 117.

¶ 233. One who has rented a dock under an express contract, and has not been disturbed in his possession, cannot, when sued for rent, question the owner's right to recover, by showing that part of the dock is in a city street.—Cunning v. Tittabawassee Boom Co., 88 Mich. 237.

¶ 234. Where a lease is made without any stipulation as to the taxes, the tenant may show that the title of the landlord has become extinguished by sale for taxes so as to defeat an action for rent.—Sherman v. Spalding, 126 Mich. 561.

¶ 235. A house is an entirety so long as it is occupied as such by a tenant, and the possession, by an adverse party, of a single room cannot be held a possession of the building to the exclusion of the tenant.—Soule v. Hough, 45 Mich. 418.

§ 64. ——Right to dispute title upon surrender of possession.

Effect where tenants collude with purchaser of tax-title by surrender and return to possession, see also post ¶ 245.

¶ 236. A tenant in fact cannot dispute the title under which he obtained possession, even though he has since acquired a better title; but when he has surrendered the possession obtained by tenancy he may then try titles. These principles do not apply to cases where the party in possession did not enter under the other and has never made himself the other's tenant in fact.—Nims v. Sherman, 43 Mich. 45.

237. A tenant is estopped from disputing his landlord's title so long only as the lease continues or he holds over. After he surrenders possession he is as free to set up an independent claim to the property as any other person; and any one who comes into possession by the tenant's consent is no further estopped than he is.—Bertram v. Cook, 44 Mich. 396.

¶ 238. One who is in possession of land as tenant of another cannot buy in an adverse title which existed at the time he received his lease, and make such purchase the basis of a suit in equity to quiet his title as against his landlord. The possession acquired by means of the lease must be surrendered before the tenant is in position to dispute the title under which he entered.—Ryerson v. Eldred, 18 Mich. 12.

¶ 239. A son, being one of a family in the occupancy of a farm, to the fee of an undivided part of which he is equitably entitled by inheritance, who takes a lease of the farm from his mother, who had acquired the legal title—the family still living together on it—will not, after the expiration of the time and the surrender of the possession, be estopped by such lease to set up his claim to his part of the farm.—Campbell v. Campbell, 21 Mich. 438.

¶ 240. Where, on the execution of a writ of possession, a defendant in the ejectment suit takes a lease from the plaintiff in order to avoid being put off the land, the act will not permanently estop him from contesting plaintiff's title in another action of ejectment brought after the expiration of the lease and notice to quit.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 241. The fact that defendant's predecessors in title while in possession of land, executed an unsealed instrument to plaintiff, acknowledging themselves to be his tenants, does not estop defendant from setting up title to the land by adverse possession.—Lake Shore & M. S. Ry. Co. v. Johnson, 157 Mich. 115.

§ 65. Attornment by tenant to third person.

Creation of new tenancy by attornment, see ante § 20.

Attornment to assignee of lessor, see ante § 59.

Necessity for notice to quit to tenant who has attorned to stranger, see ante ¶ 160.

Public policy as to agreement to accept stranger as landlord, see also Contracts § 70.

¶ 242. A tenant cannot, by his own act merely, change the tenure, so as to enable himself to hold against his landlord. He cannot, during the continuance of the lease or tenancy, make a valid attornment to a third person without his landlord's consent.—Byrne v. Beeson, 1 D. 179; Falkner v. Beers, 2 D. 117; Lee v. Payne, 4 Mich. 106; Blanchard v. Tyler, 12 Mich. 339; Fuller v. Sweet, 30 Mich. 237; Bertram v. Cook, 32 Mich. 518; Hoffman v. Clark, 63 Mich. 175.

¶ 243. Beyond its application to prevent a tenant from denying his landlord's title the doctrine of attornment serves but little, if any, useful purpose here; and it is inconsistent with our laws, customs and institutions.—Perrin v. Lepper, 34 Mich. 292.

¶ 244. A tenant cannot dispute his landlord's right to recover demised premises on the expiration of a lease, by showing an attornment to a third person who held a tax-title at the creation of the tenancy.—Balch v. Radford, 182 Mich. 292.

¶ 245. Where the purchaser of a tax deed colluded with the tenants of the owner of the land, asked them to leave, and then return to possession as his tenants, he is estopped to deny the possessory right of the owner.—Williams v. Fox, 152 Mich. 215.

¶ 246. An attornment by a tenant to a third party, who has recovered the premises from him by an action of ejectment and writ of possession, is not voluntary in any such sense as to make it a wrong against the tenant's original landlord.—Foss v. Van Driele, 47 Mich. 201.

¶ 247. A contract by which a tenant is induced to desert his landlord is corrupt and void, and no action can be maintained upon it. If he accepts a lease from a third person, either he or his landlord may defend his possession against proceedings by such third person, by showing the prior existence of the tenancy.—Byrne v. Beeson, 1 D. 179.

¶ 247a. A contract by which a tenant agrees to accept another as landlord is contrary to public policy; and constitutes no obstacle to pleading the original tenancy against an action by the other party for possession.—Byrne v. Beeson, 1 D. 179, cited in Fuller v. Sweet, 30 Mich. 237, dictum on page 241 to the same point. [Note. In both these cases the real point was that the tenant could not attorn to a third person and thus defeat the paramount title of his landlord, and what is said about public policy seems to be obitor.—Editor.]

IV. MUTUAL RIGHTS AND LIABILITIES.

A. USE AND ENJOYMENT OF PREMISES; PROPERTY INCLUDED.

§ 66. Rights of use and enjoyment in general.

Landlord's reservation of rights, see post § 67.
Covenants and conditions as to use and enjoyment, see post §§ 68-70.
Invasion or interference with tenant's possessory rights, see post § 71.
Ouster or eviction by landlord, see post § 72.
Extent of demise and property included, see post § 73.
Right of enjoyment as incident of tenancy, see ante ¶ 2.
Action for fraud or concealment of matters affecting enjoyment of premises demised in procuring tenant, see post § 164.
Rights and liabilities toward third persons, see post VII.
Use of property as incident to contract, see Contracts, VI, F; and see also Licenses to Enter.
Rights of married woman under joint lease running to her and her husband, see Husband and Wife § 127.
Evidence of right as bearing on justification for assault in defense of claim, see Assault § 28.
Liability for waste, see Waste.
Assaults in defense of rightful possession of premises, see Assault § 18.
Rights of lessee of lots of summer resort association as member thereof, see Associations § 9.
Harvesting crop sowed without right as a conversion of it, see Conversion ¶ 27.
Forbearance of right to take possession as consideration for tenant's promise, see Contracts ¶ 479.
Right of lessee for years to work opened mines, see Mines ¶ 3.

¶ 248. The lease of a building, or of one floor or story thereof, conveys to the lessee the absolute dominion over the premises leased, including the outer as well as the inner walls; and such lessee obtains the right, in the absence of restrictions, to use such premises, including the walls, for all purposes not inconsistent with the lease.—Forbes v. Gorman, 159 Mich. 291.

¶ 249. A tenant leased the first floor of a building for mercantile purposes with a privilege of putting an electric sign on the roof. Held, this privilege gave him only a right to put up a sign connected with his own business, and the lessee's assignee had no right to rent the roof space to an advertising firm to put up a whisky sign.—Forbes v. Gorman, 159 Mich. 291.

§ 67. ——Landlord's reservations of rights.

¶ 250. A tenancy does not necessarily imply a right to complete and exclusive possession; it may be created with implied or express reservation of a right to possession on the landlord's part for all purposes not inconsistent with the privileges granted to the tenant.—Morrill v. Mackman, 24 Mich. 279.

¶ 251. A lease of an equal undivided half of specified premises for all the purposes of mining, including the erection of necessary buildings, also provided that the lessor should not dispose of the interest leased without giving the lessee the refusal of it, and that until sold the lessor should retain, for agricultural purposes, the use of so much of the land as was not needed for mining. Held, that this did not give an ordinary leasehold interest, but a specific mining privilege; the lessee's right, until he took actual possession, was a mere incorporeal right, floating and indefinite, and not enforceable by an action of ejectment.—Harlow v. Lake Superior Iron Co., 36 Mich. 105.

¶ 252. A lease of land for a term, subject to the lessor's right to explore the same for minerals and to mine them, gives the lessee a valuable use of the land entitling him to make any use he chooses subject to the reserved right; and the fact that lessor objects is not material.—Ray v. Johnson, 98 Mich. 34.

§ 68. Covenants and conditions as to use and enjoyment.

Breach of covenants and conditions, see post § 69.
Waiver and acquiescence in breach, see post § 70.
Implied covenant as to premises being fit for purpose for which leased, see ante ¶ 64.
Contract of lessor to indemnify lessee against loss or damage, see Indemnity § 4.

¶ 253. Covenants affecting the mode of occupation and enjoyment of leased premises run with the land, and the assignee though not named may be restrained by injunction from violating them.—Wertheimer v. Wayne Circuit Judge, 83 Mich. 56.

§ 69. ——Breach of covenants and conditions.

Breach of covenant or condition as ground for termination, see ante § 45.

¶ 254. The breach of a condition that the tenant shall not cease to use the house as a dwelling, he having moved out and left his goods stored there, is a reasonable ground of forfeiture.—Marsh v. Bristol, 65 Mich. 378.

¶ 255. Accidental injuries to the premises from natural causes, which interfere with the lessee's enjoyment of the premises, are not considered a breach of the lessor's covenant for quiet enjoyment.—Bowen v. Clemens, 161 Mich. 493.

¶ 256. Where the lease restricted the use of the building to the sale of teas, coffee and

similar goods, and the lessors consented to its use for the sale of small musical instruments and sheet music by a sublessee who sublet it to be used for a "misfit" clothing house, such use may be enjoined at the suit of the original lessors.—Wertheimer v. Wayne Circuit Judge, 83 Mich. 56.

¶ 257. A lease of wine and billiard rooms provided for re-entry in case of nonperformance of any of the covenants at any of the times mentioned for the performance thereof. There were conditions against incumbering furniture or violating the law and ordinances relating to the business. Held, that as these conditions were continuous in their nature, any breach of them would be a breach of the time mentioned for their performance; and would be a cause of forfeiture.—Alexander v. Hodges, 41 Mich. 691.

¶ 258. The condition of a bond securing the right to the occupancy of a certain room in a building is broken where, by the obligor's procurement, the only mode of access to the room is denied to the obligee, in consequence whereof the occupation is abandoned.—Grove v. Youell, 110 Mich. 285.

¶ 259. Where the lessee of a hotel sublets the cigar and newsroom, with the appurtenances thereto, including the right of entrance to and from the hotel rooms, for the business of cigar-selling and news-dealing, the lease containing a grant of the entire cigar privilege of the hotel, and a covenant for the peaceable and quiet enjoyment of the leased premises, there is an express covenant to maintain the hotel, and the closing thereof is such an interference with plaintiff's use of the premises as amounts to an eviction.—Coulter v. Norton, 100 Mich. 389.

§ 70. ——Waiver and acquiescence in breach.

¶ 260. Lessor's consent to occupancy of leased premises by sublessee for a specified business is a constructive waiver of condition not to sublet or to carry on any other business than that specified in the lease; but it applies only to such sublessee and business.—Wertheimer v. Wayne Circuit Judge, 83 Mich. 56.

¶ 261. The use of leased premises for purposes other than those named in the lease will not work a forfeiture thereof where such use is acquiesced in by the lessor with full knowledge thereof.—Poli v. Jacobs, 177 Mich. 238.

§ 71. Invasion or interference with tenant's possessory rights.

Measure of damages for eviction or disturbance of enjoyment, see Damages §§ 73, 74, 100.

Liability for treble damages for forcible entry and eviction, see Damages § 208.

¶ 262. Putting a lock on the door of a building in the possession of a tenant does not place the landlord in possession thereof, it constituting merely an invasion of the tenant's possessory rights.—Hayward v. Hope Township School Dist. No. 9, 139 Mich. 539.

¶ 263. In order to eject plaintiff tenant from a room after the lease had expired, defendant at 11:30 p. m. bored a hole through the partition and injected formaldehyde. He admitted that he knew the plaintiff might be sleeping in there, and that he took the step for the purpose of fumigating the room with the idea that the plaintiff might get out if he wanted to. Held, defendant was liable for damages resulting from his wrongful act.—Saros v. Avenue Theatre Co., 172 Mich. 238.

§ 72. Ouster or eviction by landlord.

Rerenting by lessor after surrender of key as eviction, see post ¶ 598.

Instructions as to what constitutes eviction, see post ¶ 644.

Action for damages for eviction or wrongful dispossession, see post § 163.

Right to quit or terminate in general, see post IV, I.

Measure of damages for eviction or disturbance of enjoyment, see Damages §§ 73, 74, 100.

Loss of profits and expenses as elements of damages for eviction, see Damages § 42.

Measure of recovery by tenant as limited by his limited interest, see Damages, IV.

Liability for treble damages for forcible entry and eviction, see Damages § 208.

Measure of recovery on agreement to indemnify tenant against costs of appeal from judgment of eviction, see Indemnity § 10.

Quarrelsomeness and reputation of evictor as evidence of force, see Evidence ¶ 1942.

¶ 264. An act of a landlord depriving a tenant of the beneficial enjoyment of demised premises amounts to an eviction even though there is not any actual physical expulsion.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

¶ 265. A lessor conveyed by warranty deed to a bona fide purchaser without notice premises held under an unrecorded lease but not at the time in the tenant's actual possession, and then notified the tenant that the land had been sold and the lease terminated, forbidding him to enter the premises. The purchaser also threatened the tenant with prosecution if he entered. Held that, when sued for damages, the lessor was estopped from relying upon the absence of a technical ouster.—Cornelissens v. Driscoll, 89 Mich. 34.

¶ 266. A tenant is evicted from a room in a building, so as to constitute a breach of a bond securing the right to its occupancy,

where the only mode of access to the room is denied to him by the procurement of the obligor, in consequence of which the occupation is abandoned.—Grove v. Youell, 110 Mich. 285.

§ 73. Extent of demise and property included.

Disability to enlarge demise by language of habendum clause, see ante ¶ 49.

Inaction making estoppel to claim accounting from tenant for lease of sign spaces beyond right, see also Estoppel ¶ 158.

Description in lease of premises covered, see ante § 19.

Right of lessee of building to use roof space for advertising sign, see also ante ¶ 249.

Right of lessee of building or of floor of building to use outer walls, see also ante ¶ 248.

¶ 267. Where the exclusive possession of land occupied by leased buildings is necessary to the enjoyment of the demise, the land passes as an incident to the demise.—Chesebrough v. Pingree, 72 Mich. 438.

¶ 268. Where a building covers the whole of the lot upon which it stands, a lease of such building "together with all and singular the benefits, liberties and privileges to the same premises belonging" covers the entire premises and not merely the building.—Chesebrough v. Pingree, 72 Mich. 438.

¶ 269. Where, after describing leased premises as "one-half of cellar in front of stairway leading down from G. Murray's saloon in store 110 Woodward avenue, corner of Congress street," the lease says: "I consent to his (lessee's) occupying the side of said store on Congress street, from rear of show window at corner of Congress street to entrance to cellar, as a fruit and nut stand, on the sidewalk next to the building," the cellar alone is rented, and a mere license is given to occupy the sidewalk space; and to such license the covenant for quiet possession does not apply.—Brown v. Schiappacasse, 115 Mich. 47.

¶ 270. A lease described property as the "dwelling house, 471, located on the west side of Lincoln Ave." The lot had a frontage of thirty feet, and the back yard was thirty by forty feet. The barn, located on the rear of the lot and on the rear of the adjoining lot occupied by the landlord, had no opening ino the tenant's back yard. Held, the lease carried with it all of the lot let to the tenant except that portion occupied by the barn.—Kuschinsky v. Flanigan, 170 Mich. 245.

¶ 271. Plaintiff's barn stood on the back of two adjoining lots, one of which he leased to defendant together with the house thereon and the ground floor of a barn standing on the rear of both lots. In remodeling the second story, plaintiff constructed an outside stairway and permitted the tenants of said second story to pass over defendant's lot to and from the street, and in the course of the remodeling filled the back yard of defendant's lot with building materials and rubbish. Held, plaintiff invaded defendant's right under the lease by depriving him of the beneficial use of the adjoining portion of the premises.—Kuschinsky v. Flanigan, 170 Mich. 245.

B. ASSIGNMENT AND SUBLETTING.

§ 74. Assignments in general.

Executory contracts to assign, see post § 75.

Subletting as distinguished from assignment, see post § 76.

Necessity for lessor's consent, see post § 77.

Covenants against assignment, subletting or transfer, see post § 78.

Forfeiture for assignment or subletting, see post § 79.

Waiver of breach of covenant, see post §§ 80, 81.

Rights and liabilities of assignees, see post § 82.

Subtenancy and rights and liabilities incident thereto, see post § 83.

Assignment of lease as security, see post § 84.

Rights and liabilities towards third persons, see post VII.

Conveyance or assignment to tenant or sublessee, see ante § 60.

Assignments by lessor of rent or of leasehold, see ante §§ 58-60.

Nonassignability of contract where consideration running to lessor involves personal skill or services, see Assignments § 7.

Assignment of lease as change of possession of chattels covered by it, see Chattel Mortgages ¶ 172.

Contingent nature of rents to accrue as affecting assignability, see also Assignments ¶ 18.

Assignment of rents due or to accrue, see post IV, G.

Agreements amounting to novations, see Novation.

¶ 272. One of two lessors, even if the other be his wife, cannot assign the lease.—Hecht v. Ferris, 45 Mich. 376.

¶ 273. A., by deed, leased premises to B., who afterwards assigned the lease to C. A. assented to the assignment, and agreed, by parol, to accept C. as his tenant, and to look to him for the rent. Held, that there had been a sufficient surrender of the lease by operation of law to satisfy the statute—Code of 1833, p. 342, § 9 (see How. St., § 6179)—which declared that "no lease, etc., shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed," etc., "or by operation of law"; and that A. could not afterwards maintain covenant against B. for the rent.—Logan v. Anderson, 2 D. 101.

¶ 274. A sublease and a contract for assignment of the lease which are executed at the same time must be construed together. —Great Lakes Realty & Building Co. v. Turner, 190 Mich. 582.

¶ 275. Rights under a contract to repair, held by a lessee under an agreement separate from the lease, do not pass under an assignment of the lease, but may be transferred by separate agreement; and an instruction that the lease and the contract were parts of one transaction, and must be construed together, and that all rights in both passed under the assignment of the lease, is erroneous.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

§ 75. Executory contracts to assign.

¶ 276. An executory contract to assign a lease for a term of years does not constitute an assignment although the prospective assignee is let into possession.—Great Lakes Realty & Building Co. v. Turner, 190 Mich. 582.

¶ 277. Where a lease for a term of years provided that the lease might be assigned only when a specified building was erected upon the premises and the lessee sublet the premises and at the same time contracted to assign the lease upon the erection of such building by the sublessee, there was no assignment of the lease but simply an executory contract to assign when the conditions were such that the lessee had a right to assign.—Great Lakes Realty & Building Co. v. Turner, 190 Mich. 582.

§ 76. Subletting as distinguished from assignment.

¶ 278. A sublease for part of a term does not constitute an assignment of the lease for the entire term.—Great Lakes Realty & Building Co. v. Turner, 190 Mich. 582.

¶ 279. Where the lessee assigns his interest in the whole or a part of the demised premises for the residue of the unexpired term, the assignee is substituted in place of the original lessee as tenant, and stands in that relation to the original lessor. But where the demised premises are let for a part only of the unexpired term, the assignee is only a sublessee, and the relation of landlord and tenant does not exist between him and the original landlord.—Lee v. Payne, 4 Mich. 106.

¶ 280. A lease by the lessee of the three lower stories and the cellar of a four-story store, which the lessee held under a lease in which he had covenanted "not to transfer this lease," was held no breach of this covenant.—Copland v. Parker, 4 Mich. 660.

¶ 281. The lease of a building excepted all the upper story but the front room, and stipulated that if the tenant re-leased, or assigned the lease, without the landlord's written consent, the latter might re-enter. Held, that a license from the tenant to a third person to use a single apartment on the ground floor for thirty days, or even a sublease of the apartment for such a period, was not a breach of the condition.—Leduke v. Barnett, 47 Mich. 158.

¶ 282. A lease of a hall provided that the hall should be occupied for holding lodge meetings and socials, and that the lessee should not re-lease or assign the lease, or sublet the leased premises, except for society purposes, without written consent, and contained the usual clause providing for reentry in case of default in payment of rent or in any of the covenants of the lease. The hall was rented to various societies, which occupied it five evenings in the week for lodge meetings, socials, concerts, and dances, and, in addition, a dance was once held in the hall by four members of the club holding the lease. Held, in summary proceedings by the lessor against the lessee to recover possession of the hall, that a forfeiture under the covenants can only be claimed when the hall is sublet (not used) for other than society purposes; that the only use to which it is shown to have been put, that can be said not to fall within that term, was that of the dance held by the four members of the club, and that, if that should be technically so held, there is nothing to indicate a subletting for that purpose, but a mere user by those having charge and control of the premises, and who were part owners of the term. —Sommers v. Reynolds, 103 Mich. 307.

§ 77. Necessity for lessor's consent.

Covenants against assignment, subletting or transfer, see post § 78.
Forfeiture for assignment or subletting, see post § 79.

¶ 283. A lease upon shares is not assignable without the lessor's consent.—Lewis v. Sheldon, 103 Mich. 102.

¶ 284. A lease upon shares is a personal contract and not assignable without the consent of the lessor where the amount of rent received must depend on the character and skill of the lessee, or where it gives the lessee the use of the lessor's tools on condition that they may be properly kept.—Randall v. Chubb, 46 Mich. 311.

§ 78. Covenants against assignment, subletting or transfer.

¶ 285. A covenant in a lease not to assign or underlet the leased premises without the written consent of the lessor is a fair and reasonable covenant.—White v. Huber Drug Co., 190 Mich. 212.

¶ 286. Where it is clearly stipulated in a lease that the lessee shall not assign or underlet the leased premises, the lessor may insist upon his rights regardless of the qualifications of the proposed assignee.—White v. Huber Drug Co., 190 Mich. 212.

¶ 287. The scope of the term "assignment" in a lease containing a covenant not to assign or unlet the premises without the written consent of the lessor will not be enlarged by the courts, and the covenant will not be considered as violated by any technical transfer that is not fairly and substantially an assignment.—White v. Huber Drug Co. 190 Mich. 212.

¶ 288. The lessor lodge, Grangers, leased to the Masonic lodge certain premises, reserving to the Grangers "the use of the second story equally with" the Masons. It was stipulated that the upper hall should be used for lodge purposes only, "and cannot be leased or rented to any lodge without a two-thirds majority of both lodges." By mutual consent the Masonic lodge permitted the Order of the Eastern Star to use the lodge room, they being affiliated, and the Grangers permitted an affiliated order, the Pomona Grange, to use them. Held, not to show a waiver of the stipulation against leasing to other lodges, so as to disable the Masonic lodge to insist on it.—Portage Grange No. 16, P. of H. v. Portage Lodge, No. 340, F. & A. M., 141 Mich. 402.

¶ 289. A covenant by a lessee not to transfer the lease without the consent of the lessor does not inhibit a subletting by the lessee.—Copland v. Parker, 4 Mich. 660.

¶ 290. There was an actual and substantial assignment of a lease held by a corporation in violation of a covenant therein prohibiting an assignment without the written consent of the lessor where the lessee corporation sold all its assets, including the lease, to a new corporation, which was organized by a small minority of the stockholders of the lessee corporation for the purpose of excluding the majority of the stockholders, although the new corporation assumed the name of the old corporation and took control of the leased premises and of the business of the old corporation.—White v. Huber Drug Co., 190 Mich. 212.

§ 79. Forfeiture for assignment or subletting.

Waiver of breach of covenant, see post §§ 80, 81.

Breach of covenant or condition as ground for termination, see ante § 45.

¶ 291. The assignment of a lease which contained a covenant not to assign worked a forfeiture of the term.—Wray-Austin Machinery Co. v. Flower, 140 Mich. 452.

¶ 292. A personal lease is forfeited by an assignment and attempt to give the assignee possession, and the lessor may take immediate steps to recover the premises.—Randall v. Chubb, 46 Mich. 311.

¶ 293. An attempted assignment by the lessee in a lease on shares and delivery of possession to the assignee work a forfeiture, and the lessor may proceed at once to regain possession.—Lewis v. Sheldon, 103 Mich. 102.

¶ 294. One who has leased a farm on shares does not forfeit his lease by orally giving to a third person permission to work part of the farm on the same terms, where the oral arrangement is abandoned without anything being done under it.—Grovenburg v. McKeough, 117 Mich. 555.

¶ 295. A forfeiture of a lease to a club for violation of a provision that the premises should not be sublet "except for society purposes" is not worked by allowing the premises to be used for a dance once a week by four members of the club.—Sommers v. Reynolds, 103 Mich. 307.

¶ 296. A covenant against subletting in a farm lease is not broken by giving possession of a house on the premises to one employed to assist in the farm work.—Vincent v. Crane, 134 Mich. 700.

¶ 297. Where a lease containing a covenant against assignment without the written consent of the lessor is assigned without his consent by the lessee to another, recorded, and then a quitclaim deed given back without any change in possession, and for the sole purpose of making record title of the lessee's rights, the lease not having been executed with the proper formalities to permit its recording, there is no forfeiture.—McDonald v. Andrews, 199 Mich. 160.

¶ 298. A lease contained a printed clause forbidding subletting without the consent of the owner, but contained a written clause permitting the lessee to sublet portions of the premises for the same line of business. The lessee, an individual, organized a corporation to carry on his business, and subleased to it all of the premises except a small floor space which he retained. Held, such subletting was not to be treated as a mere subterfuge so as to work a forfeiture of the lease.—Hilsendegen v. Hartz Clothing Co., 165 Mich. 255.

¶ 299. A lease provided for forfeiture in case of assignment by S., the lessee. It was to expire in 1884. In 1881 it was indorsed by the lessor, "For a valuable consideration I hereby give S. the privilege of occupying the store mentioned in this lease for ten years from 1884," the indorsement providing further that the rent should be the same, and all improvements were to be the lessor's property "as part of the consideration for extending lease." Held, that the indorsement constituted a new letting, canceling the old lease, and could not be forfeited by an assignment.—Walsh v. Martin, 69 Mich. 29.

§ 80. Waiver of breach of covenant.

By acceptance of rent from assignee or sublessee, see post § 81.

¶ 300. If, after notice of breach of a covenant against subletting, the lessor allows

the assignee of the lease to repair the premises, he waives the breach of the covenant.—Patterson v. Carrel, 171 Mich. 296.

¶ 301. A covenant in a lease against assignment of the leased premises without the written consent of the lessor is not waived by the execution by the lessor of an agreement for the renewal of the lease by the lessee, "its successors and assigns," at their option.—White v. Huber Drug Co., 190 Mich. 212.

§ 81. ——By acceptance of rent from assignee or sublessee.

¶ 302. Breach of a covenant against subletting without the landlord's consent is waived by acceptance, with knowledge of the breach, of rent subsequently accruing from the sublessee.—Patterson v. Carrel, 171 Mich. 296.

¶ 303. When breach of a covenant against subletting has been waived by acceptance of rent by the landlord from the subtenant, a subsequent vendee cannot sue for breach of the covenant though he accepts further rent only conditionally.—Patterson v. Carrel, 171 Mich. 296.

¶ 304. The relation of landlord and tenant arises where an assignee of a lease who entered thereunder and occupied demised premises, was recognized by the lessor as his tenant by the acceptance of rent, although an assignment of the lease was prohibited by its terms.—Weber v. Van Blerck Motor Co., 186 Mich. 449.

¶ 305. Whether by accepting rent from an assignee a lessor waived a provision of the lease forbidding an assignment or subletting, held under the evidence, a question for the jury.—Weber v. Van Blerck Motor Co., 186 Mich. 449.

§ 82. Rights and liabilities of assignees.

Rights and liabilities incident to subtenancy, see post § 83.

¶ 306. Under an absolute assignment of a lease for an entire term the assignee succeeds to all the rights and liabilities of the original lessee.—Weber v. Van Blerck Motor Co., 186 Mich. 449.

¶ 307. Whether the assignee of a lease was answerable to the lessor for rent, held a question for the jury, where the alleged assignment was made in violation of the terms of the lease to a company of which the original lessee was a member, and subsequent payments of rent were accepted from the assignee by the lessor.—Weber v. Van Blerck Motor Co., 186 Mich. 449.

¶ 308. An assignee of a lease who has accepted such assignment thereby becomes liable for the rent of the premises according to the terms of the lease.—Darmstaetter v. Hoffman, 120 Mich. 48.

¶ 309. An assignee under an unauthorized assignment of a lease containing a covenant against assignment without the consent of the lessor, is liable to his assignor for the rent, though the latter has not paid the rent to the original lessor.—Darmstaetter v. Hoffman, 120 Mich. 48.

¶ 310. One who has taken a tenant's interest without the landlord's knowledge or consent takes subject to the obligations assumed by the tenant, and cannot be allowed, through their nonperformance, to gain any advantage as against the landlord.—Bertram v. Cook, 32 Mich. 518.

¶ 311. Rights held by a lessee under a contract to repair which is separate from the lease, may pass by parol to an assignee of the leased premises if such was the intention of the parties, the question of intention being one for the jury.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

¶ 312. Where the lessor has consented to an assignment of the lease, evidence may be introduced of the contract between the lessee and the assignee, although the lessor was not present, in order to show whether a right to repairs under a collateral contract passed, since the lessor's consent is not necessary to the transfer of such rights.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

§ 83. Subtenancy and rights and liabilities incident thereto.

Rights and liabilities of assignees, see ante § 82.

Liability of lessee's assignee for waste, see Waste.

Agreement with subtenant amounting to novation, see Novation.

Agreement by purchaser from lessee to indemnify lessor against loss for money advanced to lessee, see Indemnity § 1.

Admissibility of sublease without proof of consent to subleasing, see Evidence ¶ 2588.

¶ 313. In summary proceedings under Comp. L. 1897, § 11164, How. 2nd Ed., § 13684, to recover possession of land in possession of a sublessee who was holding over after the expiration of a term, evidence held insufficient to show consent by the landlord to the tenancy of the sublessee.—Tuller v. Michigan Cent. R. Co., 194 Mich. 312.

¶ 314. The claim of a subtenant that under its lease rent was payable on the 15th of each month, and the practice of paying rent in accordance with such claim, negatived its allegation in a bill for subrogation, that by its sublease it assumed the position of the original lessee under a lease requiring the rent to be paid on the first of each month.—Wray-Austin Machinery Co. v. Flower, 140 Mich. 452.

¶ 315. In a suit to restrain summary proceedings in which complainant claimed to

be an assignee of defendant rather than defendant's sublessee evidence held sufficient to show that complainant recognized and admitted in a former suit between the parties in which defendant sought by summary proceedings to recover the land that he was a tenant of and held the premises in subordination to defendant.—Murphy v. Sayles, 201 Mich. 78.

¶ 316. Where a mother takes a life lease from her son and sublets the property to him and the son recognizes her rights under the lease and agrees to retain possession of the premises as her subtenant, paying her rent therefor, his possession therafter emanates from her and is subordinate to her rights to the same intent and extent as though they had gone through the idle ceremony of some physical delivery and redelivery of possession, he not living on the property, and being up to the time of the father's death but a gratuitous tenant at will.—Heinze v. Heinze, 195 Mich. 365.

¶ 317. Neither an agreement in a lease that upon re-entry the subleases should belong to the lessors, nor the promise of the tenant not to disturb the subtenants, created such a relation between the landlord and the subtenant as to entitle the latter to hold the premises during the term, or to make such subtenant liable to the landlord as his tenant.—Williams v. Michigan Cent. R. Co., 133 Mich. 448.

¶ 318. An assignee of a lessee to whom a subtenant has attorned is liable to such subtenant for so closing the premises as to interfere with the use and enjoyment of the premises to an extent amounting to an eviction.—Coulter v. Norton, 100 Mich. 389.

§ 84. Assignment of lease as security.

Leases as security for other undertakings, see ante § 31.

¶ 319. An assignment of a lease as security, made in good faith, is not a violation of a covenant therein against assignment without the consent of the lessor.—Crouse v. Michell, 130 Mich. 347.

¶ 320. As between unrecorded assignments of a lease for more than three years, as security, the one first made has priority.—Crouse v. Michell, 130 Mich. 347.

C. REPAIRS AND IMPROVEMENTS, INSURANCE, TAXES AND CHARGES.

§ 85. Duty and covenants of landlord to repair.

Liability for injuries suffered from disrepair or defective condition of premises, see post IV, D; VII.

Duty to sweep chimneys, see also post ¶ 356.

Liability of landlord towards third persons on covenant to repair, see post § 179.

Rights and liabilities towards third persons, see post VII.

Measure of damages for breach of covenant to repair, see Damages § 75.

Consideration for agreement to make repairs after lease is in force, see Contracts ¶ 533.

¶ 321. A landlord who has not agreed to make repairs is under no obligation to make them.—Rhoades v. Seidel, 139 Mich. 608.

¶ 322. In the absence of covenants on his part a landlord is not obliged to make repairs even when the premises become defective by deterioration or decay.—Petz v. Voight Brewery Co., 116 Mich. 418.

¶ 323. A lessor is under no general obligation to put premises in repair, and his covenants to do so are not to be enlarged beyond their fair intent, and he is not responsible for any damages not contemplated by the lease as chargeable to him, as the result of a failure.—Clark v. Babcock, 23 Mich. 164.

¶ 324. A promise of the landlord to repair leased premises made subsequent to the making of the lease is without consideration.—Brown v. Gray, 199 Mich. 359.

¶ 325. A contract by a lessor to repair and improve the premises does not merge in the lease, where the lease does not contain its substance nor refer to it in any way.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

¶ 326. Where a contract of the landlord to repair is made along with a lease of the premises, although the two agreements were separate, they may be construed together as one transaction, for the purpose of settling the question as to the transfer of the right to repairs.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

¶ 327. The owner of a building owes a subtenant, who is in possession without his knowledge or consent, no duty to keep the premises in repair.—Donaldson v. Wilson, 60 Mich. 86.

§ 86. ——Waiver, release or excuse for breach of duty.

Waiver of tenant's covenant to repair, see post § 91.

¶ 328. Occupancy by a tenant from month to month, for a period longer than a month after the refusal or neglect of the landlord to make repairs, does not make a new contract so as to relieve the landlord from liability for damages arising from the failure to repair.—Mason v. Howes, 122 Mich. 329.

¶ 329. Where a plaintiff lessor agreed to put the premises leased for theatrical purposes in a condition conformable with the city's fire requirements, he is not excused from doing so by the fact that the city stationed firemen in the building to protect the public.—Norris v. McFadden, 159 Mich. 424.

¶ 330. If a lessor has performed her obligation to repair and improve the leased premises, and the lessee has accepted her performance as a full performance of the whole or the particulars in which it has been performed, a right to further claim is thereby lost, and cannot be acquired.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

§ 87. Remedies of tenants against landlord for failure to repair.

Vacation or abandonment of premises by tenant, see post § 88.

Injuries from dangerous conditions caused by failure of landlord to repair, see post § 104.

Remedy of tenant against landlord for injury caused by dangerous condition arising from failure to repair, see post, IV, D.

¶ 331. Where there is no express covenant in a lease on the part of the landlord to repair the premises, sec. 8959, Comp. L. 1897, and subd. 9 of sec. 50, Comp. L. 1897, preclude any relief in damages for breach or by specific performance.—Minnis v. Newbro-Gallogly Co., 174 Mich. 635.

¶ 332. Where the lessor of salt-works was made liable to a deduction of rent for delays caused by breakage, etc., and was required to have the works in order by a given time before the opening of the business season, in default of which the lessee was authorized to complete the work at his expense and deduct the same from the first payments, it was held that the lease contemplated that the lessee, having the same time allowed him as was given to the lessor, would be able, after the lessor's default, to finish the work before the business season, and that it did not authorize any claim for damages for delay from the lessor's failure to do the work in time, the remedy in the lease being evidently deemed sufficient to prevent any probable loss to the lessee from such delay.—Clark v. Babcock, 23 Mich. 164.

§ 88. ——Vacation or abandonment of premises by tenant.

See also ante ¶ 185 and see also post ¶ 531.

¶ 333. Where, in consequence of the lessor's failure to repair, as he has covenanted, the flume of a sawmill, the mill becomes useless, the lessee is not obliged to make the repairs himself, deducting the expense thereof from the rent, but may abandon the premises.—Bostwick v. Losey, 67 Mich. 554.

§ 89. Obligation and covenants of tenant to repair.

Forfeiture of lease for breach of covenant, see post § 90.

Waiver of covenant to repair, see post § 91.

¶ 334. "Damages by the elements," which are ordinarily excepted from a lessee's covenant to keep in repair, cover destruction by fire occurring without fault or negligence in the lessee.—Van Wormer v. Crane, 51 Mich. 363.

¶ 335. The exception in a covenant by a lessee to repair contained in the expression "damage by the elements excepted," includes all injury by wind, rain, snow, frost and heat, as well as all ordinary decay from natural causes.—Sweezy v. Collins Northern Ice Co., 171 Mich. 75.

¶ 336. Where a tenant occupies the three upper stories of a six-story building and has sole charge of a freight elevator operated by his own employee, but the other tenants have the right to use it for carrying freight, and the elevator is in good condition at the time it is turned over to the tenant, the obligation to repair it thereafter devolves upon the tenant.—Sikora v. Fellowcraft Club, 189 Mich. 235.

§ 90. ——Forfeiture of lease for breach of covenant.

Breach of covenant or condition as ground for termination, see ante §§ 45, 46.

¶ 337. In an action to terminate a lease and for partition, the evidence failed to show that there had been such a breach of the covenant to repair as would operate as a forfeiture of the lessee's rights thereunder.—Eberts v. Fisher, 54 Mich. 294.

¶ 338. In an action by a landlord against his tenant on his covenant to repair, there is a contradiction in terms where the court charges as follows: "Defendant was not to be responsible for any decay arising from the reasonable use of the building for such purposes. If the buildings were damaged from this cause defendant would not have to make them good (although against such it would be required to maintain, in a salable condition and safe during its tenancy)."—Sweezy v. Collins Northern Ice Co., 171 Mich. 75.

§ 91. ——Waiver of covenant to repair.

Waiver of landlord's covenant to repair, see ante § 86.

¶ 339. The fact that a landlord during a period of three years accepts rent, less deductions for repairs made by the tenant, does not constitute a waiver as to subsequent repairs of a covenant by the tenant to keep the premises in repair.—Drouillard v. Huiet, 192 Mich. 54.

§ 92. Credit to tenant for repairs.

¶ 340. A tenant who holds under a lease which makes it his duty to keep the premises in good repair, and, at the end of the term, deliver the same in like condition as when received, "reasonable use and wear thereof and damage by the elements excepted," in order to be entitled to credit for

repairs, must show that the repairs were made necessary by the reasonable use and wear of the premises, or by damage from the elements.—Hovey v. Walker, 90 Mich. 527.

§ 93. Right of lessee to make improvements or alterations.

Liability for injury arising from negligence in making alteration, see post ¶ 370.

¶ 341. Proposed changes in a demised building by cutting openings in a side wall, which will increase the fire risk, are within a condition of the lease prohibiting changes in the exterior of the building without the approval of the lessor.—B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145. (McAlvay, C. J., Brooke and Kuhn, JJ., dissenting.)

¶ 342. A side wall of a building although abutting against and covered by the wall of an adjoining building, is an "exterior" wall within a condition of a lease prohibiting changes in the exterior of a demised building without the consent of the lessor.—B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145. (McAlvay, C. J., Brooke and Kuhn, JJ., dissenting.)

§ 94. Tenant's rights and interest in improvements.

Right to remove improvements or buildings, see post § 95.

Right to compensation for improvements, see post § 96.

Duties and obligation under public regulations, see post § 97.

¶ 343. A tenant's erections are not brought within a subsequent mortgage on the premises by the tenant's neglect to remove them on a renewal of his lease by a new landlord.—Kerr v. Kingsbury, 39 Mich. 150.

§ 95. ——Right to remove improvements or buildings.

Right of tenant to remove fixtures, see post § 109.

Landlord's lien on improvements where provided for in lease, see post ¶¶ 528, 529.

Leasing building as realty as estoppel to treat it as chattel, see Fixtures ¶ 12.

¶ 344. Under a covenant to surrender premises in as good condition as when taken, reasonable use and wear and injury by the elements excepted, a tenant cannot tear out improvements which he has himself put in, if their removal injures the freehold.—Murray v. Moross, 27 Mich. 203.

¶ 345. Where a lease reserves to the lessee the right, at the end of his term, to remove all buildings placed upon the leased premises, he is entitled to ingress and egress, rent free, for a reasonable time after the expiration of the lease, for the purposes of such removal.—Davidson v. Crump Mfg. Co., 99 Mich. 501.

¶ 346. A tenant erecting buildings on the leased premises, in furtherance of the purpose for which the premises were leased, may remove them at any time during the tenancy and if it terminates upon a contingency he may remove them within a reasonable time after termination.—Hayward v. Hope Township School Dist. No. 9, 139 Mich. 539.

¶ 347. Where a lease under which a school district had placed a school house on defendant's land was terminated because the school was discontinued, and the district asserted its right to remove the school building within 5 days after such termination, it had a reasonable time therafter to remove the building.—Hayward v. Hope Township School Dist. No. 9, 139 Mich. 539.

§ 96. ——Right to compensation for improvements.

¶ 348. To entitle a tenant to be paid for improvements he has made, there must be between him and his landlord as definite an agreement as any other contract of employment.—Leslie v. Smith, 32 Mich. 64.

§ 97. Duties and penalties under public regulations.

General law of building regulations, see Buildings.

Michigan Housing Act, see Pub. Acts 1917, No. 167.

¶ 349. A subtenant under an oral lease, who is in control of the premises, is a "lessee" under the terms of sec. 12 of Act 285, Public Acts of 1909, requiring automatic gates on elevators.—Noack v. Williams, Davis, Brooks and Hinchman Sons, 175 Mich. 15.

¶ 349a. Under Act No. 285, Pub. Acts 1909, § 12, making it the duty of the owner, agent or lessee of a manufacturing establishment to provide automatic gates for the elevator shafts, the duty to provide such gates is imposed on the owner of the building although a tenant is in possession of the same.—Barfoot v. White Star Line, 170 Mich. 349.

¶ 349b. In a suit under Pub. Acts 1909, No. 285, for personal injuries due to the lack of automatic elevator gates, the evidence to prove that defendant was owner of the premises consisted of a written lease of the third floor of the building of which the lessee was in possession at the time of plaintiff's injury; proof of the payment and receipt of rent; and a letter written by defendant to the tenant confirming oral arrangements before the execution of the lease therefor and stating that defendant would provide automatic gates for the elevator. Held, there was sufficient testimony of defendant's ownership of the building to sustain a verdict against it.—Barfoot v. White Star Line, 170 Mich. 349.

§ 98. Covenants to rebuild.

Construction and operation of covenants in general, see ante § 16.

¶ 350. A covenant in the lease of a wooden building, binding the landlord to rebuild in case it burns, is released by the passage of a valid municipal ordinance forbidding the erection of wooden buildings.—Cordes v. Miller, 39 Mich. 581.

§ 99. Covenants as to insurance.

Construction and operation of covenants in general, see ante § 16.

¶ 351. A lessee's covenant to insure the property and to assign the insurance policy to the lessor was held not to have been broken where the insurance was in fact effected, but where, apparently by tacit consent of all parties, the practice of assigning was discontinued after a year or two. A court of equity would treat the stipulated insurance as held in trust for the lessor.—Eberts v. Fisher, 54 Mich. 294.

§ 100. Covenants to pay taxes.

Construction and operation of covenants in general, see ante § 16.

¶ 352. Where a lease is made without any stipulation as to the taxes, the landlord and not his tenant is bound to pay the taxes.—Sherman v. Spalding, 126 Mich. 561.

¶ 353. Where a tenant had covenanted in the lease to pay certain taxes, it is no breach if, under a warrant for the collection of the assessment, the tax was paid by a sale of his leasehold interest and of buildings erected by him upon the premises. It was satisfied out of the tenant's and not the landlord's property.—Goode v. Ruehle, 23 Mich. 30.

¶ 354. A lessee's omission to pay a paving assessment could not properly be treated as a breach of his contract, if it arose from a question as to the validity of the assessment, and if he paid it when its validity was settled.—Eberts v. Fisher, 54 Mich. 294.

¶ 355. Where one of the conditions of a lease is the payment of taxes by the lessee, and a clause provides for re-entry upon breach of condition, it cannot be held that this clause does not apply to a failure to pay taxes, on the ground that another clause makes a building on the premises security for their payment; a lessor may have double security if his lessee consents to give it.—Brand v. Frumveller, 32 Mich. 215.

D. INJURIES FROM DEFECTIVE OR DANGEROUS CONDITIONS.

§ 101. In general.

Injuries to tenant or occupants, see post §§ 102-106.

Presumptions and evidence as to liability, see post § 107.

Injury to or destruction of premises as termination of lease or tenancy, see ante § 48.

Injury to or destruction of premises as defense to payment of rental, see post § 127.

Remedies of tenants against landlord for failure to repair, see ante § 87.

Liability of landlord toward third persons for injuries from defective or dangerous conditions, see post VII.

§ 102. Injuries to tenants or occupants.

Landlord's knowledge of defects, see post § 103.

Dangerous condition caused by failure to repair, see post § 104.

Premises used in common by several tenants, see post § 105.

Injury to or loss of tenant's property, see post § 106.

What constitutes contributory negligence of tenant, see Negligence, IV.

Effect of contributory negligence of tenant, see Negligence, IV.

Defects or conditions amounting to nuisances, see Nuisances.

Constructing or maintaining structures to tenant's injury as nuisance, see Nuisances.

¶ 356. A city ordinance requiring "every owner, agent, or occupant of any building" to have the chimneys swept at least once a year, does not fix the duty as between an owner and a tenant.—Cooper v. Lawson, 139 Mich. 628.

¶ 357. A landlord is not liable for injury to his tenant caused by failure to sweep the chimney belonging to his apartment, where the tenant had the right to use the hallways and stairways and might have used them to reach the roof to sweep the chimney flue belonging to his apartment without interfering with, or trespassing upon the rights of the other tenants in the building.—Cooper v. Lawson, 139 Mich. 628.

Liability of owner of dwelling apartment or tenement for injuries from defects therein to tenant or one employed on premises. See note, 5 N. C. C. A. 291-323.

§ 103. ——Landlord's knowledge of defects.

¶ 358. The liability of a landlord to a tenant for injuries resulting from defects existing at the time premises are leased extends only to defects which he knows or he should know, and which are not open to the observation of the tenant.—Rhoades v. Seidel, 139 Mich. 608.

¶ 359. Plaintiff leased of defendant certain premises with an open sewer connection which was known to both parties. Later this sewer began to emit gas and plaintiff became ill as a result. In an action against the landlord, held that he was not liable since he did not know and was not chargeable with

knowledge that the sewer would emit gas.—Rhoades v. Seidel, 139 Mich. 608.

¶ 360. In an action by a sublessee living on the second floor of a flat building against the landlord to recover for injuries due to the giving way of a porch railing at the rear of the building, held that an instruction that it was the duty of defendant to make such an inspection "as would naturally disclose the defect, if it existed," was erroneous.—Burtis v. Davison, 199 Mich. 14.

§ 104. ——Dangerous condition caused by failure to repair.

Remedies of tenants against landlord for failure to repair, see ante § 87.

Mutual rights and duties of landlord and tenant relating to repairs in general, see ante IV, C.

¶ 361. Where premises had been leased and after having been occupied for some time, a sewer connection began to emit sewer gas, and the landlord promised to repair it but failed in an attempt to do so, he is not liable for injury to the tenant who became sick because of the gas, since the promise to repair was without consideration and the landlord could not be held as for negligence in making the repairs since he did not carry out the undertaking.—Rhoades v. Seidel, 139 Mich. 608.

¶ 362. A landlord who has violated his promise to repair defective plastering is liable for damages resulting from falling plaster, just as any other person who was a party to a contract would be.—Mason v. Howes, 122 Mich. 329.

¶ 363. A woman tenant who remained in premises with knowledge that plastering was defective, but without knowledge of danger and who relied upon the promise of the landlord to repair, was not guilty of contributory negligence preventing recovery for damages resulting from falling plaster.—Mason v. Howes, 122 Mich. 329.

¶ 364. The owner of premises in possession of a tenant will not be liable for an injury occasioned by the premises becoming, subsequent to the leasing, out of repair, in a case where the obligation to repair is on the tenant, and the owner has no legal control of the premises.—Fisher v. Thirkell, 21 Mich. 1.

¶ 365. A tenant who, with full knowledge of the dangerous condition of a stairway, which she had not used for over a year, voluntarily attempts to use it for a trivial purpose, cannot recover damages for the injuries sustained, nor will the landlord's failure to keep his promise to repair it warrant such recovery.—Town v. Armstrong, 75 Mich. 580.

¶ 366. In an action for damages against a landlord for failure to repair premises, an opening statement sets out a cause of action where it alleges that defendant negligently and wilfully permitted stagnant water to accumulate and remain for several days after notice given to him, in the cellar of the premises, causing unwholesome smells, disease and sickness to plaintiff and his household, compelling him to move, and putting him to expense, and which alleges a lack of contributory negligence on the part of plaintiff.—Haynes v. Maybury, 166 Mich. 498.

§ 105. ——Premises used in common by several tenants.

¶ 367. A landlord who leases separate portions of the same building to different tenants, and reserves control of those parts of the building or premises used in common by all the tenants, is under an implied obligation to keep in a safe condition the parts over which he reserves control.—Cooper v. Lawson, 139 Mich. 628.

¶ 368. Where a three-story building, the second and third stories of which are occupied by numerous tenants for living purposes, has a common stairway, and a porch on each floor level in the rear used by the tenants as a rear entrance, for hanging out clothes, and for pleasure purposes during warm weather, the railings of which are toenailed in the upright timbers, and such stairway and porches have been in use for about 15 years, it is a question for the jury, in an action by a sublessee on the second floor against the landlord for personal injuries received as the result of a railing giving way while she was leaning over it to call her husband, whether defendant made such inspection from time to time, as an ordinarily prudent man would have made under like circumstances.—Burtis v. Davison, 199 Mich. 14.

¶ 369. A landlord who rents rooms in a tenement building to various tenants, giving to all the right to all conveniences, including a platform extending from the second floor and a clothes reel on a post attached to the platform, although not agreeing to make repairs, is liable for injuries sustained by a tenant due to the rail giving way, while she is using it with care, and precipitating her to the ground.—Cates v. Parker, How. N. P. 2.

§ 106. ——Injury to or loss of tenant's property.

¶ 370. A landlord is liable for damages to his tenant where the latter's property is destroyed because of the collapse of the building, due to the negligent making of alterations by another tenant under the landlord's permission.—Blickley v. Luce's Estate, 148 Mich. 233.

¶ 371. Defendant rented the lower floor of his building to plaintiff, who had a drygoods store there. Upon the second floor, which was rented to other tenants, was a water-closet, under their control, but to which

plaintiff had access, defendant having no control over it, though he kept it in repair. Through improper use by some unknown person, and not for lack of repairs, the closet became obstructed, the water overflowed, and plaintiff's store was damaged. Held, that defendant was not liable.—Kenney v. Barns, 67 Mich. 336.

§ 107. Presumptions and evidence as to liability.

¶ 372. The fact that a landlord suffered alterations to be made in the course of repairing a fire-damaged building without procuring a permit as required by a city ordinance, while not of itself negligence, is evidence to be considered with other facts as tending to show negligence.—Blickley v. Luce's Estate, 148 Mich. 233.

¶ 373. The collapse of a building while alterations are being made to it is prima facie evidence of negligence on the part of the landlord so far as his responsibility to a tenant is concerned.—Blickley v. Luce's Estate, 148 Mich. 233.

E. FIXTURES AND EMBLEMENTS, ISSUES AND PROFITS.

§ 108. Title and right to fixtures in general.

Right of tenant to remove or dispose of, see post § 109.
Right of tenant to compensation for fixtures, see post § 110.
Right to emblements, issues and profits, see post §§ 111-114.
Invalidity of landlord's lien on fixtures as against execution levy, see post ¶ 529.
Rights and liabilities towards third persons, see post VII.
General law of fixtures, see Fixtures.
Things regarded as fixtures or movables, see Fixtures.
Rights of persons buying or selling under lease in fixtures, see Fixtures § 26.
Effect of physical severance by lessor of machine left by lessee to make it a chattel, see also Fixtures ¶ 62.
Agreement between lessor and lessee preserving personal character of chattels affixed to land, see Fixtures § 24.
Right to purchase trade fixtures from preceding lessee, see also Fixtures § 26.
Merger of lessee's rights in fixtures by their purchase of the fee, see also Fixtures ¶ 102.
Leasing building as realty as estoppel to treat it as chattel, see Fixtures ¶ 12.
Manure as fixture of the farm, see also Fixtures § 11.

¶ 374. A tenant's sale as personalty of permanent fixtures and the taking back of a chattel mortgage upon them does not affect the landlord's rights.—O'Brien v. Kusterer, 27 Mich. 289.

¶ 375. A tenant need not remove his trade fixtures so long as he has a right to occupy the premises with the same, and if he puts up trade fixtures under his first lease and then obtains the right to continue in possession under subsequent leases, making his occupancy continuous, he need not take his fixtures away until his tenancy ends.—Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92.

¶ 376. A provision in the lease of a building to be used as a saloon and hotel, to the effect that "all improvements, betterments, and changes or alterations," should remain in the building and become the property of the lessor, applies to an alteration of the front of the building but not to the saloon furniture such as bar, refrigerator, beer pump, ice box, tables, chairs, signs, etc.—Wright v. La May, 155 Mich. 119.

¶ 377. Where the purchaser of a leasehold and of certain fixtures placed by the original tenants in the leased building, demands the return of such fixtures after she has delivered possession of them to the landlord, a reply within twenty-four hours, Sunday excepted, is made in a reasonable time.—Felcher v. McMillan, 103 Mich. 494.

§ 109. ——Right of tenant to remove or dispose of.

Right of tenant to remove improvements or buildings, see ante § 95.
Landlord's lien on fixtures or machinery where provided for in lease, see post ¶¶ 528, 529.

¶ 378. Tenants are not entitled as of right to remove fixtures such as pillars, partitions, sewers and floors installed in place of original ones, and so built into the leased building as to become a part thereof.—Felcher v. McMillan, 103 Mich. 494.

¶ 379. A tenant has a right to remove trade fixtures, but he must do so while still in possession under his lease, unless the time for doing so has been extended.—Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92.

¶ 380. Where a tenant places trade fixtures or places of amusement on the premises during the term of his lease and continues in possession thereof as sublessee under a lease from the successor to the lessor he does not lose his right to his fixtures and may sell them during such second term.—Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92.

¶ 381. As a general rule, a tenant must remove erections which he has placed upon the leased premises within his term or within a reasonable time thereafter, and, not doing so, it will be presumed that he has abandoned them.—Higginbotham v. Phillips, 192 Mich. 49.

¶ 382. Where a lease empowers a tenant to put in machinery and remove it at the expiration of his lease, the tenant cannot be held liable for such necessary damage to the freehold as is occasioned by removing the machinery with due care; especially if the particular damage is not specially counted on and proved.—Hunt v. Potter, 47 Mich. 197.

¶ 383. In an action to restrain the removal of certain brewery fixtures, the plaintiff being the owner of the brewery, and having bought at foreclosure sale certain storage tanks, fermenting tubs, chip casks, kettles, and pipes for cooling beer, left by a tenant who had surrendered his lease, on the question of ownership the trial court had a right to assume that the property belonged to the landlord.—Dehring v. Beck, 146 Mich. 706.

§ 110. ——Right of tenant to compensation for fixtures.

¶ 384. A tenant who has remained in possession for five months after the expiration of his term, cannot then elect to terminate the lease and recover from the lessor for fixtures placed on the premises, under a lease providing that such tenant may, at the expiration of the term, renew the lease for four years or terminate it and receive from the lessor 75 per cent of the cost of fixtures placed on the premises by the tenant.—Hangsterfer v. Shafer, 130 Mich. 223.

§ 111. Right to emblements, issues and profits.

Right of tenant against grantee of lessor, see post § 112.
Right of purchasers from tenant before default, see post § 113.
Vacation and abandonment of premises and crops, see post § 114.
Lease reserving share of produce as basis of rental, see post § 142.

¶ 385. A tenant for an uncertain term has a right to harvest such crops, in the nature of emblements, as are growing but unripe at the time of the termination of his tenancy by the act of his landlord.—Harwood v. Williams, 161 Mich. 368.

¶ 386. A tenant for an uncertain term who has a right to harvest crops growing but unripe at the time of the termination of his tenancy by the act of his landlord, is entitled to the straw as well as to the grain.—Harwood v. Williams, 161 Mich. 368.

¶ 387. Under an arrangement for raising a single crop on shares, the possession of the premises is held by the owner of the land, either alone or in common with the party who sowed the seed.—Wells v. Hollenbeck, 37 Mich. 504.

¶ 388. A lease of a farm, granting to the tenant "the privilege to keep and harvest all the crops (in case the land is sold) which he may have put in, and have either pay for what he may do in preparing to put in other crops, or the privilege of putting them in and harvesting the same, for the term of one year, with the privilege of three years, if not sooner sold, from and after the 1st day of April, A. D. 1866," the lease containing an agreement on the tenant's part to "hire the said premises for the term of one or more years, as above mentioned," and that he would "not put in more than twenty acres of wheat in any one year," was held to confer upon the tenant the right to harvest a field of wheat of not more than twenty acres, after the expiration of the lease.—Brown v. Parsons, 22 Mich. 24.

¶ 389. Where the evidence tended to show possession of a farm belonging to defendant under a lease which had been later cancelled, and that defendant told plaintiff to go and put in fall wheat and that when harvested he should have his just and lawful share, and acting thereon plaintiff furnished manure, seed and all labor, there is established a valid agreement between the parties under which they became and were tenants in common of the wheat, and an action in assumpsit may be maintained and a recovery under the common counts.—McLaughlin v. Salley, 46 Mich. 219.

¶ 390. Assurance by the landlord's heir to the tenant that if he would sow a crop there would be no trouble about reaping it when mature after the end of the year does not estop the heir to assert that by the original lease, renewed from year to year, the tenant on taking possession agreed with his landlord to leave on the ground as many acres of wheat as were then growing.—Ladd v. Brown, 94 Mich. 136.

¶ 391. A lessee whose lease gave him the option of renewing it at the same rate if the premises were not sold wrote to the lessor in the July preceding the expiration of the lease, while the two were negotiating for a surrender at the end of the term, a letter stating the terms upon which he would surrender, and adding "I shall want to know soon, as I shall want to commence plowing next week," Held that, in the absence of any response from the lessor, the lessee was authorized to proceed and put in his wheat crop in the full belief that he was to hold the farm for another year; that the fact that the lessee was notified in the spring immediately preceding the expiration of his lease that the farm had been sold, and he could stay no longer, whereupon he left the premises, is immaterial.—Starkey v. Horton, 65 Mich. 96.

¶ 392. A landlord who, in ignorance of his rights, stood by and permitted a tenant to cut and stack wheat on a farm, after the expiration of a lease, and then commenced attachment by levying upon the wheat as the tenant's property, and then upon learning that he was the owner of the wheat dis-

missed the attachment and converted the property to his own use, was not estopped by such actions to set up title to the wheat in trover by one to whom the tenant had sold it.—Smith v. Sprague, 119 Mich. 148.

¶ 393. Where the assignee of an invalid lease has abandoned his family and a new lease is given to his wife, running in his name but signed by her by attaching her mark to his name without authority from him, he is not a party to the lease, and if she and her minor children farm the land she is entitled to the crops.—Cody v. Phelps, 47 Mich. 431.

§ 112. ——Right of tenant against grantee of lessor.

¶ 394. A tenant for an uncertain term who has the right to harvest growing crops at the time of the conveyance of the premises by his lessor has a right to harvest such crops as against the grantee of the lessor.—Harwood v. Williams, 161 Mich. 368.

¶ 395. The grantee of the lessor has no right to any part of the wheat harvested by a lessee of the grantor where the lessee was authorized to plant the wheat in the full belief that he was to continue his tenancy for another year.—Starkey v. Horton, 65 Mich. 96.

¶ 396. Defendant had for several years occupied and worked certain land as a tenant, yielding to the owner a certain part of the products as rent. By an arrangement between the parties, defendant was to surrender the premises when they should be sold. Plaintiff purchased the land after defendant had sowed it to wheat. Held, that defendant was entitled to possession until he had harvested and threshed the wheat, and that, not having previously surrendered such possession, he was not liable to the plaintiff in trespass q. c. f. for acts committed during such period which were incident to his occupancy of the premises.—Toles v. Meddaugh, 106 Mich. 398.

¶ 397. The defendant and his tenant made a contract in March terminating their relations, and providing for a division of the live stock and various other articles on the farm. A crop of rye had been sown, of which no mention was made in the contract. The tenant gave to plaintiff a mortgage on his half thereof. In July the rye was cut, and defendant appropriated all of it. In a suit in trover for conversion of the tenant's half, held, that the contract did not operate to release the tenant's interest in the crop, despite its language indicating a general settlement of all claims betwen the parties, and that plaintiff should recover.—Lamb v. Lamb, 161 Mich. 80.

§ 113. ——Right of purchasers from tenant before default.

¶ 398. The rights of one who has bought a crop from a tenant will be protected as against a subsequent forfeiture of the lease and the landlord's re-entry.—Miller v. Havens, 51 Mich. 482.

¶ 399. One who buys a growing crop of wheat from a tenant who owes no rent and whose lease is good is not divested of title by the latter's subsequent default and abandonment of the premises to his landlord.—Nye v. Patterson, 35 Mich. 413.

¶ 400. Where a tenant, holding land under a lease which entitles him to reap as well as sow a crop of wheat, sells the crop before default or forfeiture, his vendee's title is not defeated by a subsequent default.—Carney v. Mosher, 97 Mich. 554.

§ 114. ——Vacation and abandonment of premises and crops.

¶ 401. One who, without fault on the landlord's part, rescinds his contract to farm another's land, and abandons the premises, yields his right to the crop sown.—Kiplinger v. Green, 61 Mich. 340.

¶ 402. A tenant's right to sell growing crops on abandoning the land during the life of his lease is not shown to be lost by failure to perform the conditions of the lease, unless it also appears that there was a clause of forfeiture for nonperformance.—Dayton v. Vandoozer, 39 Mich. 749.

¶ 403. Under the rule that a lease not in writing expires one year from the date it was made, a tenant who moved off the farm in question and thereby presumably surrendered it to the landlord, had thereafter no right to the wheat thereon, and the party to whom he sold the wheat had no greater right.—Smith v. Sprague, 119 Mich. 148.

F. OPTIONS TO BUY, RENEW OR FOR OTHER PRIVILEGES.

§ 115. Option to purchase premises.

Deductions, additions and adjustments on purchase price, see post § 116.
Liability for taxes upon exercising option to buy, see post § 117.
Options for renewal, see post §§ 118-121.
Rights and liabilities towards third persons, see post VII.
Options to buy and sell lands generally, see Vendor and Purchaser, I, B.

¶ 404. An option in a lease permitting the the lessee within a designated time to purchase the demised premises at a designated sum, is enforceable.—Bushman v. Faltis, 184 Mich. 172.

¶ 405. A stipulation in a lease giving the lessee an option to buy the land at a price to be agreed upon by the lessors and lessee, "price not to exceed seventy-five dollars an acre" is not void for uncertainty, for the lessors have bound themselves to sell at a

certain and fixed price if the lessee chooses to pay that price.—Wright v. Kaynor, 150 Mich. 7.

¶ 406. An option in a lease executed by husband and wife to purchase demised premises owned by them is valid and enforceable notwithstanding that her name does not appear in the body of the instrument, which from its face appears to be the individual act of the husband only.—Agar v. Streeter, 183 Mich. 600.

¶ 407. A tenant may exercise an option to purchase contained in a lease, by tendering the amount specified at any time within the life of the option.—Bushman v. Faltis, 184 Mich. 172.

§ 116. ——Deductions, additions and adjustments on purchase price.

¶ 408. On granting specific performance of an agreement to sell in a lease, it is improper to allow defendant, the lessor, the amount spent on repairs to render the premises tenantable.—Mentlikowski v. Wisniewski, 173 Mich. 642.

¶ 409. On granting specific performance of an agreement to sell in a lease, defendant, the lessor, will be allowed payment for permanent improvements made during the leasehold period.—Mentlikowski v. Wisniewski, 173 Mich. 642.

¶ 410. On granting specific performance of an agreement to sell in a lease, complainant, the lessee, may be allowed as a deduction from the purchase price the amount necessary to release the mortgage upon the premises.—Mentlikowski v. Wisniewski, 173 Mich. 642.

¶ 411. In granting specific performance of an agreement to sell in a lease, all rent paid after commencement of the suit is deducted from the purchase price.—Mentlikowski v. Wisniewski, 173 Mich. 642.

§ 117. Liability for taxes upon exercising option to buy.

¶ 412. In a suit for specific performance of a provision in a lease giving the lessee a right of purchase of the leased premises, and where tender of the price was rejected, held, in decreeing specific performance, that the lessee, purchaser, would be liable for and should pay all taxes and special assessments becoming due since the filing of the bill.—Nowicki v. Kapelczak, 195 Mich. 678.

§ 118. Options for renewal.

Necessity and sufficiency of notice of election to renew, see post § 119.

Terms, rights and privileges of new lease, see post § 120.

Waiver and estoppel, see post § 121.

¶ 413. Whether or not a covenant for a renewal of a lease implies a renewal on the same terms, or binds the lessor to any covenants whatever, quære.—Brand v. Frumveller, 32 Mich. 215.

¶ 414. Where a lease provides that it may be renewed from year to year by the lessee giving notice of thirty days, the lessor cannot refuse to renew, and the giving of the notice required constitutes a renewal of the lease.—Chittenden v. Western U. Tel. Co., 154 Mich. 1.

¶ 415. A provision in a lease for an option on the part of lessee to renew the lease or purchase the land, forms part of the inducement for the execution of the lease, and is therefore founded upon a sufficient consideration, although the provision for the option to renew or purchase is unilateral in the sense that the lessee was under no obligation to renew the lease or purchase the land.—Wright v. Kaynor, 150 Mich. 7.

¶ 416. The fact that a renewal lease is acknowledged at a date subsequent to that of its date, and to the date at which the renewal should have been executed, does not justify the inference that the renewal was not timely.—Wright v. Kaynor, 150 Mich. 7. (Grant, J., dissenting.)

¶ 417. Where a lease is executed for "the term of three years, with privilege of five years," it cannot be construed as a lease for three years with the privilege of five additional years.—Gensler v. Nicholas, 151 Mich. 529.

¶ 418. A lessee of land agreed to put up a building thereon, the value of which was to be appraised at the expiration of the lease, when the lessor, after proper notice, could have the building on paying its value, or the lease should be extended. Held, that an appraisal of the building was unnecessary where no notice was given of a purpose to terminate the lease. And an appraisal of the land by mutual consent was equivalent to an agreement that the lease should be continued, and should not be interfered with by partition where the parties to the lease were tenants in common.—Eberts v. Fisher, 54 Mich. 294.

¶ 419. A lease provided that the lessee should "have the privilege of renting said premises for another year at the same rate, provided the lessor does not sell the same." Held, that the sale meant was an open, notorious one, that should be brought home to the lessee's knowledge; and until such notice he is entitled to deal with the lessor, the apparent owner of the title, the same as if he were the actual owner, and the grantee in a secret conveyance will be bound by the acts and declarations of his grantor, the lessor, until he takes some steps to inform the

lessee of the sale.—Starkey v. Horton, 65 Mich. 96.

¶ 420. A lease for term of years, providing that the lessors, their "executors, administrators, or assigns," may at their election, at the end of the term, purchase buildings erected by the lessee at a valuation not to exceed a specified amount, and that, if they elect not to make such purchase, the lease shall continue for a similar term at a rental value to be determined by a reference, at the expiration of which, and of each succeeding term of like length, the same right shall exist, and the same result follow its nonexercise, and that if the lessee, his "executors, administrators, or assigns," do not keep all the conditions of the lease, it shall immediately cease and be utterly void,—does not provide for any renewals beyond the lives of the parties thereto.—Brush v. Beecher, 110 Mich. 597.

§ 119. ——Necessity and sufficiency of notice of election to renew.

See also ante ¶ 414.

¶ 421. Notice of a landlord's election to renew a lease need not be in writing, unless the lease so stipulates, so long as the lease itself contains all the terms and conditions of renewal and the tenant is in possession.—Darling v. Hoban, 53 Mich. 599.

¶ 422. Where the lessee is given an option to renew the lease, he must either give actual notice of election to renew or else maintain actual, visible, and exclusive possession of the land, in order to make a valid renewal.—Wright v. Kaynor, 150 Mich. 7.

¶ 423. Where a lease gives the lessor the right to elect, at the end of the term, whether or not to renew the lease, such election may be made on or before the last day of the term.—Darling v. Hoban, 53 Mich. 599.

¶ 424. Lease "for the term of one year with the privilege of having the same three years at the same rate," at lessee's option, and containing a covenant that the lessee would, at the end of said term, deliver up quiet possession of the premises. Held, that the lessee by continuing in possession after the end of the first year elected to hold the premises for the full term of three years.—Delashman v. Berry, 20 Mich. 292.

¶ 425. A year's lease gave the privilege of an extension for three years if written notice of the intention to continue should be given thirty days before the expiration of the year. Held, that the estate created by the lease terminated at the end of the year if the notice was not given as stipulated; and that an additional estate for three years could not, under Comp. L. 1871, § 4694 (How. St. § 6181), be created by any oral agreements or any waiver of the stipulation, actual or constructive, even though the tenant held over (distinguishing Delashman v. Berry, 20 Mich. 292, in that the option allowed in that case did not have to be expressed in writing).—Beller v. Robinson, 50 Mich. 264.

¶ 426. Where a man and woman, believing themselves to be tenants by the entirety, but, as a matter of fact, being tenants in common, execute a lease giving the lessee an option to renew, the lessee may bind the heirs of the woman, who has since died, by giving notice of election to renew to the man, for in such a case there also exists between the man and woman a relationship of joint contractors, and the woman by entering into the contract as a joint contractor with the man, impliedly stipulated that the other party to the contract might bind her interest by serving notice on the other joint contractor, the man.—Wright v. Kaynor, 150 Mich. 7.

¶ 427. Where a lease provides that it may be renewed from year to year by the lessee giving thirty days' notice, and the lessee continues to pay the rent, and the lessor to accept the same, the lease is thereby renewed despite some talk by the lessor in the nature of a refusal to renew the lease.—Chittenden v. Western U. Tel. Co., 154 Mich. 1.

¶ 427a. Where a landlord elects to renew a lease, tender of a new lease is unnecessary if the tenant has declared that he will not accept a renewal.—Darling v. Hoban, 53 Mich. 599.

§ 120. ——Terms, rights and privileges of new lease.

¶ 428. It is always a presumption that a lease for one year with the privilege of several is to be continued on the same terms and with the same rights and privileges to the tenant as during the first year, unless some other intention is expressed.—Brown v. Parsons, 22 Mich. 24.

¶ 429. Where a lease provides for its own renewal upon terms to be decided by referees, and they vary its terms and their award is accepted, the party accepting it must be held bound by the terms of the original lease as varied by the referees.—Brand v. Frumveller, 32 Mich. 215.

§ 121. ——Waiver and estoppel.

General law of estoppel, see Estoppel.

¶ 430. A new lease need not be tendered where the tenant has declared that he will not accept a renewal.—Darling v. Hoban, 53 Mich. 599.

¶ 431. A lessee having an option of renewal cannot, after notifying his lessor that he does not desire to renew, and after the lessor has made expenditures relying upon the election as first made change his mind and within the stipulated time elect to renew.—Grenier v. Cota, 92 Mich. 23.

¶ 432. Assent to the continued occupancy of farming lands upon the same terms as before may fairly be presumed if, at the beginning of the planting season, the owner silently permits the occupant to continue in possession for some weeks longer, and does not enforce a contingent arrangement for the surrender of the premises at that time. And in subsequent proceedings to recover possession as from a tenant holding over, he is estopped from showing that any such arrangement existed.—Pickard v. Kleis, 56 Mich. 604.

G. RENTAL, USE AND OCCUPATION, OR SHARE OF PRODUCE.

§ 122. In general; nature of rent.

Notice to tenant by foreclosure purchaser of reversionary interest to charge with rent, see also ante ¶ 201.
Covenants and agreements to pay rent, see post §§ 123, 124.
Particular defenses or conditions affecting rights, see post § 125.
Failure of consideration, see post § 126.
Injury to or destruction of premises, see post § 127.
Premises untenantable or unsuitable for purpose of tenancy, see post §§ 128, 129.
Re-entry or eviction precluding recovery of rent, see post §§ 130, 131.
Disturbance or dispossession of tenant by third person, see post § 132.
Vacation of premises during term or without notice, see post §§ 133, 134.
Persons entitled to rent, see post §§ 135, 136.
Persons liable for rent, see post §§ 137, 138.
Acceptance of rental as waiver of breach of conditions, see post § 139.
Basis for rentals, accrual and computation of amount due, see post §§ 140, 141.
Lease reserving share of produce, see post § 142.
Liability for use and occupations, see post § 143.
Action for rent, see post V, A.
Rent as incident of tenancy, see ante ¶ 2.
Termination of lease or tenancy by notice to quit for nonpayment of rent, see ante § 40.
Renewal of tenancy by acceptance of rental, see ante § 51.
Time of payment of rent as determining character of lease, see ante ¶ 83.
Necessity for agreement to pay rent for creation of tenancy, see ante ¶ 6.
Future rent as garnishable debt, see Garnishment ¶ 74.
Right of owner to recover on implied contract money paid by tenant to one purporting to be owner's lessee, see Implied Contracts ¶ 100.

¶ 433. Rent is a sum stipulated to be paid for the actual use and enjoyment of another's land, and is supposed to come out of the profits of the estate.—Marsh v. Butterworth, 4 Mich. 575.

¶ 434. Rent, strictly so-called, always grows out of express contract and is fixed and definite in amount.—Hogsett v. Ellis, 17 Mich. 351.

§ 123. Covenants and agreements to pay rent.

Construction and operation of covenants in general, see ante § 16.
Payment in advance, see post § 124.

¶ 435. Under a lease for a term of years, stipulating for annual rental without fixing the time of payment, the rent is payable at the end of each year.—Bushman v. Faltis, 184 Mich. 172.

¶ 436. A three years' lease of farm lands began in March, 1877, and the rent was to be paid annually, October 15. September 2, 1878, the parties terminated the lease, but it was agreed that the tenant might keep possession until he could harvest his crops; that he was to pay no rent from that date, and that this stipulation was not to affect the rent to become due in October. Held, that this did not bind him to pay the rent for the whole year, but only until September 2, the date of the stipulation.—Bates v. Phinney, 45 Mich. 388.

¶ 437. Where a lease provides for monthly payments, but does not fix the time for payment, rent is not due till the end of the month; but it is competent to agree that it shall be paid in advance and to make such payment a condition to the vesting of any estate in the tenant.—Hilsendegen v. Scheich, 55 Mich. 468.

§ 124. ——Payment in advance.

¶ 438. A mere agreement by a tenant from month to month to pay rent in advance is a personal covenant, and not a condition precedent to the right of possession.—Hilsendegen v. Scheich, 55 Mich. 468.

¶ 439. The fact that rent is payable in advance does not make the actual use of the leased premises any the less the consideration for such payment.—Barber v. Stone, 104 Mich. 90.

§ 125. Particular defenses or conditions affecting rights.

Failure of consideration, see post § 126.
Injury to or destruction of premises, see post § 127.
Premises untenantable or unsuitable for purpose of tenancy, see post §§ 128, 129.
Re-entry or eviction precluding recovery of rent, see post §§ 130, 131.
Disturbance or dispossession of tenant by third person, see post § 132.
Refusal of tenant to attorn to lessor's grantee as defense to action for rent, see ante ¶ 194.
Non-joinder of cotenant as defense, see post ¶ 543.
Actions to enforce collection of rent, see post V, A.

¶ 440. One who claims title to property under adverse right cannot be made liable for rent as upon an implied contract to pay by proof that the landlord notified him that he would be required to pay rent at a specified rate, if he stayed, and presented monthly bills therefor.—Smith v. Haight, 188 Mich. 512.

¶ 441. The acceptance of rent money from a stranger to a lease did not tend to show any substitution of parties, in an assumpsit for the rent, and did not release the lessee from liability for such rent.—Hartz v. Eddy, 140 Mich. 479.

¶ 442. Where a tenant has vacated the leased premises prior to the expiration of his term, mere knowledge on his part that the landlord has since entered, and is making repairs inconsistent with the occupancy of the premises, is insufficient to charge him with consent thereto, so as to affect the question of his liability for rent accruing subsequent to such entry.—Schulenburg v. Uffelmann, 106 Mich. 453.

¶ 443. A lease in the usual form, limited only by a reserved right to mine, for the exercise of which right the lessor was to pay consequent damages if it rendered occupancy for a family residence impossible, was assigned, and the assignee platted the land, and leased lots to defendant, who, when sued for rent, sought to show that an iron formation ran across the land, including the lots leased to himself; also what were the methods generally used in mining iron ore, and that the original lessor objected to plaintiff's platting and leasing the lots. Held, that such evidence was properly excluded, it not tending to show want of consideration, and plaintiff's rights being determined by his lease, and not by what his lessor may have claimed subsequently.—Ray v. Johnson, 98 Mich. 34.

§ 126. Failure of consideration.

Failure of consideration in general, see Contracts, V, C.

Promise to pay rent to one without possession or title as lacking consideration, see Contracts § 134.

¶ 444. Rent is the consideration for occupancy, and there is no consideration for its payment when the enjoyment of the rented premises ceases.—Bates v. Phinney, 45 Mich. 388.

¶ 445. Where the consideration of a lease fails, the lessee is justified in leaving and in refusing to pay further rent; and when premises are rented with the distinct understanding that they are in good condition, that becomes part of the consideration.—Tyler v. Disbrow, 40 Mich. 415.

¶ 446. A parol promise by one in possession to pay rent to one out of possession, and who has no title, is void for want of consideration.—Fuller v. Sweet, 80 Mich. 237.

¶ 447. Rent for water power is not recoverable for a period during which water was not furnished.—Gordon v. Constantine Hydraulic Co., 117 Mich. 620.

§ 127. Injury to or destruction of premises.

Premises untenantable for purposes of tenancy, see post § 128.

Injury to or destruction of premises as termination of lease or tenancy, see ante § 48.

Statutory provision relieving lessee from payment of rent on the destruction of leased premises without his fault or neglect, see Pub. Acts 1917, No. 42.

¶ 448. Where a lessee rents a lot and an entire building thereon smaller than the lot, and has the right to rebuild in case of fire, he is liable for the rent if the building is destroyed by fire.—Bowen v. Clemens, 161 Mich. 493.

¶ 449. The fact that a building is damaged and that the owner recovers the insurance does not release the lessee from the payment of rent.—Bowen v. Clemens, 161 Mich. 493.

¶ 450. When a tenant covenants to pay rent, and does not provide against liability in case of destruction of the premises by fire or other casualty, he is bound, in the absence of statutory provisions or covenant on the part of the landlord to rebuild, to pay the rent.—Minnis v. Newbro-Gallogly Co., 174 Mich. 635.

¶ 451. A tenant is bound to pay a rent, when a written lease does not provide against liability in case of destruction of the premises by fire or other casualty, and when there is no statutory provision or covenant on the part of the landlord to rebuild, although there is an exception to the rule where a room in a building is leased, and the whole building is destroyed so that the tenancy is terminated.—Lieberthal v. Montgomery, 121 Mich. 369.

¶ 452. A tenant cannot claim that he is not bound to pay rent because of a fire in a building, where the whole building was not destroyed, and there was no such destruction of the leased property as to deprive the tenant of his right of occupancy for the purpose of repairing, there being no covenant in the written lease for repairs by the landlord, and in such case the landlord could not enter to make repairs without the consent of the lessee.—Lieberthal v. Montgomery, 121 Mich. 369.

¶ 453. A tenant cannot claim that a written lease of a store building and land in the rear of such building is terminated be-

cause of a fire in the building, where there is no evidence of surrender of the premises after the fire.—Lieberthal v. Montgomery, 121 Mich. 369.

¶ 454. Where a lease, under which rent is payable monthly, is void under the statute of frauds, so that the only rights and liabilities of the parties arise from the lessee's holding over, the lessee is not liable for rent beyond the month in which the building is totally destroyed by fire.—Chesebrough v. Pingree, 72 Mich. 438.

¶ 455. A store building leased by plaintiff to defendant was damaged by fire and defendants moved out but retained the key. Plaintiff entered and began reconstructing the building without any arrangement with defendants but the latter subsequently requested certain changes and when completed moved in and remained paying the monthly rental as before. In a suit for the rent during the time the building was being reconstructed, held, that verdict for plaintiff was properly directed, since plaintiff's acts did not amount to an eviction.—Schloss v. Schloss, 137 Mich. 289.

¶ 456. A covenant to repay rent in the case of a fire cannot be implied under the statute (How. St. § 5655), and where there is no covenant in a written lease to repay such rent, a voluntary advance payment cannot be recovered.—Lieberthal v. Montgomery, 121 Mich. 369.

§ 128. Premises untenantable or unsuitable for purposes of tenancy.

Necessity of notice to landlord, see post § 129.

Injury to or destruction of premises, see ante § 127.

Statutory provision relieving tenant from payment of rent upon the premises becoming untenantable without his fault or neglect, see Pub. Acts 1917, No. 42.

¶ 457. Where premises that were habitable when demised have become untenantable through inherent defect, rent is still payable, if there was no fraud on the landlord's part.—Petz v. Voight Brewery Co., 116 Mich. 418.

¶ 458. Where, during the tenancy, leased premises become unfit for occupancy, the tenant, in the absence of a provision requiring the landlord to make repairs, is liable for rent during the time he is excluded from the premises while repairs are making, unless an agreement releasing him from liability is shown.—Petz v. Voight Brewery Co., 116 Mich. 418.

¶ 459. Where, from defects in its construction, a dwelling-house cannot be properly heated and is unhealthy because filled with sewer-gas, a tenant may vacate the premises without being liable for further rent.—Leonard v. Armstrong, 73 Mich. 577.

¶ 460. Where a well of water is an important part of leased dwelling-house premises, the fact that the water, unknown to the tenant, is polluted, amounts, if the cause cannot be removed, to an eviction, and relieves the tenant from paying rent after leaving the premises in consequence thereof.—Maywood v. Logan, 78 Mich. 135.

¶ 461. Where a landlord expressly covenants to have the leased building in suitable condition for the tenants' business on the date they are to take possession, and to keep the premises in good repair, his failure to perform his covenant is a bar to an action for the collection of rent for the unexpired term of the lease, the tenants having, after repeated notices of such breach, vacated the leased premises.—Pierce v. Joldersma, 91 Mich. 463.

¶ 462. One who leases premises to an Odd Fellows lodge, "to be occupied for lodge purposes," binds himself that they shall be suitable for the lessee's purposes, cannot recover rent therefor if the premises are not suitable or are not rendered suitable within a reasonable time after notice.—Young v. Collett, 63 Mich. 331.

¶ 463. Where premises leased for the purposes of an Odd Fellows lodge were given up to the landlord, who took up the floor, rendering the room untenantable, and then neglected to make the needed changes and repairs, such neglect amounted to an eviction, excusing non-payment of rent.—Young v. Collett, 63 Mich. 331.

¶ 464. In January, 1904, the city council ordered defendant, owner of a building used for theatrical purposes, to make certain alterations as a protection against fire. In October, 1904, plaintiff leased the premises to defendant to be used as a theater, without informing him of the requirements of the council. In August, 1905, defendant renewed the lease and agreed to make certain changes as required by law and the ordinances with reference to scenery, dressing rooms, and a fly gallery, relying on plaintiff to satisfy the fire requirements. In a suit for rent, defendant offered as a defense the withholding of information by the plaintiff as to the fire requirements, and plaintiff's failure to satisfy the same. Held, this defense was good, and was not rendered invalid by the fact that defendant in the renewal of August, 1905, agreed to make certain specified changes.—Norris v. McFadden, 159 Mich. 424. (Grant J., dissenting.)

¶ 465. A tenant was in possession of premises hired for a particular purpose, under a lease providing that he should keep the premises in repair. The premises were damaged by servants of the lessor which was called to his attention and he attempted to make repairs but failed, and though requested, he made no further attempt to make the premises fit for the purpose for which

they were leased. Held that the tenant was justified in terminating the lease and vacating the premises.—Adams v. Werner, 120 Mich. 432.

§ 129. ——Necessity of notice to landlord.

¶ 466. In an action for rent the defense that the premises were untenantable is not made out where the lessor had no notice that the house was claimed to be untenantable, and the tenant assigned other reasons for leaving the premises in his notice of removal, and, while testifying to the presence of bad odors, arising from the alleged want of repairs, did not testify that he left the house on that account.—Holmes v. Wood, 88 Mich. 435.

§ 130. Re-entry or eviction precluding recovery of rent.

Waiver by tenant of constructive eviction, see post § 131.

Termination of lease or tenancy by notice to quit for nonpayment of rent, see ante § 40.

Pollution of well of water appurtenant to dwelling house as eviction, see also ante ¶ 460.

¶ 467. A tenant's obligation to pay rent ceases upon termination of his right to occupancy of the land by act of the landlord in evicting him.—Stott Realty Co. v. United Amusement Co., 195 Mich. 684.

¶ 468. Where a landlord, during the continuance of a lease, without the consent of the tenant, enters upon the demised premises, which have been vacated by the tenant, and the entry is followed by a continuous possession inconsistent with the possessory right assured to the tenant by the lease, such possession amounts to an eviction, and precludes the recovery of rent while it continues.—Day v. Watson, 8 Mich. 535.

¶ 469. A landlord's entry upon the demised premises followed by continuous possession, amounts to an eviction whether the entry be for condition broken or not. If for condition broken, it signifies an intention to terminate the lease entirely; while, if the landlord regard the lease as still continuing, the right to rent is suspended during the occupancy.—Day v. Watson, 8 Mich. 535.

¶ 470. A water-lot, extending by the terms of the lease to the channel-bank of the river, and including "all the liberties and privileges belonging to the premises," was rented to be used for a boat house. During the last month of the term the landlord caused his propeller to be moored at the docks, on either side of the slip and in front of the premises, shutting off ingress and egress, and thereby depriving the lessee of the particular and only use for which the premises were rented. Held, such an actual eviction as would abate the rent during its continuance.—Pridgeon v. Excelsior Boat Club, 66 Mich. 326.

¶ 471. Where, under a lease authorizing the lessor to terminate it at his option for nonpayment of rent, the lessor serves a notice to quit, and immediately thereafter excludes the lessee from part of the premises, the latter is not liable for the rent of such part of the premises after his exclusion therefrom, nor for any rent after vacating the rest of the premises in accordance with the notice.—Wreford v. Kenrick, 107 Mich. 389.

¶ 472. It does not necessarily follow from the fact that an action by a landlord for rent after eviction cannot be maintained that the parties may not by contract obligate themselves in such manner that an action technically upon the covenant to pay rent may not survive re-entry, and such contracts are lawful and enforceable.—Stott Realty Co. v. United Amusement Co., 195 Mich. 684.

§ 131. ——Waiver by tenant of constructive eviction.

¶ 473. Where, in a suit for rent accruing after the abandonment of premises, the tenant sets up as a defense a partial eviction in the act of the landlord in permitting third persons to pass over the premises and in filling a part of them with building materials and rubbish, it is error for the trial court to refuse to submit to the jury the question of the tenant's waiver of such eviction, where there is evidence that the defendant expressly consented to the acts of eviction complained of and impliedly consented to same by joining in the doing of such acts.—Kuschinsky v. Flanigan, 170 Mich. 245.

¶ 474. Where a landlord permits the tenants of an apartment to pass over a lessee's lot in going to and from the second story of a rear apartment located on the lot of the lessee and on the adjoining lot of the landlord, and fills the lessee's back yard with building materials and rubbish, the lessee does not waive his right to insist upon such partial eviction as a defense, in a suit for rent accruing after the abandonment of the premises, by reason of the fact that after such eviction the lessee stayed for several months in possession of the remainder of the premises.—Kuschinsky v. Flanigan, 170 Mich. 245.

¶ 475. Where a part of a dock has been leased to A. for storage purposes, a subsequent lease thereof to B. will not, in an action for rent, be regarded as an eviction of A. if he, by accepting and using another part of the wharf, consented to the change.—Cunning v. Tittabawassee Boom Co., 88 Mich. 237.

§ 132. Disturbance or dispossession of tenant by third person.

¶ 476. Where a tenant is dispossessed by one who enters under a paramount title, such entry is equivalent to an eviction by legal process, and will excuse the tenant from paying rent to the landlord. The tenant is not bound to retain possession until actually expelled by legal process; but may quietly yield possession, incurring the risk of being able to show that the entry was under a paramount title.—Marsh v. Butterworth, 4 Mich. 575.

§ 133. Vacation of premises during term or without notice.

Releting by lessor to mitigate damages, see post § 134.

¶ 477. A tenant at will until the tenancy is legally terminated by notice must pay for use and occupation, and is not relieved from payment by vacating the premises while the tenancy exists.—Huntington v. Parkhurst, 87 Mich. 38.

§ 134. ——Releting by lessor to mitigate damages.

See also post ¶ 607.

Rerenting by lessor as eviction, see post ¶ 598.

¶ 478. Where a lessor, having accepted no surrender, rents to others premises that have been given up to him by the lessees before their term expires, doing so for the lessee's benefit, he does not release the payment of any deficiency in rent that may arise.—Stewart v. Sprague, 71 Mich. 50.

¶ 479. By seeking to rent and finally renting vacated premises, the lessor does not relieve the lessee from paying rent for that part of the term during which they were vacant.—Scott v. Beecher, 91 Mich. 590.

§ 135. Persons entitled to rent.

Grantees and assignees of landlord, see post § 136.

Actions for rent, see post V, A.

Right of representative to rents of realty of estate during administration, see Estates of Decedents § 62.

Authority of agents for collection of rents and care of property, see Agency, II.

¶ 480. Where the tenant's possession is not received from the party who claims rent, it is proper to authorize the claimant's title to be investigated, unless there is some other ground of estoppel.—Fuller v. Sweet, 30 Mich. 237.

¶ 481. A complainant seeking to set aside a deed is not bound to account for rent to the wife of his landlord who is the defendant but to the estate of such landlord, if the relation of landlord and tenant could be found to exist.—Williams v. Williams, 118 Mich. 477.

¶ 482. One who lets the upper rooms of his store building under a lease which gives to the tenant full control of an adjacent stairway cannot thereafter recover rent from the adjoining proprietor for the use of the stairway during the continuance of such lease.—Hirschfield v. Franks, 112 Mich. 448.

¶ 483. A lessee, who held under an unfiled chattel-mortgage lease, mortgaged the property covered by this clause of the lease. The mortgage was withheld from record. After the mortgage and the lease had been filed, the lessee gave the mortgagee a second mortgage upon the same property, which recited that it was subject to the former mortgage and to the lease. Held, that the second mortgage being expressly subject to the lease, the rights of the lessors as creditors, to the extent of the rent which had accrued between the time of the execution and of the filing of the first mortgage, are superior to the rights of the mortgagee.—Crockett v. Bearce, 104 Mich. 257.

§ 136. ——Grantees and assignees of landlord.

Assignment by lessor of rent or of leasehold in general, see ante §§ 58-60.

Grantee of lessor as proper party to sue for rent, see post ¶ 545.

¶ 484. The deed of premises covered by a lease carries with it to the grantee, as an incident of the reversion, the right to collect the rent.—Simons v. Diamond Match Co., 159 Mich. 241.

¶ 485. Under an assignment of rents and after notice thereof to the tenants, the rent after it becomes due can be collected by the assignee.—Brownson v. Roy, 133 Mich. 617.

¶ 486. A conveyance of premises to a receiver under order of court subsequent to an assignment of future rents, did not terminate the right created by such assignment, where the latter was given as security for a claim against the owner.—Brownson v. Roy, 133 Mich. 617.

¶ 487. Under an agreement of joint occupancy of premises and joint conduct of business, there can be no claim for rent assigned by one of the parties as against the other because such claim is not distinct and severable.—Carver v. Palmer, 33 Mich. 342.

¶ 488. Where a paid-up lease for a certain period is given to mortgagees as additional security, the assignee of the mortgagor's claim for rent of the leased premises has no greater rights than his assignor.—Storey v. Dutton, 46 Mich. 539.

¶ 489. The surrender of a lease by the tenant before the expiration of his term, with the lessor's knowledge, will defeat a suit for subsequent rent by the lessor's grantee, who takes a deed while the premises are unoccupied.—Foster v. Fleishans, 69 Mich. 543.

¶ 490. An assignee of the rents of premises having knowledge of the actual possession by tenants has notice enough to exclude any benefit from assignor's neglect to inform plaintiff of the advance payment of rent.—Spicer v. Bonker, 45 Mich. 630.

¶ 491. B. and S. held mortgages on certain rented premises already heavily incumbered. S. obtained an assignment of B.'s mortgage, and in order that his own might not be merged procured a deed of the premises to be made to his wife, intending to collect the rents until a foreclosure of prior mortgages. His wife assigned to him "all the use of" the premises "for his use and benefit." B., who understood these arrangements, meanwhile procured assignments of the leases and collected the rents himself in advance. S. sued him for money had and received to plaintiff's use. Held, that an instruction to find for defendant did not prejudice the plaintiff, whose right of action arose under the assignment from his wife, and as she did not hold the leases, her right to collect the rents, if she had that right, rested on her ownership of the equity of redemption and on whatever estoppel may have arisen against B.; but the word "use" in her assignment was too uncertain to cover rents under leases which she did not hold.—Spicer v. Bonker, 45 Mich. 630.

§ 137. Persons liable for rent.

Subletting and liability of subtenants, see post § 138.

Liability for rent under and for appeal in summary proceedings, see Forcible Entry § 58.

¶ 492. Where, as security additional to a mortgage, a paid-up lease for ten years of other than the mortgaged premises was given, which provided that it should be at the lessees' option to keep possession after a certain date, on or after which, also, the lessees might cancel the lease if the bond should be fully paid, held, that when the mortgagees had satisfied their debt by a foreclosure, they could not keep possession without paying rent.—Dutton v. Merritt, 41 Mich. 537.

§ 138. ——Subletting and liability of subtenants.

Liability of assignee of lease for rent according to terms thereof, see also ante ¶ 308.

¶ 493. Ordinarily a subtenant is not liable for rent to the original lessor, there being no privity.—Williams v. Michigan Cent. R. Co., 133 Mich. 448.

¶ 494. Under the rule that after the expiration of the time limited by a notice for the nonpayment of rent, the lessee is a trespasser; a subtenant could not be made liable to the landlord by an agreement made by the tenant after the expiration of the time limited under a notice to quit, and while the tenant had only a bare possession and that wrongful.—Williams v. Michigan Cent. R. Co., 133 Mich. 448.

¶ 495. A subtenant was not liable to the landlord for rent, where the latter had accepted a surrender from the tenant and an assignment of the subtenant's lease, but where there was no reservation from the surrender and no confirmation of such subtenant's lease.—Williams v. Michigan Cent. R. Co., 133 Mich. 448.

¶ 496. A subtenant cannot resist the payment of rent or abandon the premises because the lessor makes an untenable objection to the subtenant's rightful use of the premises.—Ray v. Johnson, 98 Mich. 34.

¶ 497. Where a tenant has sublet the whole or any part of the leased premises, and the subtenant is in possession at the termination of the original lease, the tenant must remove him, otherwise he will not be in a situation to render that complete possession to which the landlord is entitled; and, unless the entire possession is surrendered, the reponsibility of the tenant for rent will continue, although it may have become impossible for him, in consequence of the obstinacy or ill-will of the subtenant, and his refusal to quit, to give the landlord full possession.—Campau v. Michell, 103 Mich. 617.

§ 139. Acceptance of rental as waiver of breach of conditions.

Effect of acceptance of rent on rights of assignee, see ante ¶¶ 304, 305.

¶ 498. Continuing conditions in a lease are not necessarily waived by receipt of rent after they have been violated; the lessor can exercise forbearance in furtherance of his own interests and those of the tenant.—Alexander v. Hodges, 41 Mich. 691.

¶ 499. The mere receipt of rent due before forfeiture, after the lease has been forfeited, is not a waiver of the forfeiture.—Pendill v. Union Min. Co., 64 Mich. 172.

§ 140. Basis for rentals, accrual, and computation of amount due.

Payments in services or board, see post § 141.

Storing property as part consideration for lease of premises, see Bailments ¶ 25.

Arbitration to fix amount of rent to be paid, see also Arbitration.

Validity of appraisal by arbitrators, see Arbitration ¶¶ 92, 93.

¶ 500. The rental of premises may be fixed on the basis of a certain percentage of the cost of the premises.—Eames v. Barber, 192 Mich. 1.

¶ 501. A lessee has the whole of the day on which his rent falls due for making pay-

ment, and a taking, under a lease purporting to give a lien, of property for default in payment of rent before the day has expired, is a taking before default, and consequently a trespass.—Dalton v. Laudahn, 27 Mich. 529.

¶ 502. Where rent is payable weekly, or at other stated intervals, in advance, the tenant has the whole of the first day of each succeeding week, or other interval of time, in which to make the payment.—Sherlock v. Thayer, 4 Mich. 355.

¶ 503. Where a lease for half-months expires with the last day of a month the period for which rent is due ends at midnight and the lessee cannot be required to leave before. —Detroit Sav. Bank v. Bellamy, 49 Mich. 317.

¶ 504. A son who leases a farm from his parents, according to the terms of which lease he is to have the sole management and all that the land produces, but is to support the parents and pay them a small sum of money, is not entitled to payment for his services in the management of the farm.—Montgomery v. Montgomery's Estate, 191 Mich. 398.

¶ 505. On the expiration of a lease it was renewed for five years by an unsigned interlineation to that effect. In consideration of such renewal the lessee agreed to pay a three per cent increase based upon the increased valuation for assessment. This was indorsed on the lease but not signed. The lessee paid the increased rent as computed by the lessor until the latter sold the premises. The grantee attempted to raise the rent upon the basis of the increased assessment. Held, that the original lessor and lessee had construed the lease by acting thereon without objection, and that the lessor's grantee was estopped to question such construction.—Poli v. Jacob, 177 Mich. 238.

§ 141. ——Payments in services or board.

Nonassignability of contract involving personal skill or services, see Assignments § 7.

¶ 506. Rent may be reserved in services as well as in money.—Shaw v. Hill, 79 Mich. 86.

¶ 507. By the terms of a lease of a hotel the rent was made payable in monthly instalments, and the lessor agreed to take one-half the same "in board as the same falls due." Held, that it was not optional with the lessee to pay in money or board, but that he was under the same obligation to pay the board, if demanded, as the lessor to receive it.—Evans v. Norris, 6 Mich. 369.

¶ 508. The lessee, covenanting to furnish board in payment of rent, was under no obligation to call upon the lessor, and demand that boarders be sent, but the lessor was bound to call for the board within the term, and substantially as the same fell due.—Evans v. Norris, 6 Mich. 364.

§ 142. Lease reserving share of produce.

See also ante ¶¶ 294, 296.

Occupancy under farming contract as implied tenancy, see ante § 4.

Right to emblements, issues and profits in general, see ante §§ 111-114.

Right to seize crops for breach of farm lease, see post § 172.

What constitutes surrender of farm lease, see post ¶ 602.

Nonassignability of leases on shares without lessor's consent, see ante ¶¶ 283, 284.

Personal character of lease reserving share of produce, see post ¶ 284.

Rights of parties as common tenants of crops, see also Tenants in Common, II.

Nonassignability of contract involving personal skill or services, see Assignments § 7.

Relationship created by infant's written agreement to work another's land on shares, see Infants ¶ 50.

¶ 509. A contract under which one comes into possession of a farm is a lease; where such contract provides that the tenant is to pay the owner of such farm two-thirds of the income of the farm, unless otherwise specified, when the hay, grain, potatoes, hogs, wool or any other marketable product is sold the toll to be first deducted, and where under the terms of such contract the tenant became the owner of such crops, with full power to sell, and a right of security in case of a breach of the covenants thereof is expressly reserved against such owner by such tenant.—Cockerline v. Fisher, 140 Mich. 95.

¶ 510. Under a contract by which lessees work a farm on shares, it seems to be their duty to deliver to the lessor his share, and not his duty to parcel their shares out to them.—Coe v. Wager, 42 Mich. 49.

¶ 511. The tenant in possession under an agreement whereby the owner of a farm rents it for a term of years, and furnishes to the tenant the stock on the farm, and one-half the seed grain, and pays one-half the expenses of carrying on the farm, exclusive of charges for labor, which is furnished and paid for by the tenant, the owner and the tenant each to receive one-half the products, is not entitled to any part of grain previously sown, although harvested during his tenancy.—Williams v. Rogers, 110 Mich. 418.

¶ 512. Whether a tenant on shares is entitled to remuneration from the owner for delivering milk from the farm to regular customers is properly left to the jury, under instructions that, if it was understood by the parties to the agreement that the tenant's obligation to do the work included this service, he could not recover therefor, but

that if it was not so understood, and the work was performed by the tenant under a special arrangement at the request of the owner, he should be allowed what such services were reasonably worth.—Williams v. Rogers, 110 Mich. 418.

¶ 513. Complainant's land was worked by defendant during the year 1900 on shares, and the land was seeded to grass with the crop of grain, by complainant at his own expense. For the year 1901, defendant's son, at his father's consent and request, made an agreement for the cutting of the hay for that season. No further agreement was made. Complainant arranged with another for the harvesting of the hay in 1902 when defendant interfered claiming that he was a tenant at will and his tenancy not terminated. Held, that his rights terminated with the season of 1901, and injunction granted to restrain him from interfering.—Kenney v. Apley, 139 Mich. 320.

§ 143. Liability for use and occupation.

Occupancy under contract of purchase, see ante § 5.
Occupancy by grantor after conveyance, see ante § 6.
Actions for use and occupation, see post § 151.
Liabilities under implied contract in general, see Implied Contracts.
Person entitled to compensation for use and occupation during period between execution sale and deed, see Executions ¶ 211.
Liability of person in possession of land for rent thereof, see Comp. L. 1915, § 11809.

¶ 514. A contract for use and occupation cannot be made out unless the person charged as tenant has either accepted possession from the landlord, or done some other act in plain recognition of the relationship, or which equitably estops him from denying it.—Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536.

¶ 515. Recovery for the use and occupation of leased premises cannot be had against others than the lessees during the term of the lease, if it has not been assigned or the lessees discharged from liability, or if they have not surrendered their interest or known or assented to any new lease that may have been made to the other.—Doty v. Gillett, 43 Mich. 203.

¶ 516. One who enters upon the use of another's property with full knowledge of the rent demanded therefor is under contract obligation to pay such rent, even though he has originally refused to or has said that he would only pay under protest.—Thompson v. Sanborn, 52 Mich. 141.

¶ 517. A tenant by sufferance will be liable for use and occupation, etc., after notice to quit and demand of possession.—Hogsett v. Ellis, 17 Mich. 351.

¶ 518. Where the occupancy of premises by a tenant at will has been beneficial to him, that is a sufficient ground to imply a promise to pay a reasonable sum as a compensation for such occupancy, unless there is something in the circumstances inconsistent with the notion of such a promise or of an obligation to pay.—Dwight v. Cutler, 3 Mich. 566.

¶ 519. Where mortgaged merchandise was placed in a leased storeroom, the mortgagees under an arrangement with the lessee having placed an agent in the store to receive the cash from the sales and to apply it upon the indebtedness to them, the lessee and mortgagor being permitted to draw out a stated sum for expenses, in the absence of an express agreement to pay rent the mortgagees are not liable to the lessor for the use of the store while their agent was there.—Fisher v. Pforzheimer, 93 Mich. 650.

¶ 520. A receiver of an insolvent company who retains possession of leased premises, but who does not assume the lease, either expressly or impliedly, but who repudiates liability under the lease, is only liable for the reasonable rent of the property during the time of actual occupancy.—Stoepel v. Union Trust Co., 121 Mich. 281.

¶ 521. In an action for the use and occupation of premises under the lease of a right of way it is no defense that other persons also had a right of way if the right was in neither case exclusive.—Ledyard v. Morey, 54 Mich. 77.

H. LIENS AND SECURITIES OF LANDLORD.

§ 144. In general.

Underwriting, guaranty or suretyship, see post § 145.
Provisions in lease, see post §§ 146, 147.
Rights and liabilities towards third persons, see post VII.
Stipulation in lease granting power of sale of chattels, effect as chattel mortgage, see Chattel Mortgages § 2, ¶ 7.

¶ 522. Although the landlord, to whom possession of a merchandise stock is surrendered with the lease, may not be a warehouseman within the meaning of the statute, he is entitled to a lien as such as against the tenant, where he immediately advises the latter that he will make a claim for storage if the goods are not removed.—Schneider v. Dayton, 111 Mich. 396.

¶ 523. A change of possession of a stock of merchandise from the merchant to the owner of the store building is effected, where the latter, on being informed by the merchant that he has sold the goods, and that he claims no further interest therein, acquiesces in a surrender of the lease, and thereafter watches and cares for the goods

during litigation between the former tenant and the alleged purchaser.—Schneider v. Dayton, 111 Mich. 396.

§ 145. Underwriting, guaranty or suretyship.

General law of guaranty and suretyship, see Guaranty; Suretyship.

Necessity of writing under statute of frauds to answer for debt of another, see Frauds, Statute of, I, B; II, A.

¶ 524. Where, at the time a lease is executed, a third party executes under seal, upon the back thereof, an agreement to become surety for the payment of the rent and performance of the covenants mentioned in the lease, such agreement becomes a part of the lease, and he may be sued jointly with the lessees for the rent due; and a subsequent reduction of the rent without his knowledge or consent does not discharge him.—Preston v. Huntington, 67 Mich. 139.

§ 146. Provisions in lease.

Property included, see post § 147.

¶ 525. A lien on property given by a lease to secure the performance of its conditions is inseparable from the lease, and can only be enforced against the lessee by the landlord or his assignee.—Hansen v. Prince, 45 Mich. 519.

¶ 526. A clause in a lease providing that anything placed on the premises shall be liable for the rent, and that the lease shall constitute a mortgage to secure it, and that on default the lessor may seize and sell the property on certain notice and may retain from the proceeds the rent and the "costs of such sale," does not justify the detention of property so seized if the rent is paid without sale and there is no showing of actual costs or of information thereof to the lessee, or of any notice of proceedings to be taken.—Hamilton v. Langley, 52 Mich. 549.

¶ 527. Defendant leased a farm to one Young. The lease contained a provision that all the fruit raised thereon should be shipped in the name of the lessor, and a mortgage clause in favor of the lessor on all the produce of the land, whether harvested or not, to secure the tenant's compliance with the terms of the lease. After the execution of the lease Young gave a mortgage to the plaintiff on his fruit crop to secure a note. The crop was harvested by Young and sold and shipped by him in defendant's name. Young gave an order on the consignee to pay to plaintiff the amount of the note out of the proceeds of the fruit. Defendant refused to sign such order. Held, trover would not lie for the conversion of the fruit.—Lytle v. Peters, 167 Mich. 345.

§ 147. ——Property included.

¶ 528. By the terms of a lease of a planing-mill the lessors were to have a lien for unpaid rent upon all "improvements" made by the lessee on the premises, and the lessee was authorized to remove—in case the rent should be paid—all machinery placed thereon by him, such machinery to be treated by both parties as "chattel property." Held, that no present lien upon or interest in the machinery was created by the lease, and that it was subject to mortgage by the lessee as personalty.—Booth v. Oliver, 67 Mich. 664.

¶ 529. Where a lease provides that the lessors shall have a lien enforceable, like a chattel mortgage, on machinery placed on leased premises, such lien not being recorded as a chattel mortgage, nor the property reduced to the lessor's possession, is void as against levies by third persons.—Lake Superior Ship Canal, R. & I. Co. v. McCann, 86 Mich. 106.

¶ 530. A clause in a lease stipulating, by way of securing the payment of rent, that "all goods, wares and merchandise, household furniture, fixtures or other property which are or shall be placed in or on said premises by them, shall be liable, and this lease shall constitute a lien or mortgage on said property," does not cover the dwelling-house upon the premises.—Kuschell v. Campau, 49 Mich. 34.

I. RIGHT TO QUIT AND TERMINATE.

§ 148. In general.

See also ante ¶ 333.

Estoppel to assert right, see post § 149.

Right of lessor to terminate lease for breach of implied covenant, see ante ¶ 62.

Right to emblements, issues and profits on vacation or abandonment of premises or crops, see ante § 114.

Forfeiture of lease for breach of covenant, see ante § 90.

Right of tenant to vacate or abandon premises because of landlord's failure to repair, see ante § 88.

Rights and liabilities towards third persons, see post VII.

Termination of lease or tenancy in general, see ante II.

Termination by ouster or eviction, see ante II.

Right of tenant to quit when leased property is destroyed or rendered untenantable without his fault or neglect, see Pub. Acts 1917, No. 42.

¶ 531. A tenant who has refused to pay rent until repairs are made, and is accordingly notified to quit, has a right to regard the lease as ended.—Conkling v. Tuttle, 52 Mich. 630.

¶ 532. The failure of a landlord, upon notice, to compel other tenants to cease offending a tenant by the use of offensive language and conduct does not constitute an eviction barring recovery for rent, under a covenant for quiet and peaceable possession and a clause in the tenant's lease forbidding

the use of foul and abusive language so as to become a nuisance to other tenants and neighbors, where the tenants causing the disturbance have no title interest in the premises and the landlord does not encourage the conduct of such tenants, and although the leases of the other tenants contain similar clauses against the use of such language, and the tenants might have been ejected because thereof.—Stewart v. Lawson, 199 Mich. 497.

¶ 533. Defendant leased premises with right of renewal for one year. Before his term expired, he stated to the lessor's brother-in-law, whom he supposed to be the lessor's agent, that he would renew the lease if proper heating facilities were provided which was promised and he continued in possession. The promise was ratified by the lessor but the heating facilities were not provided, and he vacated. In an action for the rent after the abandonment, held that he was justified in vacating the premises before the year expired and the rent thereupon ceased.—Rogers v. Babcock, 139 Mich. 94.

¶ 534. In determining the right of the lessee to quit because the premises leased were not suitable for the lodge purposes to which the lease restricted the lessee and were not made suitable within a reasonable time by the lessor, it is immaterial whether the lodge had any legal existence.—Young v. Collett, 63 Mich. 331.

§ 149. Estoppel to assert right.

¶ 535. Tenants who continue to occupy leased premises without offering to surrender them after egress has been cut off on one side by the lessor's erecting a fence across an adjoining street, are estopped from claiming that such erection constitutes an ouster. —Beecher v. Duffield, 97 Mich. 423.

V. MUTUAL REMEDIES AND ACTIONS.

A. ACTION FOR RENT AND ADVANCES OR FOR USE AND OCCUPATION.

§ 150. Right of action in general.

Actions for use and occupation, see post § 151.
Necessary and proper parties, see post §§ 152, 153.
Declaration and other pleadings, see post § 154.
Issues, proof and variance, see post § 155.
Burden of proof, presumptions and evidence, see post § 156.
Questions of law and fact and instructions, see post § 157.
Actions against tenant for breach of covenant or condition, see post § 160.
Actions against landlord for breach of duty, see post §§ 161-164.
Particular defenses or conditions affecting cause of action for rent, see ante §§ 125-132.
Summary proceedings to oust tenant and recover possession, see post V, B, and see also Forcible Entry and Detainer.
General law of assumpsit, see Assumpsit.
Judgment as bar or estoppel upon landlord or tenant of party, see Former Adjudication § 74.
Decree reforming a lease as res adjudicata upon surety on the lease, see Former Adjudication § 72.
Judgment in action for rent as res adjudicata of the execution of the lease, see Former Adjudication ¶ 406.
Proper limitations of actions for rent and computation of time, see Limitations.
Assumpsit on leases under seal, see Assumpsit § 2.
Recoupment of damages or right to set-off in action for rent, see Set-off.
Actions for recovery of rent, see Comp. L. 1915, §§ 11810, 11811.

¶ 536. An agreement that a person who retains no ownership in the lease, and has sold the land, should receive certain portions of the rent thereafter payable, gives him no title to enforce such payment by any action founded directly on the lease itself. All rights of that kind belong to the grantee of the land under lease, where they cannot be separated from the ownership of that instrument, and the beneficial interest in the partial revenues must be enforced in some other way.—Hansen v. Prince, 45 Mich. 519.

§ 151. ——Actions for use and occupation.

Liability for use and occupation, see ante § 143.
Occasion and propriety of use and occupation, and of the other common counts, see Assumpsit, II.

¶ 537. An action for use and occupation does not lie where no actual use existed or was bargained for.—Bates v. Phinney, 45 Mich. 388.

¶ 538. The action of assumpsit for use and occupation does not lie where the holding is adverse, or where there is no obligation to pay rent by virtue of an express or implied contract relation, as of landlord and tenant.—Dwight v. Cutler, 3 Mich. 566; Ward v. Warner, 8 Mich. 508; Hogsett v. Ellis, 17 Mich. 351; Dalton v. Laudahn, 30 Mich. 349; Wilmarth v. Palmer, 34 Mich. 347; Marquette, H. & O. R. Co. v. Harlow, 37 Mich. 554; Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536; Henderson v. City of Detroit, 61 Mich. 378.

¶ 539. An action of use and occupation, being founded on contract, express or implied, will not lie where the occupancy of the one sought to be charged is under claim of adverse right, as the remedy, if any, is by action of trespass or tort.—Smith v. Haight, 188 Mich. 512.

¶ 540. An action for use and occupation may not be maintained by the owner of land against an occupant who is neither a tenant nor a contract purchaser until notice to quit is given.—Robinson v. Batzer, 195 Mich. 235.

§ 152. Necessary and proper parties.

Assignee or grantees, see post § 153.

¶ 541. An action for rent must be brought in the names of the lessors if the lease has not been assigned.—Hecht v. Ferris, 45 Mich. 376.

¶ 542. One named as the payee of the rent in a lease executed by another party may in her own name sue the lessee therefor.—Toan v. Pline, 60 Mich. 385.

¶ 543. In an action for rent the nonjoinder of a cotenant as plaintiff can only be set up in abatement, and where not so pleaded it will go merely to apportion the damages.—Perrin v. Lepper, 34 Mich. 292.

¶ 544. In an action for the use and occupation of premises under the lease of a right of way, persons also having the use of the right of way are not necessary parties.—Ledyard v. Morey, 54 Mich. 77.

¶ 554a. One who undertakes, as copromisor to pay rent under a lease may be sued jointly with the other copromisors, the promises being parts of one contract though placed in different writings.—Preston v. Huntington, 67 Mich. 139.

§ 153. ——Assignees or grantees.

¶ 545. The grantee of leased land, not the grantor who by agreement has a beneficial interest in part of the rent, is the proper person to sue on the lease for rents.—Hansen v. Prince, 45 Mich. 519.

¶ 546. Where a lessor has conveyed the reversion with the rent, or has assigned the rent, retaining the reversion, the grantee or assignee, as the case may be, may sue for the rent.—Perrin v. Lepper, 34 Mich. 292.

¶ 547. An action for rent must be brought in the lessor's name where the lease has not been assigned.—Hecht v. Ferris, 45 Mich. 376.

¶ 548. An assignee of a nontransferable lease may recover rent advanced to the lessor through the original lessees where the lessor has rented to a third person after having given his verbal assent to the lessees' transfer of the lease and surrender of possession to the assignee.—Harrington v. Hall, 126 Mich. 704.

¶ 549. There can be no action for use and occupation by a lessor on an assignment from the lessee of a claim for rent against a third party who entered into an agreement with the lessee for joint occupancy of premises and joint conduct of business.—Carver v. Palmer, 33 Mich. 342.

¶ 550. The remedy for the breach of an agreement by a lessee against another for the joint occupancy of premises and joint conduct of business is not an action for use and occupation by the lessor under an assignment of rent claim by the lessee but an action by the lessee himself for breach of contract.—Carver v. Palmer, 33 Mich. 342.

§ 154. Declaration and other pleadings.

¶ 551. The declaration in an action for rent on a parol lease must allege the time the term commenced.—Pendill v. Neuberger, 64 Mich. 220.

¶ 552. In declaring on an agreement as a demise, it must either be stated by its legal effect or be set forth in such a manner that its legal character can be seen.—Tillman v. Fuller, 13 Mich. 113.

¶ 553. In an action for rent the declaration set forth an agreement on the part of the plaintiff to lease the premises to the defendant, in consideration of which the defendant did actually rent and hire the premises. It was held that such agreement to lease could not be a consideration for an actual renting, unless it was so stated as to amount to a present demise.—Tillman v. Fuller, 13 Mich. 113.

¶ 554. A declaration alleging that defendant agreed, "as per lease attached and made part of this declaration," to pay plaintiff a specified sum per month, for one year, for the rental of certain premises, and to perform certain other conditions, all of which he had neglected and refused to do, is sufficient if not demurred to, a copy of the lease being attached as stated, to authorize a recovery for use and occupation, though no formal count for use and occupation is made.—Twitchel v. Goebel, 106 Mich. 225.

¶ 555. Use and occupation may be sued for specially without reference to the form of the lease.—Conkling v. Tuttle, 52 Mich. 630.

§ 155. Issues, proof and variance.

Proof of new lease under general issue, see also Assumpsit § 52.

¶ 556. In an action for the recovery of rent on a parol lease the time of the commencement of the term must be proved as alleged.—Pendill v. Neuberger, 64 Mich. 220.

¶ 557. In an action by a tenant against his landlord for interference with the former's possession, a count which rests the whole ground of complaint on a continuous right of possession as lessee, and enumerates various acts inconsistent therewith, calls for a showing of such a continuous leasehold right as alleged, as such right is material;

the absence of such showing is fatal, and excludes from the case everything that depends on the count.—Ives v. Williams, 53 Mich. 636.

¶ 558. In an action for rent of premises which defendant vacated without giving sufficient notice, the defense that the premises were untenantable cannot be shown under the plea of the general issue without notice.—Holmes v. Wood, 88 Mich. 435.

¶ 559. Where, pending a suit to recover rent, the lessee dies, and on the trial it appears that, after the lessee had entered upon a second term provided for in the lease, the lessor, under a provision giving him that right, sought to terminate the lease, but, on the claim of the lessee that he had entered upon another term, acquiesced in his continued possession of the leased premises, for which use and occupation the suit was brought, the court will not inquire into the validity of the lease, which is claimed by the administrators to be void, and to have been terminated by its terms before the commencement of the use and occupation sued for, but will leave that question to be settled on the hearing in probate court of a contingent claim filed against the estate, based upon such lease.—Brush v. Beecher, 98 Mich. 235.

§ 156. Burden of proof, presumptions and evidence.

Presumptions and burden of proof arising from occupancy, see ante § 21.
Evidence and proof of relation, see ante § 22.
Presumptions and evidence as to liability for injuries from defective or dangerous conditions, see ante § 107.
General law of evidence, see Evidence.
Presumption of tenancy, see also Forcible Entry ¶ 146.
Admissibility of lease to prove amount of rent due, see Comp. L. 1915 § 11810.

¶ 560. The burden of proof in an action by the administrator of an estate of a woman against decedent's son on notes given for rent of property leased for life by the son to the mother and sublet by him to her to establish a tenancy and agreement to pay rent is on the plaintiff.—Heinze v. Heinze, 195 Mich. 365.

¶ 561. Where a telegraph company abandons space leased by it in a hotel lobby, and the lessor thereupon uses the space abandoned, along with the rest of the lobby, for hotel purposes, it cannot be inferred from this that the lessor in a suit for rent has derived from such use the rental value of the space.—Chittenden v. Western U. Tel. Co., 154 Mich. 1.

¶ 562. In determining, in an action for rent upon an oral lease, the time when the lease commenced, it is proper to consider the time when defendant went into possession, the time from which he paid the rent, and all other circumstances throwing light upon the question.—Pendill v. Neuberger, 67 Mich. 562.

¶ 563. In an action for rent where rental value was in dispute, it was error to require plaintiff to testify what rent he received for adjoining premises owned by him.—Stevens v. Beardsley, 122 Mich. 671.

¶ 564. Plaintiff, the owner of a building used for theatrical purposes, was ordered by the city council to make certain alterations as a measure of safety against fire. Afterwards, plaintiff leased the premises to defendant to be used as a theater, without informing him of the requirements of the council. In a defense against a suit for rent, held, it was error to exclude the records of the city council offered in evidence by defendant to show the official action and reports of the agents of the city in enforcing the said requirements.—Norris v. McFadden, 159 Mich. 424.

¶ 565. In an action for rent against the sureties on an appeal bond bringing up proceedings for the recovery of the premises leased by a man and his wife, an order payable out of the rent, signed by the man but not by the wife, and drawn upon the tenant, is inadmissible where there is no assignment of the lease by both lessors.—Hecht v. Ferris, 45 Mich. 376.

¶ 566. Proof that saloon fixtures belonging to defendant remained in plaintiff's building for some months will not support an action for use and occupancy, where it appears that at the time plaintiff purchased the building the fixtures were in possession of another, and that defendants did nothing to disturb such possession.—Bonnazza v. Joseph Schlitz Brewing Co., 155 Mich. 36.

¶ 567. Where an action for use and occupation was brought against one of the original lessees and a stranger to the lease, and supported by evidence that the defendants acted as copartners, the latter may show their actual relation, and the contract between them may be put in evidence. They may also show that the stranger had agreed to pay what would have been his proportion of the rent under the lease to his codefendant.—Doty v. Gillett, 43 Mich. 203.

§ 157. Questions of law and fact and instructions.

Instructions in general, see Instructions.
Right to set-off against rent for expenditure by tenant for repairs and improvements as jury question, see Set-off.

¶ 568. In an action for rent by an administrator held that it was a question for the jury whether an agreement was made between decedent and defendant, her son, whereby the defendant should be liable to

decedent for the use of the premises which had been originally leased by defendant to decedent.—Heinze v. Heinze, 195 Mich. 365.

¶ 569. It is not error to refuse to charge on a month to month letting where plaintiff's testimony showed a letting for a year, if believed, while that of defendant, if believed, showed merely a license terminable without notice on nonpayment of compensation, neither showing a month to month tenancy.—Hirschfield v. Franks, 112 Mich. 448.

¶ 570. It is error to instruct in an action upon a lease for rent, that a surrender and cancellation of the lease by operation of law resulted, where it appears that plaintiff was informed that defendants, the original lessees, had failed and that thereafter a corporation occupied the premises and paid rent, but it did not appear that plaintiff released the original lessees or that he had dealings with the corporation other than to make bills against it for rent and to collect such rent, and where checks of the corporation for the rent were delivered by one of such original lessees.—Detroit Pharmacal Co. v. Burt, 124 Mich. 220.

¶ 571. Plaintiffs, partners, sued defendant to collect a bar bill, and for money loaned. Defendant claimed a set-off for rent due, the rate per month being in dispute. One of the plaintiffs testified that he had turned over to his deceased partner his share of the rent money to be paid to defendant, but could not testify that the money had ever been so paid over. The deceased partner and defendant had been on very friendly terms. There was no other evidence that the rent had been paid. Held, the court should have instructed the jury to find in favor of defendant that there was no payment of rent, and should have directed them to confine their inquiry to the disputed question of the rate of the rent.—Trudeau v. Boivin, 158 Mich. 585.

¶ 572. In an action by the administrator of the estate of a woman on promissory notes given for rent of real estate rented by defendant of decedent, his mother, after having been leased for life by him to her, where he was not living on the property and was but a gratuitous tenant at will up to the time of his father's death, held that an instruction that the mother had the right under the instrument to possession and use of the land described in it, that whether she saw fit to assert that right and had an understanding or contract with defendant by which he recognized her right and agreed to attorn to her as a tenant for the use of the land was a question of fact, but, if she did not assert her right and saw fit not to put him off or rent it to him, simply permitting him to remain in possession of it, if there never was any agreement by which he rented it to her, plaintiff could not recover, and that the burden of proof rested upon plaintiff to establish a tenancy and agreement to pay rent by a preponderance of evidence, was not erroneous.—Heinze v. Heinze, 195 Mich. 365.

¶ 573. A finding for plaintiff will not be directed in an action for rent against the original lessees where there is testimony tending to show a surrender of the lease and occupancy by the plaintiff after business failure of an assignee of such lessees.—Detroit Pharmacal Co. v. Burt, 124 Mich. 220.

¶ 574. A verdict should not be directed for the plaintiff in an action to recover rent, where the testimony is conflicting as to whether there had been an eviction.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

B. SUMMARY PROCEEDINGS TO OUST TENANT AND RECOVER POSSESSION.

§ 158. In general.

Necessity of notice or proceedings for reentry for breach of covenant, see post § 171.

Proceedings where lease provides that lessor may terminate without notice, see post ¶ 621.

Expulsion of licensee, see post § 180.

Summary proceedings to put landlord in possession, see Forcible Entry.

Forcible entry and detainer proceedings or summary proceedings by lessor against lessee or by tenant against landlord, see Forcible Entry.

Right of sublessors to forcible entry or summary proceedings, see Forcible Entry, I.

Necessity that rent be earned and due before summary proceedings, see Forcible Entry § 9.

Propriety of summary proceedings by evicted or excluded tenant to recover possession, see Forcible Entry § 9.

Issues of title in summary proceedings, see Forcible Entry §§ 36, 37.

Propriety of summary proceeding by lessor against lessee's assignee, see Forcible Entry ¶ 70.

Notice to quit as basis for summary proceedings, see Forcible Entry §§ 10, 11.

Grounds for and maturity of right to summary proceedings, see Forcible Entry and Detainer §§ 9-11.

Ouster of jurisdiction of forcible entry or summary proceedings by raising issue of title, see Forcible Entry § 13.

Right of landlord to maintain ejectment before terminating tenancy, see Ejectment ¶ 61.

Right of landlord to ejectment against tenant after expiration of tenancy, see Ejectment ¶ 30.

Pleadings, procedure, trial and judgment in forcible detainer action or summary proceedings, see Forcible Entry and Detainer, II.

Bill in equity as remedy to obtain possession of premises from tenant, see post ¶ 575.

Actions on appeal bonds in summary proceedings, see Forcible Entry § 62.
Propriety of handcuffing tenant in executing writ of restitution, see Forcible Entry ¶ 217.
Judgment in summary proceedings as res adjudicata, see Former Adjudication § 13.
Right to pay amount due and avoid restitution, subtenant's right, see Forcible Entry § 64.
Liability for rent under bond for appeal in summary proceedings, see Forcible Entry § 58.
Alternative remedy on appeal bond for damages or in trespass for treble damages, see Forcible Entry § 60.
Presumption of tenancy, see also Forcible Entry ¶ 146.
Estoppel of dowress renting to husband's grantee to eject him while lease endures, see Dower ¶ 156.

C. ON OTHER CAUSES OF ACTION.

§ 159. Remedies and procedure in equity.

Actions against tenants for breach of covenant or condition, see post § 160.
Actions against landlord for breach of duty, see post §§ 161-164.
Actions for rent, see ante V, A.
Liability for treble damages for forcible entry and eviction, see Damages § 208.
Recovery of over-payments of rent made by mistake, see Payment, VI.
Right of lessor to interplead his vendee and the lessee, both claiming possession, see Interpleader ¶ 16.
Injunction to restrain violation to leases, see Injunctions § 30.

¶ 575. A bill in equity is not the appropriate remedy to obtain possession of premises from a tenant holding over after the expiration of a lease, nor to try the title he sets up to maintain his holding, and though in a proper case, in aid of legal proceedings to recover possession, a court of equity might by injunction restrain the tenant from committing irreparable mischief pending the proceedings, it will not take original jurisdiction for such a purpose.—Torrent v. Muskegon Booming Co., 22 Mich. 354.

¶ 576. A bill set out that complainant orally leased his farm to defendant for a certain rental per acre; that defendant failed to pay the rent; that defendant did not farm according to good husbandry; and that defendant has disposed of his personal property in order to avoid the collection of rent. Held, equity had no jurisdiction to decree possession to the lessor as the remedy at law was adequate.—Gault v. Gault, 158 Mich. 303.

¶ 577. Neglect to cultivate a vineyard on a farm will not sustain a bill to cancel a lease on the ground that the lessee had obtained it by the fraudulent representation that he was a skilful farmer in all branches of husbandry. If the lease provides for its termination by notice the lessor has an adequate remedy at law for any actual damages.—Arnold v. Bright, 41 Mich. 207.

¶ 578. Equity has not jurisdiction to decree a forfeiture in favor of parties claiming under an agreement to give a lease and who are out of possession, against one who is in possession under the holders of the legal title.—Grummett v. Gingrass, 77 Mich. 369.

§ 160. Actions against tenant for breach of covenant or condition.

Remedy for breach of implied covenant, see also ante ¶ 63.

¶ 579. In an action for breach of a lease, alleging that the lessee negligently allowed debris to accumulate and be around the premises (a saw mill) and negligently allowed fire to be thrown among such debris and failed to provide a watchman and protect the property, it cannot be urged against the lessor that he was negligent in not protecting the property merely because he knew that fire had once before broken out and was likely to do so again; where there was not yet any termination of the lease and he had no actual knowledge that there was fire smoldering or that it was not watched.—Stevens v. Pantlind, 95 Mich. 145.

¶ 580. Where a certain lease provided that in case of the lessee's default the lessor might re-enter and repossess the premises and deduct from the sum deposited in the lessor's hands as security all sums due the lessor and bring action for and collect all damages sustained by the lessor on account of the breach by the lessee, and that the remedies of the lessor should be cumulative, held, that re-entry and eviction for such default were not a bar to an action to recover damages for such breach of the contract.—Stott Realty Co. v. United Amusement Co., 195 Mich. 684.

§ 161. Actions against landlord for breach of duty.

For keeping tenant out of possession, see post § 162.
For damages for disturbances, eviction or wrongful dispossession, see post § 163.
For fraud or concealment in procuring tenant, see post § 164.

¶ 581. In an action brought by the assignee of a lease against the lessor upon a contract to repair made separate from the lease, a declaration in which the plaintiff claims his rights under such contract by virtue of the assignment of the lease, should not be so strictly construed as to exclude proof that he acquired such rights by a parol transfer.—Keeley Institute Co. of West Michigan v. Shaw, 149 Mich. 519.

¶ 581a. A special declaration on the covenants of a lease suffices without expressly

alleging actual ouster by the lessor, where it sets forth facts estopping the lessor to deny that there was one.—Cornelissens v. Driscoll, 89 Mich. 34.

§ 162. ——For keeping tenant out of possession.

¶ 582. Where a landlord refuses possession to a lessee, but exercises no force or intimidation, the remedy of the tenant is either by an action for damages or in ejectment.—Chylowski v. Steinberg, 198 Mich. 547.

¶ 583. In action for damages to a lessee by the refusal of a lessor to let the former into possession of demised premises a request to charge the jury that after the mutual abandonment of an agreement to lease premises, the minds of the parties never met in a new agreement, held covered by the general instructions.—Murdock v. Roe, 186 Mich. 233.

¶ 584. A verdict in favor of the plaintiff in an action for the breach of an agreement to let him into possession of a house, held sustained by the evidence.—Murdock v. Roe, 186 Mich. 233.

¶ 584a. A tender of the rent is unnecessary to permit a recovery by a lessee for the breach of an agreement to rent property, where the owner absolutely refuses to recognize the agreement.—Murdock v. Roe, 186 Mich. 233.

§ 163. ——For damages for disturbance, eviction or wrongful dispossession.

Ouster or eviction by landlord in general, see ante § 72.

¶ 585. Any one who has the right of possession under a lease can sue in an action on the case for disturbance of such right.—Ives v. Williams, 53 Mich. 636.

¶ 586. In an action on the case for the disturbance of rights held under a contract of lease, any one who has rights of possession derived from the lease can sue for their disturbance and recover his actual damages.—Ives v. Williams, 53 Mich. 636.

¶ 587. A tenant in possession of a house and lot may recover in an action of trespass against his landlord who in the tenant's absence and without his consent, enters upon the premises and moves the house and digs a cellar and erects another house on the lot.—Maney v. Lamphere, 139 Mich. 429.

¶ 588. In an action by a tenant against a landlord for wrongful ejectment under Comp. Laws 1897, § 11206, which provides for treble damages, such damages may be recovered for the loss sustained by plaintiff in moving his household goods, but not for his tools and household goods injured or left on the place, or for the deprivation of profits and benefits under the lease.—Carman v. Scott, 172 Mich. 44.

¶ 589. In an action by a tenant against his landlord to recover damages for injury to his business as the result of rendering the premises untenantable by removing the building to a new location, where defendant was to occupy it until a new building was erected on the old location, held, that it was a question for the jury whether a new agreement was made whereby the store building was to be moved to the new location before the expiration of the term and occupied at a reduced rental until the erection of the new building on the old location and the landlord agreed to promptly repair the building upon its removal.—Kezeli v. River Rouge Lodge, No. 410, Independent Order of Odd Fellows, 195 Mich. 181.

¶ 590. In an action by a tenant for damages for ouster from the leasehold premises the lessor is estopped by deed to purchaser and by notice to the tenant, then not in actual occupancy, of termination of lease from relying upon absence of technical ouster, where he also told the tenant not to resume possession because of such deed and the purchaser excluded him.—Cornelissens v. Driscoll, 89 Mich. 34.

¶ 591. In an action by a tenant against the landlord to recover damages for injury to his business as the result of rendering the premises untenantable in removing the building to a new location where defendant was to occupy it until a new building was erected on the old location, and failing to repair it, where the only evidence as to the loss of profits was a mere summary of his receipts and disbursements, held, that the refusal of defendant's requested instruction that there was no evidence in the case as to the loss of profits and that the jury could not consider that question in reaching their verdict was erroneous.—Kezeli v. River Rouge Lodge, No. 410, Independent Order of Odd Fellows, 195 Mich. 181.

§ 164. ——For fraud or concealment in procuring tenant.

¶ 592. Where the landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof, in an action for fraud and deceit.—Morton v. Hanes, 162 Mich. 366.

¶ 593. While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease.—Morton v. Hanes, 162 Mich. 366.

VI. SURRENDER AND RE-ENTRY.

§ 165. Surrender in general.
Surrender of tenancy at will, see post § 166.
Surrender by operation of law, see post § 167.
Acceptance of surrender, see post §§ 168, 169.
Re-entry for breach of covenant, see post §§ 170-172.
Peaceable re-entry after notice to quit, see post §§ 173, 174.
Presumptions and evidence of surrender or re-entry, see post § 175.
Questions of law and fact and instructions, see post § 176.
Evidence of surrender, see post ¶¶ 631-636.
Presumption of surrender from non-user, see post ¶ 630.
Presumption of surrender from abandonment of premises by tenant, see post ¶ 629.
Loss on reletting after surrender by insolvent corporate lessee as claim against its estate, see Corporations ¶ 827.
Right of lessee to surrender leased property destroyed or rendered untenantable without his fault or neglect, see Pub. Acts 1917, No. 42.

¶ 594. The surrender of a lease must be the mutual and voluntary action of the parties to the lease.—Wray-Austin Machinery Co. v. Flower, 140 Mich. 452.

¶ 595. A voluntary surrender of leased premises to a landlord prior to the expiration of the term by the lessee's assignee in bankruptcy, who is informed by the landlord that he intends to hold the lessee for the rent for the residue of the term, does not, though the landlord afterwards rents the premises to others, amount to an eviction or to a surrender of the term; surrender must be by mutual consent of the parties to the lease.—Stewart v. Sprague, 71 Mich. 50.

¶ 596. Vacating leased premises before the term expires, and offering the key, which is refused, is not a surrender.—Huntington v. Parkhurst, 87 Mich. 38.

¶ 597. Where, after agreeing to surrender a lease, the lessee says to the lessor, "you may consider the ground in your possession this evening," and acting upon that statement the lessor takes possession without hindrance, and keeps it, the surrender is as effective and valid as if the lessee had broken a twig over the land, or made any other symbolical delivery.—Baumier v. Antiau, 65 Mich. 31.

¶ 598. Delivery of the keys of leased premises by the lessee's assignee in bankruptcy to the lessor, who declares that he will hold the lessee's estate liable for the residue of the term, does not, though the lessor subsequently rents the premises to others, amount to a surrender of the term or to an eviction.—Stewart v. Sprague, 76 Mich. 184; same case on former writ of error, 71 Mich. 50.

¶ 599. Where the tenant leaves the premises, and sends the key by a clerk to the landlord, who declines to receive it, and the clerk then hands it to one of the bell-boys at the hotel where the landlord is boarding, and it comes into the landlord's possession, such acts will not constitute a surrender and acceptance of the premises.—Scott v. Beecher, 91 Mich. 590.

¶ 600. If a tenant at will vacates the premises, which he may do at any time, it will be treated as a surrender to the landlord.—Shaw v. Hill, 79 Mich. 86.

¶ 601. The lessee of a building went out of business by joining with others in forming a corporation. The lessor refused to accept the corporation as lessee under the lease but agreed to let it use the premises at the same rental until he could find another tenant and the corporation thereafter used the premises for storage purposes. Held that there was a surrender of the lease by the original lessor and a new contract with the corporation.—Drew v. Billings-Drew Co., 132 Mich. 65.

¶ 602. The lessee of a farm upon shares, owing to his inability to put in spring crops by reason of the season's being wet, rented a hotel near the farm, to which he removed his family, but left in the house on the farm, which he locked up, some of his furniture, and upon the farm some tools and poultry. After such removal he did some work upon the farm, repairing fences and planting corn. When leaving the farm his intention was to retain possession thereof, and, before the expiration of his lease, to return and cut some hay growing thereon. Held, that he did not surrender to the landlord his lease, or his right to the possession of the farm, or his right to the hay.—Hough v. Brown, 104 Mich. 109.

¶ 603. Under a lease authorizing the lessee to surrender the premises in the event of his being prevented "by reason of any statute or law or authoritative order from using said premises for the purpose of a saloon," the fact that the lessee was unable to secure a tenant as a saloonkeeper who was acceptable to the common council of the city in which the building was located, was held not to authorize a surrender.—Lynch v. Val Blatz Brewing Co., 179 Mich. 355.

¶ 604. A lease of a mill for sawing certain logs which provided that when work was done lessees should restore premises in as good condition as when received, was not terminated when timber was cut and mill shut down, lessees not having removed all their lumber from yard or rubbish from mill which were necessary to put it in the con-

dition in which it was received.—Stevens v. Pantlind, 95 Mich. 145.

§ 166. ——Surrender of tenancy at will.

¶ 605. The relation of general tenancy at will is not terminable by either party without notice to the other; nor can the tenant without justifiable cause abandon the premises and treat such abandonment as a surrender without giving the statutory notice.—Huntington v. Parkhurst, 87 Mich. 38.

§ 167. Surrender by operation of law.

¶ 606. An agent executed a lease to certain parties for his principal. While it was still in force the principal executed an independent lease of the same premises to the agent, who then orally leased them for a smaller rent than before to the original tenants, who continued in possession without change. Held, that the original lease was surrendered by operation of law, and not assigned to the agent, and therefore that he could not claim from the tenants the difference in rent between the two.—Donkersley v. Levy, 38 Mich. 54.

§ 168. Acceptance of surrender.

See also ante ¶ 599.

Estoppel to accept or enforce surrender, see post § 169.

¶ 607. A landlord who receives from his tenant before the expiration of the term a letter stating the vacation of the premises and enclosing the key, is not bound to search out the tenant or serve him with notice that he holds him for rent, but may take possession and diminish as far as possible the tenant's obligation by renting to other parties.—Joslin v. McLean, 99 Mich. 480.

¶ 608. Where a telegraph company, having leased space in a hotel and built a railing around it, abandons its lease, and takes down the railing, it cannot be inferred that the lessor has accepted the attempted termination of the lease from the fact that it uses thereafter the space abandoned, along with the remaining portion of the lobby.—Chittenden v. Western U. Tel. Co., 154 Mich. 1.

§ 169. ——Estoppel to accept or enforce surrender.

Estoppel in general, see Estoppel.

¶ 609. Failure for some weeks to enforce a contingent arrangement for surrender of farming premises at planting time will estop owner from showing such arrangement and recovering possession.—Pickard v. Kleis, 56 Mich. 604.

§ 170. Re-entry for breach of covenant.

Necessity of notice or proceedings, see post § 171.

Right to seize crops for breach of farm lease, see post § 172.

Peaceable re-entry after notice to quit, see post §§ 173, 174.

Moving or assuming dominion of tenant's goods on retaking possession as a conversion, see Conversion ¶ 15.

¶ 610. Where a lease does not provide for re-entry on breach of condition, and there is no agreement that a failure to perform shall operate as a forfeiture or termination of the lease, the tenant cannot for such cause be said to "hold over" contrary to the terms of the lease.—Pickard v. Kleis, 56 Mich. 604.

¶ 611. The re-entry clause in a lease provided for its termination if the tenant holds over contrary to the conditions or covenants thereof. Held, that this referred to such conditions and covenants as were in the nature of limitations, and not to the lessee's mere agreement to do certain things.—Langley v. Ross, 55 Mich. 163.

¶ 612. The erasure of a re-entry clause in a lease divests the landlord of the statutory remedy (How. St. § 8295) for recovering possession on the tenant's default in paying rent, because no terms of limitation are left in the lease, and the covenants are no longer linked with a condition.—Langley v. Ross, 55 Mich. 163.

¶ 613. In a farm lease in the absence of express covenants as to husbandry, a clause in regard to re-entry for conditions broken does not apply to the implied covenants.—Somers v. Loose, 127 Mich. 77.

¶ 614. Where plaintiff as lessor peaceably re-entered upon an evicted defendant as sublessee from the leased premises after defendant had been in default as to certain provisions of the lease for more than thirty days, and the lease provided that the lessor might in case of default in any of its provisions for thirty days re-enter and repossess the premises and remove and put out the lessee, and that the lessee expressly waived demand for possession, such re-entry and eviction by plaintiff held lawful.—Scott Realty Co. v. United Amusement Co., 195 Mich. 684.

¶ 615. Where the agreed mode of declaring a lessor's election to forfeit the lease is by re-entry and taking possession, he has the right, and it is his duty, in the first instance to resort to it; and if prevented from so doing he may adopt any other lawful mode to obtain possession.—Pendill v. Union Min. Co., 64 Mich. 172.

¶ 616. A provision and a contract of lease that the lessee shall not sell any produce without the consent of the landlord is a covenant within the meaning of a clause of re-entry on breach of covenants.—Vincent v. Crane, 134 Mich. 700.

¶ 617. Where a farm lease provided for a letting upon shares and that the lessee should work the farm in a good and husband-like manner and should he fail to do so then the lessor reserved the right to do it or cause it to be done and the cost thereof should be deducted from the lessee's share, the forfeiture and re-entry clauses being stricken out of the printed blank used in preparing the lease, the right of the tenant to remain in possession during the term of his lease does not depend upon the manner of performance of his agreement as to working the farm, and the lessor could not upon the failure to observe the covenants and conditions re-enter.—Nanaw v. Bailey, 83 Mich. 24.

¶ 618. A three years' lease of a farm stipulated that if the land were sold for a certain sum the tenant should immediately surrender possession on being reimbursed for his labor and crops; it further provided that if the landlord did not return to his farm to occupy it himself the tenant was to have the privilege of continuing to farm the premises as heretofore. Held, that in summary proceedings to recover possession for violation of the provisions of the lease the return of the landlord was properly treated as on the same footing as a sale to a third person, and that on coming in at the end of the second year after three months' notice, and offering to pay for labor and crops, the landlord had a right to resume possession.—Lord v. Walker, 49 Mich. 606.

¶ 619. In a farm lease where the land is unoccupied a denial by the landlord of the tenant's right to harvest the crop does not show that the landlord has taken possession.—Somers v. Loose, 127 Mich. 77.

§ 171. ——Necessity of notice or proceedings.

Summary proceedings to oust tenant, see ante V, B.

¶ 620. Where a lease is forfeited for nonperformance of its conditions, no notice of re-entry or of intention to re-enter is necessary.—Pendill v. Union Min. Co., 64 Mich. 172.

¶ 621. Though a lease gives the lessor the right to terminate it without notice, yet if proceedings to gain possession are necessary they must be taken by the statutory summary method or by action of ejectment.—Pendill v. Union Min. Co., 64 Mich. 172.

¶ 622. A lease of a billiard-room provided that, in case of the violation of conditions, the lessor might re-enter, have again, retain, repossess, etc. Held, that absolute notice to quit and demand of possession, made at such a time and place that if complied with possession would be at once secured, constituted a sufficient re-entry.—Alexander v. Hodges, 41 Mich. 691.

§ 172. ——Right to seize crops for breach of farm lease.

See also ante ¶ 618.

Construction and operation of covenants in general, see ante § 16.

Lease reserving share of produce as basis of rental, see ante § 142.

¶ 623. A farm lease on shares providing that in the event of failure of the lessees in the performance of any of the conditions of such lease, the lessor might peaceably re-enter and take possession "of the premises and property hereby rented, without any formal proceedings," was construed as giving the lessor merely the right of re-entry and possession of the stock and farming implements in case the lessee failed to work the farm properly, and not to authorize the seizure of crops for such breach.—Koeleg v. Phelps, 80 Mich. 466.

§ 173. Peaceable re-entry after notice to quit.

Re-entry for breach of covenant, see ante §§ 170-172.

Waiver of notice and demand, see post § 174.

¶ 624. A tenant's right to possession of leased premises terminates upon his failure to pay the rent due within the seven days' notice to quit provided for by How. St. § 5774, and the landlord may then exercise his common-law right peaceably to re-enter and take possession to the exclusion of the tenant; and such right is in no way abridged by the summary procedure provided by section 8295, for recovery of land withheld by a tenant.—Smith v. Detroit Loan & Building Ass'n, 115 Mich. 340.

¶ 625. The party entitled to the possession of property may take it in any manner that does not involve a breach of the peace, and How. St. § 8295, making a demand for payment of rent a condition precedent to re-entry, does not take away this right.—Pendill v. Union Min. Co., 64 Mich. 172.

¶ 626. Where a landlord, by notice to quit, terminates a tenancy for nonpayment of rent, and afterwards, during the tenant's temporary absence, gains possession of the premises and removes the tenant's goods, he is not liable to the latter for injuries inflicted by his agents in repelling the efforts of the tenant to regain possession, unless more force was used than was necessary to accomplish the result.—Smith v. Detroit Loan & Building Ass'n, 115 Mich. 340.

¶ 627. A landlord did not forfeit his right of re-entry for nonpayment of the rent by resorting to artifice whereby he gained peaceably possession of the leased premises, having induced his tenant and his family to leave home, since if such tenant had remained at home at the time of such re-entry, it would have been his duty to deliver possession on demand of his landlord's agents; so held in trespass quare clausum

fregit by such tenant against such landlord, where it appears that after such peaceful re-entry such tenant was denied possession with a show of force.—Cockerline v. Fisher, 140 Mich. 95.

§ 174. ——Waiver of notice and demand.

¶ 628. At common law and by statute a demand for the rent or royalty due is necessary before the lessor can re-enter, but such demand can be waived by the parties.—Pendill v. Union Min. Co., 64 Mich. 172.

§ 175. Presumptions and evidence of surrender or re-entry.

General law of evidence, see Evidence.
Rebuttal of evidence as to collusion to procure surrender, see also Evidence ¶ 442.

¶ 629. If a tenant at will abandons the premises, it will be presumed that he abandoned the possession to the landlord as a surrender.—Shaw v. Hill, 79 Mich. 86.

¶ 630. The abandonment or surrender by a lessee of his interest under a lease cannot be inferred from a mere nonuser.—Doty v. Gillett, 43 Mich. 203.

¶ 631. A surrender of leased premises before the expiration of the term by the tenant is not made out by evidence of her statements to the landlord that she would vacate on a future date, by similar statements to a prospective tenant, and by permitting her to place some furniture and household goods on the premises. This is at most merely a promise to surrender and not enforceable by summary proceedings for possession.—Fish v. Thompson, 129 Mich. 313.

¶ 632. In an action to recover rent, where the defense set up is that the tenants surrendered and abandoned the lease and premises with the landlord's assent, evidence of the occupancy of the premises or a part of them by third parties, of the delivery of the key to the landlord, and of negotiations between the landlord and third parties for a new lease, is competent upon the question of surrender in fact.—Hill v. Robinson, 23 Mich. 24.

¶ 633. In an action to recover damages for a breach of a covenant in a lease the trial court erred in finding as a matter of law, upon plaintiff's testimony presented, that the defendants had surrendered possession of the mill leased of the plaintiff prior to its destruction by fire, and that its care had been assumed by the plaintiff, where after presenting certain testimony plaintiff's counsel was interrupted by the court and asked to explain how he expected to recover on this evidence so far presented, when he had not rested his case and made certain offers to make proofs of which the court refused to receive testimony, and in his offers he had advanced no theory inconsistent with the case set forth in his declaration, his contention being that the defendants were still in possession when the fire occurred and that the lessee's agent had no authority to surrender possession, and that plaintiff had refused to accept a part of the premises.—Stevens v. Pantlind, 87 Mich. 476.

¶ 634. The payment of rent in full on the last day of the term, and on the day following, the landlord's declaring the lease to have expired, that the property was his, and he wanted it, and that he (the tenant) must get out that day, to which the tenant responded tnat "even so, we want some time to get a place. If it is impossible to get out we cannot, but if it is possible of course we will get out," are evidence of a surrender by the tenant.—Gillespie v. Beecher, 85 Mich. 347.

¶ 635. A finding of a surrender to the landlord is supported by evidence of the payment of a final month's rent and the delivery of the key to a daughter of the owner, then the landlord, and evidence that the daughter always attended to all things about the renting and collecting of rents.—Foster v. Fleishans, 69 Mich. 543.

¶ 636. Under an agreement made between a landlord and his tenant after the latter had quit upon the expiration of a 30 days' notice of intention to quit, to the effect that no further claim for rent should be made after the commencement of the term of a new tenant who might be procured, but that neither of the parties should waive any rights by the making of the agreement, the landlord was entitled to recover for the period between said quitting and the commencement of the term of the new tenant, and the acceptance of the key by the landlord was no evidence of his intention to agree to a surrender of the term.—Steketee v. Pratt, 122 Mich. 80.

¶ 637. A forfeiture of a lease and taking possession by the landlord is not shown by testimony that the landlord told the tenant "he couldn't have" the crop of hay and wheat growing thereon.—Somers v. Loose, 127 Mich. 77.

¶ 638. Where the sole possession of leased property is evidenced by fences and under the terms of the lease, the lessee is entitled to possession and has put in crops, the mere fact that the landlord has repaired the fences is not sufficient to justify the conclusion that he has retaken possession.—Somers v. Loose, 127 Mich. 77.

§ 176. Questions of law and fact and instructions.

¶ 639. Under a contract of lease requiring the tenant to keep the premises in as good repair as when taken, it is erroneous to instruct in an action for possession for breach of covenant that the defendant is required to use the care exercised by the ordinary prudent farmer in keeping the

buildings in repair.—Vincent v. Crane, 134 Mich. 700.

¶ 640. Whether under the circumstance of the case, a tenant availed himself within a reasonable time of the permission of his landlord to leave demised premises before the expiration of his term, is a question for the jury.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

¶ 641. A lessee, in violation of his covenant not to assign the lease or sublet the leased premises without the written consent of the lessor, assigned the lease. The assignee made a second assignment, and, at the request of the lessee, the lessor consented to the occupancy of the premises by the second assignee, coupled with the statement that she should look to the lessee for the rent. The second assignee arranged to sell his interest in the lease, and the proposed purchaser and the lessee, the latter representing the second assignee, called upon the lessor, who, as she testified in an action brought by her against said proposed purchaser to recover rent subsequently accruing, made an oral lease of the premises to him, while he testified that she consented to his occupancy, but told the lessee that she should look to him for the rent. The lessee testified that the lessor said she was satisfied to let the proposed purchaser take the place of the second assignee so long as he paid the rent, and, if not paid by him, she should look to the lessee for it. The second assignee thereupon surrendered the premises to the proposed purchaser. Held, that these negotiations and circumstances may have amounted to a surrender of the term, and a leasing to the proposed purchaser, which questions were properly submitted to the jury.—Youell v. Kridler, 105 Mich. 344.

¶ 642. It is error encroaching on a jury question to charge that a lessor's entry was quiet and peaceable and that he did not break and enter, where the tenant was a farmer on shares who did not live on the land and the lessor moved on it during the season and excluded the tenant.—McClure v. Thorpe, 68 Mich. 33.

¶ 643. It was a jury question whether a lease of a mill for so long as was necessary to saw certain logs, and to be returned in as good condition as when taken, was terminated when the sawing ceased and the mill shut down, where there was evidence of a conversation about turning over the mill to the lessor and if the lessee's evidence was believed the lease was then terminated but otherwise if the lessor's evidence was believed.—Stevens v. Pantlind, 95 Mich. 145.

¶ 644. Plaintiff and her husband were in possession of a house on the farm where the husband was at work, and, on the same day on which a notice to leave the premises was served on the husband, the wife and sons of the owner of the farm came to the house in the absence of plaintiff's husband, and, after informing her that she must move out at once, commenced taking the furniture out of the room where she was into an old kitchen, and told her to pack her clothes, shortly after which her husband came, and took her away. Plaintiff sued the wife and sons in trespass, claiming that she was driven from the house by defendants, and that the time for which her husband had taken the premises had not expired. The defense was that the hiring was only for one month, and that the time had expired. The court left this latter question of fact to the jury, and instructed them that, if they found that the hiring had not terminated at the time of defendants' entry, they should take into consideration what took place in the house on that day; that the mere entry into the house by defendants, under the circumstances, would not give plaintiff a right of action, even if the lease had not terminated, and, if plaintiff recovered, it must be for an injury to herself; and that the jury, in order to find a verdict for plaintiff, must find that the conduct of defendants amounted to an eviction. Held, that the charge properly stated the law.—Brown v. McKimmie, 102 Mich. 35.

VII. RIGHTS AND LIABILITIES TOWARDS THIRD PERSONS.

§ 177. Duty of landlord towards third persons.

Nuisance or injury during tenant's exclusive occupancy, see post § 178.

Effect of covenant imposing duty to repair, see post § 179.

Expulsion of licensee, see post § 180.

Property on demised premises belonging to third persons, see post § 181.

Rights of landlord against third persons, see post § 182.

Rights and liabilities of tenants towards third persons, see post § 183.

Right and liabilities of tenants towards other tenants or successors in leasehold, see post § 184.

Duty of landlord towards tenants, see ante IV.

Injury from defective or dangerous conditions, see ante IV, D.

Liability of landlord for injury to third persons from explosives on his premises, see also Explosives and Combustibles ¶ 1.

Negligence towards licensees or strangers in building, see Buildings §§ 4-6.

Necessity of joining tenants as parties defendant in ejectment against landlord, see Ejectment § 25, ¶ 97.

Nonliability of landlord for independent contractor's act, see Independent Contractors ¶ 13.

Liability for injuries to pedestrians caused by defective walls, see Highways § 258.

General duty and negligence towards third persons with respect to conditions in buildings, see Buildings.

General duty and negligence towards persons in adjoining streets with respect to dangers coming from buildings, see Highways, XII, G.

¶ 645. For the protection of persons lawfully using an area way in entering his building, it is incumbent on a landlord to make a proper inspection of said area way.—In re Sullivan's Estate, 165 Mich. 585; Staniszewski v. Lane, Id.

¶ 646. In a suit for personal injuries due to the alleged negligence of a landlord in failing to inspect and keep up an area way in his building, it is error for the trial court to instruct the jury that in determining the question of defendant's negligence they may consider whether or not defendant failed to comply with a course of inspection customary among landlords in the community.—In re Sullivan's Estate, 165 Mich. 585; Staniszewski v. Lane, Id.

¶ 647. A landlord held liable for an injury to a one-year-old grandchild of a tenant, which was temporarily staying with him, caused by the falling of an insecurely fastened post supporting a porch used in common by the several tenants, though the grandfather of the child had stated, when he rented the premises, that the youngest member of his family was ten years of age, and was told by the landlord that he did not want to rent to parties having small children.—Butler v. Watson, 193 Mich. 322, 16 N. C. C. A. 1013.

¶ 648. When an infant grandchild of a tenant, while in the custody of another tenant, was injured by the falling of an insecurely fastened post on a porch used in common by the tenants of the building, held, in an action for personal injuries, that the contention of the defendant that both tenants had been warned of the danger of piling logs against the post and that that was the cause of the accident, was fully met by a charge that if that was the fact there could be no recovery.—Butler v. Watson, 193 Mich. 322, 16 N. C. C. A. 1013.

§ 178. ——Nuisance or injury during tenant's exclusive occupancy.

¶ 649. As between landlord and tenant the tenant is presumptively liable for a nuisance on the premises unless the lease contemplated its continuance, in which case both would be liable.—Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164.

¶ 650. The tenant, and not the landlord, is liable for nuisances originating and kept up during the tenant's exclusive occupancy, unless the landlord is shown to be responsible for repairs. So held where the nuisance consisted in overflowing a neighbor's cellar by means of leaky and defective supply and water pipes.—Harris v. Cohen, 50 Mich. 324.

¶ 651. The owner of premises is not required at his peril to inspect them and prevent his tenant from creating and maintaining a nuisance upon the sidewalk in front of said premises.—Maclam v. Hallam, 165 Mich. 686.

¶ 652. Where a tenant has exclusive control over a freight elevator which is operated by his own employee subject only to the occasional use by tenants on lower floors, the landlord is not liable for the death of a person who is killed while delivering freight to the tenant because of the negligent operation of the elevator.—Sikora v. Fellowcraft Club, 189 Mich. 235.

¶ 653. The owner of premises who has leased them to a tenant without covenanting to keep them in repair is not liable to a third party who is injured by reason of their being out of repair while they are in the tenant's control, if the defect complained of did not exist at the time they were leased.—Johnson v. McMillan, 69 Mich. 36.

¶ 654. Where a tenant of a building permits crates to be piled on a sidewalk, by reason of the presence of which a plaintiff suffers personal injuries, the landlord is not liable at common law, although the crates remained so piled for so long a time as to give the landlord knowledge of their presence.—Maclam v. Hallam, 165 Mich. 686.

§ 179. ——Effect of covenant imposing duty to repair.

Covenants to repair in general, see ante IV, C.

¶ 655. The duty of landlord to keep portions of premises, used by his tenants in common and not rented to any one tenant, in safe condition for the use of all persons entitled to use them, does not rest upon any covenant to repair.—Butler v. Watson, 193 Mich 322, 16 N. C. C. A. 1013.

¶ 656. A licensee of a tenant, who was injured through the defective condition of the premises in question, had no right of action against the landlord, by reason of his covenant to repair.—Brady v. Klein, 133 Mich. 422.

¶ 657. A landlord was not liable by reason of his covenant to repair, for an injury sustained by his tenant's child through falling into a hole in a door sill, which was in existence at the time of renting the premises in question.—Brady v. Klein, 133 Mich. 422.

¶ 658. Where an accident arises from a defect known by the tenant and one which was not a nuisance, the remedy against the landlord is upon his covenant and must be brought by the tenant, there being no privity between the landlord and a third party who was injured on the premises, nor did he owe

such party any duty; but the rule is otherwise in case of a nuisance.—Brady v. Klein, 133 Mich. 422.

§ 180. ——Expulsion of licensee.

Rights of licensee in general, see Licenses to Enter.

¶ 659. Plaintiff took sick with a contagious disease while visiting with her son-in-law, the janitor of an apartment building, living in rooms in the same supplied by the landlord. Upon complaint of the other tenants, defendant, the landlord, ordered plaintiff to leave, and threatened to have an officer put her out. Plaintiff left while sick, and sued for damages. Held, the defendant owed no legal duty under the circumstances to permit plaintiff to remain, and was not liable, since he acted to protect his tenants. —Tucker v. Burt, 152 Mich. 68.

§ 181. ——Property on demised premises belonging to third persons.

¶ 660. A person entitled to the possession of premises is not required to house or otherwise protect property left there by a former tenant, and may remove the same, providing he exercises such care as the nature of the property requires, and places it in such position that the owner thereof can by the exercise of any diligence take care of it in season to avoid loss.—United States Mfg. Co. v. Stevens, 52 Mich. 330.

¶ 661. A lease of a hotel covenanted that new furniture added by the lessees should be included in the inventory to be made up when the lease expired, and accounted for accordingly, and that the lessor should have the right to take possession of it. Held, that this covenant could not cover furniture belonging to a third person but allowed by the lessee to be placed on the premises.—Beecher v. Bartlett, 42 Mich. 60.

§ 182. Rights of landlord against third persons.

Rights of landlord against tenants, see ante IV.

Evidence of tenancy to defeat adverse possession, see Adverse Possession § 48.

Right of landlord to action for trespass under void condemnation proceedings where tenant is in actual occupancy, see Eminent Domain ¶ 494.

¶ 662. An action in case will lie for damages sustained by a landlord through the burning of a blacksmith shop and adjoining buildings caused by a fire started in the forge by a trespasser.—Wyant v. Crouse, 127 Mich. 158.

§ 183. Rights and liabilities of tenants towards third persons.

Towards other tenants or successors in leasehold, see post § 184.

Duty of landlord towards third persons, see ante §§ 177-181.

Rights and liabilities of tenants towards landlords, see ante IV.

Liability of tenant for nuisance on leased premises, see also ante ¶¶ 649, 650.

Right of lessee to receive notice of condemnation proceedings for drains, see Drains § 29, ¶ 105.

Party entitled to choose place for way of necessity for tenant, see Easements § 16.

Right of lessee who builds dwelling on leased land and occupies same to claim homestead exemption, see Homesteads § 7, ¶ 15.

¶ 663. So far as regards any injury by third persons to the use of land during a term of lease, no distinction exists between the rights of tenants for years or other terms and those of owners of the fee in possession. A term for years is as clearly property as ownership in fee, and just as much entitled to the protection of the law.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

§ 184. ——Towards other tenants or successors in leasehold.

Lessee as bailee of property held over term, see Bailments ¶ 5.

¶ 664. A tenant in control of and using an artificial water supply under pressure in the upper stories of a building while not an insurer is bound to use a high degree of care proportionate to the known danger, in order to prevent injury to the occupants of the lower floors.—Waidelich v. Andros, 182 Mich. 374.

¶ 665. A prima facie case is shown by evidence that the plaintiff tenant suffered damage from the overflow of a water closet in the control of the defendant tenant on the upper floor of a building, under circumstances tending to indicate that it was caused by the negligence of the defendant. —Waidelich v. Andros, 182 Mich. 374.

¶ 666. The evidence of the upper tenant's negligence need not be direct and positive in order to make a prima facie case of injury sustained by the overflow of a water closet under his control on the upper floor of a building, since injury from such an unusual occurrence indicates negligence.—Waidelich v. Andros, 182 Mich. 374.

¶ 667. A former tenant of a farm who claimed the right to a crop of grass which he had seeded on the land but whose right thereto was disputed by the present tenant who was in possession, had no right to enter upon the land and forcibly obstruct the tenant in cutting the grass. (Comp. L. 1897, § 11153.)—Byers v. Anderson, 143 Mich. 178.

VIII. CRIMES AND PENALTIES.

§ 185. In general.

As to crimes, see generally Crimes, II; Indictment.

Prosecution and penalties for violation of municipal ordinances, see Municipal Corporations, XVI, B.
Landlord as aider or participant in keeping house of ill fame, see Crimes § 64.
Indictable letting for purposes of prostitution, see Crimes § 64; Indictment § 824d, ¶¶ 1465, 1466.
Penalty for leasing house for gambling or prostitution, see Comp. L. 1915, § 15473.
Abatement and closing of building for one year where leased for purpose of prostitution, see Comp. L. 1915, §§ 7781-7788.

LANES; LAPSED.

Cross-References.

Lanes—
Easements of way, see Easements.
Dedication to public use, see Dedication.
Proceedings to lay out private roads, see Highways, XV.
Lapse of Time—
As laches, see Equity, IV.
As bar by limitation of action or claim, see Limitations.
As completing adverse possession or prescription, see Adverse Possession; Easements; Highways, II, A.
As badge of waiver, election, or estoppel, see Election; Estoppel.
For time within which given act or acceptance must be done, see specific topics treating of the act, proceeding, or acceptance.
Presumption from lapse of time, see specific topic treating of the general subject of the presumption, e. g., Payment, V.
Lapsed Legacies—
See Wills, VI, E.

LARCENY.

TREATS of the common law offense of taking and carrying away the personal property of another with intent to convert it to the taker's own use, and of statutory larcenies akin thereto.

Analysis.

I. Nature and elements of offense.

§ 1. In general.
§ 2. Subjects of larceny.
§ 3. Intent.
§ 4. Wrongful taking by owner from rightful possessor.
§ 5. Taking by trick or pretense.
§ 6. Statutory and specific larcenies.
§ 7. Larceny by bailee.
§ 8. Attempts.

II. Prosecution, trial, evidence and punishment.

§ 9. Complaint, indictment or information.
§ 10. ——For specific statutory and qualified larcenies.
§ 11. Issues and variance.
§ 12. Admissibility of evidence.
§ 13. Sufficiency of evidence.
§ 14. Questions for court and jury.
§ 15. Instructions.
§ 16. Verdict, sentence and punishment.

Larceny as crime warranting arrest without warrant, see Arrest § 2.
Liability of carrier for theft of goods or baggage, see Carriers, II, E. V.

I. NATURE AND ELEMENTS OF OFFENSE.

§ 1. In general.

Property and value thereof as essential elements, see post § 2.
Elements of intent and taking, see post §§ 3-5.
Compound, statutory, and specific larcenies, see post § 6.
Larceny by bailee, see post § 7.
Attempts to steal, see post § 8.
Necessary and sufficient averments in charging the crime, see post § 9.
Averments of value to fix grade of offense, see post § 9.

Evidence, jury questions, and instructions, see post §§ 12-15.
Definition of degree in verdict, see post § 16.
Amount of value as test for degree of the crime, see also Crimes ¶ 24.
Receiver as party to larceny, see also Crimes ¶ 59.
General elements of crime and general law of crimes, see Crimes, I.
Receiving stolen goods, see Crimes § 123.
False pretenses and cheats, see Crimes §§ 77-80.
Offense of embezzlement, see Crimes §§ 68-74.
Element of appropriation or conversion in embezzlement, see Crimes § 73.
Statutes defining larceny and the various statutory thefts, see Comp. L. 1915, chap. 257, entitled "Offenses Against Property." See sections 15295-15300 for statutes defining the punishments with respect to the manner, circumstances, and property value of the goods taken. For statutory larcenies, see also sections 15229, 15319, 15339, 15350, 15389, 15398, 15407, 15409, 15411.

¶ 1. The fact that moneys wrongfully appropriated by a bookkeeper and assistant cashier first went into the cash drawer of his employer does not make the offense larceny, rather than embezzlement.—People v. Hawkins, 106 Mich. 479.

§ 2. Subjects of larceny.

Taking one's own chattel from another's possession as larceny, see post § 4.
Attempt to steal as affected by nonexistence of thing coveted, see post ¶ 32.
Describing property and ownership in indictment or information, see post § 9.
Instructions as to subjects and value, see post § 15.

¶ 2. In order to amount to larceny at common law it is necessary that the thing stolen be of some value, however small.—People v. Grimm, 182 Mich. 643.

¶ 3. By "value" is meant not what the thing is worth to the owner, but the price that it would bring in open market.—People v. Gilbert, 163 Mich. 511.

¶ 4. Though, like bonds, certificates of stock or paper money, the intrinsic value of a promissory note is insignificant, it has real value in the right of property which it represents, and is itself property which may be the subject of larceny.—People v. Gregg, 170 Mich. 168.

¶ 5. Stealing beer was punishable even while the prohibitory liquor law was in force.—Kreiter v. Nichols, 28 Mich. 496.

¶ 6. Under Comp. L. 1897, § 11563, providing that "every person who shall commit the offense of larceny by stealing, of the property of another, any money, goods or chattels," etc., a dog may be the subject of larceny.—Rockwell v. Oakland Circuit Judge, 133 Mich. 11.

¶ 7. A promissory note may be the subject of larceny by the maker from the holder, since it has the quality of property notwithstanding its value lies in the fact that it evidences the debt which remains unaffected.—People v. Gregg, 170 Mich. 168.

¶ 8. Where money alleged to be the subject of a larceny is mingled with that of a person other than the one named in the information, the title to it remaining unchanged, it is not necessary that it should be distinguishable to authorize a conviction.—People v. Williams, 24 Mich. 156.

§ 3. Intent.

In larceny by bailee, see post § 7.
Drunken incapacity for specific intent to steal as defense, see Crimes ¶ 68.
Evidence of intent, see post §§ 12, 13.
Intent as jury question, see post § 14.
Instructions on intent, see post § 15.

¶ 9. The felonious intent is essential to larceny; and one who in good faith takes another's property under a claim of right to do so, or of title in himself, is exempt from the charge of larceny.—People v. Hillhouse, 80 Mich. 580.

¶ 10. There can be no larceny where it appears that respondent at one time owned the article—a sewing-machine—alleged to have been stolen; that he claimed it as exempt property; that it was sold on execution against him, and that under the advice of counsel he peaceably took it away from a person who held it under the execution purchaser, telling such person by what right he claimed it, and giving a receipt for it, stating his name and residence. Testimony to such facts is admissible in defense.—People v. Schultz, 71 Mich. 315.

¶ 11. A conviction of larceny will be reversed because of the absence of felonious intent, where the assignee of a contract for the purchase of an organ with right to retake possession upon default, takes possession of the organ under the belief that a default exists, though the jury found that the contract had been fully paid up.—People v. Walburn, 132 Mich. 24.

¶ 12. Where one enters a corn crib and chicken coop with one left by the owner in charge of such buildings, and takes certain property therefrom, he is guilty of neither burglary nor larceny, in case he has good reason to believe that the caretaker has charge of the property, and can dispose of it as he pleases.—People v. Evans, 150 Mich. 443.

¶ 13. One cannot rely upon the advice of counsel to show that he has acted in good faith in taking a chattel under claim of right

unless he also shows that he has followed the advice.—People v. Long, 50 Mich. 249.

§ 4. Wrongful taking by owner from rightful possessor.

Larceny by bailee of goods in his possession, see post § 7.

¶ 14. It is larceny for the owner of property to remove it clandestinely from the rightful possession of one who has a valid lien upon it.—People v. Long, 50 Mich. 249.

§ 5. Taking by trick or pretense.

Taking under bona fide claim of right, see ante § 3.

Misappropriation by one in lawful keeping of another's money or property but without any taking, when regarded as embezzlement, see Crimes, II.

¶ 15. Larceny covers the taking of money by confederates on a sham bet contrived by them to defraud a person who advances the money for the bet, and takes part in the transaction.—People v. Shaw, 57 Mich. 403.

¶ 16. Fraud in obtaining possession of money may supply the place of a trespass in taking it, so as to make the conversion of it felonious.—People v. Shaw, 57 Mich. 403.

§ 6. Statutory and specific larcenies.

Requisites and sufficiency of indictments or informations, see post § 10.

Embezzlements and cheats and obtaining money or property by false pretenses, see Crimes, II.

Statutes defining various specific larcenies, see Comp. L. 1915, chap. 257, §§ 15229, 15319, 15339, 15350, 15389, 15398, 15407, 15409, 15411.

¶ 17. It does not change the nature of larceny from the person that the person plundered was asleep.—Hall v. People, 39 Mich. 717.

¶ 18. Whether taking merchandise away from the door of a store clandestinely is not a larceny from the store itself, and therefore a compound larceny under How. St., § 9137, quære.—People v. Wilson, 55 Mich. 506.

¶ 19. Under statute, one who, having committed larceny in another of the United States, brings the stolen property into this state, may here be found guilty of larceny and punished.—People v. Williams, 24 Mich. 156.

¶ 20. Money is "property" within the meaning of Comp. L. 1857, § 5797, How. St., § 9177, punishing persons in the possession of stolen property in this state, having stolen the same in another state.—People v. Williams, 24 Mich. 156.

¶ 21. Whether one who, after committing larceny in a foreign country brings the stolen property into this state, may, under statute, be prosecuted in this state for the larceny, quære.—Morissey v. People, 11 Mich. 327.

¶ 22. A furnished room in the basement of a building, the upper part of which was used in the day time by several persons for offices, was occupied at night by one of those persons, he having no other abiding place. Held, that the building was a dwelling-house within the meaning of How. St., § 9137; a single man may have a dwelling.—People v. Horrigan, 68 Mich. 491.

¶ 23. How. St., § 9180 (Laws 1877, Act No. 102), is aimed at preventing such horse-stealing as should be done in this state, and disturb peace of the state while the general statutes punish the receiver of property stolen beyond the state as well as any other.—In re Franklin, 77 Mich. 615.

¶ 24. How. St., § 9180, imposing heavier penalty for horse-stealing than for larceny of other property of same value, is valid.—People v. Morris, 80 Mich. 634.

§ 7. Larceny by bailee.

Larceny by cashier from cash drawer, see also ante ¶ 1.

¶ 25. Under 1 Laws 1875, p. 195, How. St., § 9156, which makes him guilty of larceny who converts to his own use property that has been delivered to him, it is a sufficient delivery of baggage to give him the checks for it.—People v. Husband, 36 Mich. 306.

¶ 26. The fact that a hotelkeeper, to whom checks for baggage have been delivered by a guest, would have a lien upon the baggage for the bill of such guest, would give him no authority to dispose of the property as his own, and would not justify his conversion of the same to his own use, or of itself preclude his being held for larceny under 1 Laws 1875, p. 195, How. St., § 9156, on the ground that he was a bailee with special property in the goods.—People v. Husband, 36 Mich. 306.

¶ 27. A man got a horse belonging to another from the latter's minor son and claimed to have exchanged another horse for it. On demand he refused to give it up and afterwards secreted it. Held, that as it was found his intention in taking it was felonious he was properly convicted of stealing it.—People v. Camp, 56 Mich. 548.

¶ 28. The recapture by a mortgagee of a mortgaged horse replevied from him by an adverse claimant is not of itself larceny; and if it is shown that the mortgagee found the horse running at large in the highway, and supposed that plaintiff in replevin allowed him to run and had thus given up possession of the animal, he cannot be convicted.—People v. Hillhouse, 80 Mich. 580.

¶ 29. Where A. entrusts B. with money to be used in buying a bicycle for A., who does not intend to give B. the title to the money, whereas B. intends at the time to convert such money to her own use, and to deprive A. of it, which she does, B. is guilty of larceny.—People v. Martin, 116 Mich. 446.

¶ 30. Where, in a prosecution for larceny, it appears that respondent's possession of the property was lawful in the first instance, his mere refusal to deliver it to the owner on demand will not warrant a conviction.—People v. Taugher, 102 Mich. 598.

¶ 31. There is no delivery of money under Comp. L. 1915, § 15315, providing that any person to whom any money of another is delivered shall embezzle or fraudulently convert to his own use, or secrete it with intent to embezzle or fraudulently use it, or any part thereof, shall be deemed guilty of larceny, where a purchaser of land makes a payment on the contract to the executor of the vendor.—People v. Day, 200 Mich. 636.

§ 8. Attempts.

¶ 32. The fact that there was nothing to take is no defense to a prosecution for an attempt to commit a larceny from the person.—People v. Jones, 46 Mich. 441.

II. PROSECUTION, TRIAL, EVIDENCE AND PUNISHMENT.

Conviction or acquittal of other related crime or degree as bar to further prosecution, see Crimes, I, D.
Jurisdiction as between circuit and lower courts, see Indictment § 89 et seq.
Harmless error, see Indictment, XV.
Objection for first time on review to qualifications of judge, see also Indictment § 512.

§ 9. Complaint, indictment or information.

For specific statutory and qualified larcenies (compound larcenies), see post § 10.
Issues presented and variance of proofs from averments, see post § 11.
Variance as to kind or denomination of money, see post ¶ 45.
General requisites of informations and indictments not dependent on peculiarities of larceny, see Indictment, I.
Laying title to and describing property in general, see Indictment § 28.
Sufficiency of complaint for trial before justice, see Indictment § 647.
Proper and permissible amendments of information, see Indictment § 69 et seq.
Joinder of counts for different offenses or degrees, see Indictment § 45.
Informations or indictments for receiving stolen goods, see Indictment § 43r.
Complaint for warrant for arrest, see Arrest, III.
Statutory provisions as to indictments, see Comp. L. 1915, §§ 15753, 15754, 15758.
Mode of pleading value of articles taken at one time, see Comp. L. 1915, § 15754.
Jurisdiction of justice courts, see Comp. L. 1915, § 15769.

¶ 33. An information for larceny must allege the ownership of the goods taken.—People v. Stewart, 44 Mich. 484.

¶ 34. The word "chattels" in an indictment under How. St., § 9140, which provides for the punishment of larceny by stealing the property of another, any bank note, bank bill, etc., denotes property and ownership, and an allegation that bank bills were the goods and chattels of a person named is a sufficient averment that they were his property.—People v. Kent, 1 D. 42.

¶ 35. Picking a pocket or appropriating a dropped pocketbook needs no description in an information for larceny different from that employed in other cases of stealing.—People v. Long, 44 Mich. 296.

¶ 36. An information for the larceny of money ought, if drawn according to common-law rules, to contain either a statement of the kind, denomination and number of the pieces, notes or bills claimed to have been stolen, or an allegation of some excuse for the omission of such statement.—Merwin v. People, 26 Mich. 298.

¶ 37. While our statutes gauge the punishment for larceny according to the value of the property stolen, the value is "of the essence of the offense," and an omission of statement of it in the information is not excused by Comp. L. 1857, § 6054, and it is generally unsafe to omit such a statement unless clearly dispensed with by statute, except, perhaps, in case of the larceny of money specifically described as of some of the particular kinds the value of which is expressly prescribed by act of congress.—Merwin v. People, 26 Mich. 298.

¶ 38. An indictment for the larceny of "fifty dollars in money, of the value of fifty dollars," would not, at common law, have been good in this general form without alleging the grand jury's inability to describe the money more specifically, and then only on proof of larceny of coin or legal tender of the country. Under Comp. L. 1871, § 7930, How. St., § 9541, an information for the larceny of "fifty dollars in money" is held sufficient where the larceny is of coin or bank notes, or of what is generally used and recognized as money. Whether such a general charge would warrant proof of larceny of promissory notes, or bills of exchange generally, or of the notes of private parties, quære.—Brown v. People, 29 Mich. 232.

¶ 39. An information for larceny which describes the property simply as "one hundred and thirty-five dollars * * * of the property, goods and chattels of," etc., and without any allegation of its value, or of any excuse for the want of greater particularity, is

fatally defective. Whether the theft was of money or of other personal property is left uncertain; if of the former, the information should allege a larceny of "money," even under Comp. L. 1857, § 6055, allowing a general allegation. The defect is not merely formal which under section 6055, is subject to demurrer or motion to quash, but affects the defendant's substantial rights.—Merwin v. People, 26 Mich. 298.

¶ 40. In an indictment under the statute of 1840, p. 42, § 1 (see How. St., § 9140), which provides for the punishment "of larceny, by stealing, of the property of another, any bank note, bank bill," etc., it was held that a description of the property stolen, as bank notes or bank bills merely, was sufficient.—People v. Kent, 1 D. 42.

¶ 40a. Where respondent was arrested, examined and held under a complaint and warrant charging the larceny of a stick pin, he cannot be convicted of larceny of a sum of money, though the information charges both offenses.—Clute v. Ionia Circuit Judge, 139 Mich. 337.

§ 10. ——For specific statutory and qualified larcenies.

¶ 41. Assuming that Comp. L. 1857, § 5797, How St., § 9177, providing for the punishment in Michigan of persons who, having committed a larceny in a foreign country, bring the stolen property into this state, is valid, whether an information under it is sufficient which charges the defendant in the ordinary form with a larceny committed in this state, quære.—Morissey v. People, 11 Mich. 327.

¶ 42. Laws 1877, Act No. 102 (How. St., § 9180), for the prevention and punishment of horse stealing, if valid at all, cannot be made to cover a case of horse stealing unless by the clearest averments, and will not support as an information for horse stealing an information that consists of the ordinary charge of larceny and includes other property besides the horse.—Boody v. People, 43 Mich. 34.

¶ 43. Whether the theft of other property besides a horse can be included in an information based on the special statute imposing an excessive penalty for that offense (How. St., § 9180), quære.—People v. Seller, 58 Mich. 327.

¶ 44. An information charging larceny from a "residence," while on fire, is sufficient compliance with Comp. L. 1897, § 11551 which provides that "every person who shall commit the offense of larceny by stealing in any building that is on fire, shall be punished, etc.," since residence so used is practically synonymous with building.—People v. Klammer, 137 Mich. 399.

§ 11. Issues and variance.

Variance of information from examination and commitment, see ante ¶ 40a.

¶ 45. In prosecuting for the larceny of money, proof of the larceny of any single piece or bill of any denomination alleged, and of any value whatever, will sustain the indictment.—Brown v. People, 29 Mich. 232.

§ 12. Admissibility of evidence.

Sufficiency of evidence, see post § 13.
General law of criminal evidence, see Indictment, VIII.
Rules for examination and cross-examination of witnesses, see Examination of Witnesses.
Evidence to identify stolen goods, see also Indictment § 177.
Expert testimony as to value of article, see Indictment ¶ 948.
Evidence of possession of recently stolen goods and inferences from such possession, see Indictment §§ 141, 174.
Possession of stolen goods as evidence of guilt of burglary, robbery, etc., see Indictment § 174.
Acts and declarations as res gestæ of possession of money or property taken, see Indictment § 242.
Evidence as to affluence or impecuniosity before and after crime, see also Indictment § 163.
Evidence of other crimes or larcenies, see Indictment § 165 et seq.
Other larcenies as evincing intent in breaking and entering, see Indictment § 166.
Advice of counsel as to property right as evidence on intent to steal, see also Indictment ¶¶ 868, 869.

¶ 46. Value of stolen property is fixed by rates prevailing at the time and place where the theft was committed, and not in some neighboring city; hence exclusion of evidence of the latter value is proper in larceny.—People v. Cole, 54 Mich. 238.

¶ 47. Where in a trial for larceny of a watch and chain, the complaining witness states that she does not know their value, it is reversible error for the court to permit her to state what their value is to her.—People v. Gilbert, 163 Mich. 511.

¶ 48. Stolen property may be identified by comparison.—People v. Pitcher, 15 Mich. 397.

¶ 49. Stolen property may be identified by tabs attached thereto which are proved to correspond with like tabs on property in the store from which it was stolen.—Cole v. People, 37 Mich. 544.

¶ 50. In a prosecution for larceny from the person, alleged to have been committed in the presence of others, the jury may properly consider the fact that no one saw the accused near the person of the complaining witness.—Hall v. People, 39 Mich. 717.

¶ 51. Respondent charged with larceny may show, as bearing on his innocence, that he had proposed marriage to a woman who testifies that she asked him for a large loan of money soon after the larceny and that he promised to make it.—People v. Howes, 81 Mich. 396.

§ 13. Sufficiency of evidence.

Sufficiency to make jury question, see post § 14.
Identity of money commingled with other money, see also ante ¶ 8.
Degree and sufficiency of proof required in criminal cases, see Indictment, VIII, C.
Sufficiency of confession as proof of corpus delicti, see Indictment ¶ 1404.
Sufficiency of proof of complicity of accused, see also Indictment ¶ 1386.
Sufficiency of proof of identity of articles, see also Indictment § 319.

¶ 52. There is a tendency to prove one guilty of larceny where it is in evidence that he was found with another's money; that he had a chance to steal it, and that the owner at once accused him of doing so; that he lied about the manner in which he obtained it; that when accused he claimed it as his own, but afterwards admitted it to be the other man's and said that the latter had intrusted it with him for safety; and that he had been seen acting as if trying to pick the other's pocket.—People v. Walker, 38 Mich. 156.

¶ 53. An intent to commit larceny is sufficiently shown by evidence that a bundle of clothing had been collected, belonging to the inmates of the house, and placed outside the door, and that respondent was surprised in the house, and fled to escape arrest.—People v. Curley, 99 Mich. 238.

¶ 54. Evidence of taking and carrying away by respondent of property delivered to him by a boy whom he had sent to obtain it, held sufficient to go to jury on question of intent.—People v. Griswold, 64 Mich. 722.

¶ 55. H. hired the buggy from a liveryman at Saginaw and took respondent driving; then H. became intoxicated, and was arrested; and respondent thereupon drove to Bay City with the buggy, and traded it off for another. On trial for larceny respondent claimed to be a bona fide purchaser for value from H., but there was evidence of admissions made by him shortly after his arrest, tending to show that he and H. had obtained the buggy, and had intended to trade it off. Held, that a conviction was justified.—People v. Dunn, 114 Mich. 355.

¶ 56. The value of the articles stolen need not be directly shown, but may be inferred generally in a prosecution for larceny from the facts in evidence.—People v. Grimm, 182 Mich. 643.

¶ 57. Evidence that the hog stolen was of a certain weight and that an animal of similar size had been sold for thirteen cents per pound, is sufficient evidence of value on a prosecution for larceny.—People v. Grimm, 182 Mich. 643.

¶ 58. Where in a trial for larceny there is no evidence that the articles stolen exceed $25 in value, so as to make the offense grand larceny, except that of complaining witness, to the effect that she valued them personally at $42.50, a conviction for grand larceny cannot be sustained.—People v. Gilbert, 163 Mich. 511.

¶ 59. The fact of the nonconsent of the owner of property alleged to have been stolen to the taking may be proved by any person having knowledge of the facts as well as by such owner or the person having control of the property at the time, or by facts and circumstances which sufficiently satisfy the jury that the taking was felonious.—People v. Jacks, 76 Mich. 218.

¶ 60. A conviction in a case involving the question of intent, e. g., where larceny is charged, cannot be predicated upon the admissions of counsel, and it is error in such case to instruct the jury either that defendant took the property with felonious intent, or that the jury must find him guilty of the offense charged.—People v. Hall, 86 Mich. 132.

¶ 61. On a prosecution for larceny of bonds, there being no contest as to the ownership of the bonds, and no claim that they were taken by authority, it is sufficient for the people to prove that the bonds were taken from the vault where they were kept, without the consent of the surviving member of the firm to which they belonged, or of an executor of one of the deceased partners, who had actual charge of the bonds, it appearing that the other executor, as also a coexecutor with the survivor of the third partner, had nothing to do with the management of the partnership business.—People v. Parsons, 105 Mich. 177.

§ 14. Questions for court and jury.

General law as to court and jury questions in prosecutions for crime, see Indictment, IX, D.

¶ 62. Felonious intent is a question for the jury, to be inferred by them from all the facts and circumstances disclosed by the testimony.—People v. Griffin, 77 Mich. 585.

¶ 63. Held, in a prosecution for larceny in the day time that there was evidence to support the charge that the property was taken in the day time, and the question was one of fact for the jury.—People v. Danenberg, 176 Mich. 337.

¶ 64. The watch which respondent was charged with stealing was shown to be the

property of a person from whom respondent admitted receiving it shortly before the death of the owner. It was found on respondent's person, although he had no interest in it, according to his own story, and he deliberately made false statements in regard to it at a time when, if his story was true, he could have had no motive to lie; and there was evidence from which the jury might find that respondent induced a witness to swear falsely in order to acquit him. Held, that the jury was properly left to determine whether larceny had been proved.—People v. Hawksley, 82 Mich. 71.

¶ 65. In a prosecution for larceny the prosecuting witness testified that, while standing with her daughter in front of a store, she felt some one taking her pocketbook from her pocket, and on turning about saw the accused running away; that she followed him with an outcry, and accused him of stealing her pocketbook, and that he was caught and denied it, but thrust upon her another pocketbook, which he said was hers, and forced a ten-dollar bill on her daughter, and ran off. Held, that the trial judge committed no error in refusing to charge that there was no evidence warranting conviction, and in submitting the case to the jury.—People v. Howard, 50 Mich. 390.

¶ 66. Respondent went to a drug store and directed a quart of brandy to be sent, with change for $5, to a certain house in Cass avenue. The druggist sent a boy with the brandy and money, and before the boy reached Cass avenue respondent met him, and told him the place to go was Second street, and before coming to that street he told the boy he would carry the "goods" himself, and thereupon the boy gave respondent the brandy and money, and took from him a worthless paper which he delivered to the druggist. A bottle of brandy of the same description was subsequently found at respondent's room. Held, that such evidence was sufficient to warrant the submission to the jury of the question of felonious intent.—People v. Griswold, 64 Mich. 722.

§ 15. Instructions.

General law of criminal instructions, see Indictment, IX, E.

Instruction as to burden of proof of taking, see also Indictment ¶ 1921.

Instructions on inferences to be drawn from incriminating possessions, flight, concealment, etc., see Indictment § 431.

¶ 67. There is no necessity for an instruction defining larceny where the evidence shows clearly that the goods were stolen and the defendant does not claim that he was in lawful possession but denies all connection with the transaction.—People v. Carey, 125 Mich. 535.

¶ 68. In a prosecution for larceny for money lost by the prosecuting witness, and found by defendant, instructions that if at the time of finding the money and picking it up, defendant formed and had the intent to convert it to his own use, he is guilty of larceny, but if, having no such intent at that time, he afterwards converted the property to his own use, he is not guilty of larceny, sufficiently state the law.—People v. Coulon, 151 Mich. 200.

¶ 69. Where, on a trial for larceny, there is no testimony tending to show that the property is worth less than $30, it is unnecessary to instruct the jury that stealing property worth less than $25 will not constitute the offense charged.—People v. Harris, 77 Mich. 568.

¶ 70. Where an information for stealing a horse is based on the general statute and makes no reference to How. St. § 9180, the value is material, and the jury should be instructed to ascertain and report the value if their verdict is guilty, in order that the punishment may be determined in passing sentence according to whether it exceeds or is less than $25.—People v. Martin, 91 Mich. 650.

¶ 71. An instruction which in substance informs the jury that respondent is charged with feloniously stealing, taking and carrying away a cow, the property of another, and from his possession, of the value of $50, sufficiently describes and defines the charge made in the information, and states what acts are necessary to be done, and with what intent, to constitute the crime of larceny.—People v. Harris, 77 Mich. 568.

¶ 72. In a prosecution for the larceny of railroad bonds, respondent was held not prejudiced by instructions that the people must prove at least the de facto existence of the railroad company, beyond a reasonable doubt, and that if the jury found the company had completed its road several years before the bonds were issued, and had equipped it with rolling stock, and had during that time actually been doing business as a railroad company, such de facto existence would be established sufficiently.—People v. Parsons, 105 Mich. 177.

¶ 73. Instructions to the jury that in case they found respondent claimed to have a lien upon the goods, and thought he had a right to pledge the goods by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods, are as favorable in this regard to the respondent as he is entitled to demand.—People v. Husband, 36 Mich. 306.

¶ 74. It is error to instruct in a larceny case that, in order for the taking of the property in good faith and under the advice of an attorney to be an excuse, the defendant must have submitted all the facts known to him, and then have acted under such advice in good faith; as in a criminal case, unlike one of malicious prosecution, there is no

such limitation upon the defense of good faith as that advice of counsel may not be relied upon unless all the facts are stated to counsel.—People v. Slayton, 123 Mich. 397.

§ 16. Verdict, sentence and punishment.

Averments of value to fix degree of punishment, see ante § 9.

Matters common to all prosecutions, see Crimes, I, E; Indictment, IX, G, XI.

Verdict for included or variant offenses and specification of crime found, see also Indictment § 472.

Conformity of sentence to kind or degree of larceny, see also Indictment § 490.

Requisites of sentence under indeterminate sentence laws and construction and effect of such sentences, see Indictment §§ 493, 497.

Term and duration of imprisonment, see Crimes § 30 et seq.

Intoxication as mitigating offense, see Crimes § 16.

Satisfaction or reparation to mitigate punishment, see Crimes § 34.

¶ 75. Larceny is not classified here as grand and petty, and as "grand larceny," is not a crime known to our law, and the crime known by that name at the common law might fall within the jurisdiction of a justice of the peace, it would be doubtful how far a conviction under that name would sustain a sentence for the higher grade of larceny.—Boody v. People, 43 Mich. 34; and see Nelson v. People, 38 Mich. 618.

LAST CLEAR CHANCE to LIABILITY

Cross-References.

Last Clear Chance Rule—
- See Negligence, IV; Carriers § 205; Highways, XIII.

Last Day—
- Inclusion or exclusion in computing time, see Time.

Last Sickness—
- Expenses as charge against estate, see Estates of Decedents § 150.
- Expenses as element of damages for death by wrongful act, see Death by Wrongful Act § 33 et seq.
- Expenses as element of damages incurred by husband, wife, or child, see Damages §§ 154, 155.
- Gifts during or in view of last illness, see Gifts.

Latent Ambiguity—
- Admissibility of parol evidence to remove, see Evidence § 165.
- Rules for construction of writings, see Contracts, VI, A; Deeds, III, A; Wills, VI, A; Statutes, V.

Latent Defects and Dangers—
- Duty and actionable negligence, see Negligence; Highways, XII; Carriers, IV, E; Railroads, VIII; Street Railways, IV; Master and Servant, III.
- Rights of buyer and seller or warrantor of goods, see Sales, VI.

Lateral and Subjacent Support—
- See Adjoining Owners; Mines, III; Highways § 195.

Law and Facts—
- Relative provinces of court and jury and matters pertaining to each, see Trial, VI; Indictment, IX, D; and see also specific topics for particular issues regarded as of law or fact.
- Representations of fact and of law as basis for claim of fraud, see Fraud § 3.
- Mistakes of law and of fact, see Mistake.
- Nonestoppel as to matters of law, see Estoppel § 4.

Law Books and Reports—
- Quotations from books in instructions, see Indictment § 413; Instructions § 12.
- Reading from books in argument, see Argument of Counsel § 27; Indictment § 388.
- Use to prove foreign laws, see Evidence §§ 121, 532, 533; Indictment §§ 185, 295.
- Reporting decisions of supreme court, see Courts § 17.

Lawful; Lawfulness—
- These words are used in such a great variety of connections that no collation of the references can be attempted. See generally the word describing the thing which is characterized as lawful or unlawful, e. g., for "lawful rate of interest," see Interest.

Law of the Case—
- On retrial or second review, see Appeal, XII, G; XV.
- Force and effect of decision as precedent on the law, see Courts, IV.

Law of the Land—
- See Constitutional Law, V.

Law of the Road—
- See Highways, XIII.

Laws—
- In the sense of statutes, see Statutes.
- Constitutionality of statutes, see Constitutional Law.
- Judicial notice and evidence to prove laws, see Evidence § 23 et seq., 59 121, 532, 533; Indictment §§ 129, 185, 210, 295.
- Mode of pleading statutes or foreign laws, see Pleading, I; Indictment § 39 et seq.

Laws of Nature—
- Subjects of judicial notice, see Evidence, I; Indictment, VIII, A.

Lay or Nonexpert Opinions—
- See Evidence, VI, A; Indictment § 196 et seq.

Laying Foundation—
- Foundation or preliminary proofs to admit evidence, see Evidence § 76; Indictment §§ 192, 201, 211, 238, 265, 266, 300.
- Order of proof and introduction of evidence before proper foundation laid,

see Trial, V, B; Indictment § 259 et seq.
Cross-examination to lay foundation for impeachment, see Examination of Witnesses § 56 et seq.; Witnesses, VI, D.
Leading Questions—
See Examination of Witnesses §§ 13-17.
Leakage—
Liability of landlords and tenants, see Landlord and Tenant, IV, D, VII.
Liability for injury from leaking gas, see Gas § 4.
Leases; Leaseholds—
Of land, see Landlord and Tenant.
Of chattels, see Sales, XII; Bailments.
Of mines, see Mines, II.
Of railroads and street railways, see Railroads, VII; Street Railways, II.
Necessity and sufficiency of writing, see Frauds, Statute of.
Leave of Court; Leave to Sue—
See generally topics treating of that for which leave is conceived to be necessary, e. g., Discontinuance § 11 et seq.; Receivers, IV, C; Bankruptcy § 15; Pleading, VI (leave to amend); Equity; Parties (leave to intervene).
Ledgers—
Admissibility as books of account, see Evidence § 522 et seq.
Legacies; Legatees—
See generally Wills, VI, VII; Estates of Decedents, XIII.
Inheritance and succession taxes, see Taxes, XIII.
Legal; Legality—
See generally the word or words with which "legal" or "legality" is coupled, e. g., legal age, see Infants; legal interest, see Interest, III; legal holidays, see Holidays; legal representatives, see Estates of Decedents; Wills, VI.
Legislation; Legislature—
Constitutional limitations, see Constitutional Law.
Mode of enacting statutes, and interpretation and effect of statutes, see Statutes.
Apportionment acts, see Constitutional Law § 258 et seq.
Eligibility of member to hold other state office, see Officers § 45.
Legitimacy; Legitimation—
See Bastards.
Lending Public Credit—
See Constitutional Law, XV; Municipal Bonds.
Lessors and Lessees—
See Landlord and Tenant.
Letters—
As best and secondary evidence, see Evidence, IV; Indictment, VIII, B.
As documentary evidence, see Evidence, VIII; Indictment, VIII, B.
As admissions or confessions, see Evidence, VII; Indictment, VIII, B.
Libelous letters, see Libel.
Threatening letters as crime, see Crimes, II.
Contract embodied in letters, see Contracts, III, B; Frauds, Statute of, II.
New promise in letter to pay barred debt, see Limitations, VI.
Presumption as to receipt of letter, see Evidence § 35.
Letters of Credit—
See Banking § 31; Negotiable Instruments.
Letters Rogatory—
See generally Depositions.
Compulsion of attendance of witnesses and answers by them, see Depositions § 14.
Letting Contracts—
Inviting proposals and award to accepted bidder, see Contracts, III; Public Contracts, II.
Levy—
Of attachment or execution, see Attachment, VI; Executions, VI; Justices of the Peace, IV, C, H.
Duties and liabilities of sheriff, see Sheriffs.
Of assessments on stock, see Corporations, VII.
Of taxes, see Taxes, V; Local Improvements, VI.
Homestead and personal exemptions, see Homesteads; Exemptions.
Levying Officers—
See Sheriffs.
Lex Loci or Lex Fori—
See Conflict of Laws.
Liability—
See specific topics treating of the liability or person or act in question to which the liability pertains.
Indemnity or insurance against liability, see Indemnity; Insurance.

LIBEL AND SLANDER.

TREATS of actionable defamation by spoken words or writings, prints, pictures, and the like, including actionable slander of title, and also including criminal slanders or libels.

Analysis.

I. Nature of the tort and parties thereto.

§ 1. In general.
§ 2. Persons responsible or liable.

II. Actionable words and publications.

A. Imputing Crime, Turpitude or Unchastity.

§ 3. In general.
§ 4. Imputations of particular acts and misdoings.
§ 5. ——Bribery and corruption.
§ 6. ——Embezzlement, dishonesty, or breach of trust.
§ 7. ——Larceny or theft.
§ 8. ——Forgery.
§ 9. ——Disorderly conduct and disturbance of peace.
§ 10. ——Perjury or false swearing.
§ 11. ——Unchastity and immorality.

B. Invoking Contempt, Ridicule or Ostracism.

§ 12. In general.
§ 13. Neglect or desertion of spouse or family.
§ 14. Violation of personal confidence or trust.
§ 15. Fraudulent, corrupt or improper conduct in public matters.

C. Impairing Occupational or Business Credit.

§ 16. In general.
§ 17. Charges injurious to professional reputation.
§ 18. Charges concerning candidate for office.
§ 19. Imputing misconduct in office.
§ 20. ——Of sheriff or constable.
§ 21. Charges injurious to plaintiff in his business or trade.
§ 22. Disparagement of financial responsibility or credit.

D. Slander of Title or Property.

§ 23. In general.

E. Construction and Application.

§ 24. In general.
§ 25. Distinction between written and spoken words.
§ 26. Construction as a whole.
§ 27. Words of double intendment, unintended meanings.

III. Privilege and justification.

§ 28. In general.
§ 29. Malice, intent and falsity affecting privilege.
§ 30. Privilege of the press.
§ 31. ——Reports of judicial proceedings and papers.
§ 32. Matter contained in pleadings and affidavits and process.
§ 33. Statements made in course of trial.
§ 34. Report by grand jury.
§ 35. Reports or complaints to police officers.
§ 36. Official reports or communications.
§ 37. ——Concerning schools.
§ 38. Criticism of public officers or candidates for office.
§ 39. Charges made in association or lodge proceedings.
§ 40. Notice not to give credit to wife.
§ 41. Communications respecting business between persons interested therein.

§ 42. Reports by commercial and credit agencies.
§ 43. Criticism of literary productions.
§ 44. Statements by way of defense or in answer to charges.
§ 45. Repetition or publication of charges made by others.
§ 46. Loss of privilege by exceeding occasion.
§ 47. Reiteration of charge after cessation of privilege.

IV. Publication.

§ 48. In general.

V. Malice and intent.

§ 49. In general.
§ 50. Reckless and wilful publication.
§ 51. Good faith of defendant.

VI. Extent, aggravation and mitigation of damages.

§ 52. In general.

VII. Actions and pleading.

§ 53. Declaration.
§ 54. ——Inducement.
§ 55. ——Colloquium.
§ 56. ——Innuendo.
§ 57. ——Showing application of charges to plaintiff.
§ 58. ——Allegations of injury or damage.
§ 59. Pleas and notices.
§ 60. Issues under the pleadings.
§ 61. ——Scope of plea or notice.
§ 62. ——Innuendo as limiting issues or proof.
§ 63. Variance between declaration and proof.

VIII. Evidence and trial.

§ 64. Burden and degree of proof.
§ 65. ——As to malice or falsity of charges.
§ 66. ——As to privilege.
§ 67. ——As to justification.
§ 68. Presumptions.
§ 69. ——As to malice and intent.
§ 70. ——Injury or damage.
§ 71. Admissibility of evidence in general.
§ 72. ——Complementary and related parts or versions of slanderous statements.
§ 73. Evidence as to application of words to plaintiff.
§ 74. Evidence as to publication.
§ 75. ——Extent of publicity.
§ 76. Evidence as to responsibility or authorship.
§ 77. Evidence as to meaning or understanding of words.
§ 78. Admissibility of fact of malice or good faith.
§ 79. Evidence to show malice or intent.
§ 80. ——Repetition or publication of charges.
§ 81. ——Privileged statements of same charge.
§ 82. ——Other or similar publications or statements.
§ 83. ——Common rumor or reports of similar imputation.

§ 84. ——Negligence of defendant as employer.
§ 85. ——Plea or notice of justification as evidence of malice.
§ 86. Admissibility of retractions and demands for and refusals thereof.
§ 87. Admissibility of character and reputation.
§ 88. Evidence to prove character and reputation.
§ 89. Evidence in justification.
§ 90. ——Partial justification.
§ 91. ——Truth or falsity of charge.
§ 92. ——Acts and statements of third persons and coparties.
§ 93. ——Other and distinct acts and deeds of plaintiff.
§ 94. ——Explanation and rebuttal evidence.
§ 95. Evidence bearing on gravity of injury or in mitigation.
§ 96. ——Effect of charges upon plaintiff's feelings.
§ 97. ——Financial, business or social standing of defendant.
§ 98. ——Truth of charges or reports substantiating belief.
§ 99. ——Provocation or invitation of charges.
§ 100. Weight and sufficiency.
§ 101. ——To justify charges or prove falsity.
§ 102. ——To establish malice.
§ 103. Questions of law and fact.
§ 104. ——Publication and responsibility therefor.
§ 105. ——Construction, meaning and effect of words used.
§ 106. ——Application of charges to plaintiff.
§ 107. ——Correctness of translation of words.
§ 108. ——Privilege.
§ 109. ——Justification and truth of charges.
§ 110. ——Retraction and sufficiency thereof.
§ 111. ——Malice and intent.
§ 112. ——Extent of injury or damage.
§ 113. ——Influence or financial standing of parties.
§ 114. ——Directing verdict.
§ 115. Instructions.
§ 116. ——Construction, meaning and application of words used.
§ 117. ——Publication and responsibility therefor.
§ 118. ——Privilege.
§ 119. ——Justification or truth of charges.
§ 120. ——Malice, motive or intent.
§ 121. Verdict and judgment.

IX. Criminal libel and slander.

§ 122. In general.
§ 123. Indictment, information or complaint.
§ 124. Evidence and trial.

I. NATURE OF THE TORT AND PARTIES THERETO.

§ 1. In general.

Words imputing turpitude or crime, see post § 3 et seq.
Words imputing want of chastity, see post § 11.
Words tending to hold a person up to hatred, scorn, contempt or ridicule, see post § 12 et seq.
Words injuring occupational or business credit, see post § 16.
Construction and application of words used, see post § 23 et seq.
Slander of title, see post § 23.
Distinction between written and spoken words, see post § 25.
Privilege and justification, see post III.
What constitutes publication of the defamatory charges, see post § 48.

Malice and intent as elements, see post § 49 et seq.
False accusations and defamation of spouse as cruelty, see Divorce § 20.
Defamation of or scandal concerning judge amounting to contempt, see Contempt, I.
Slander or libel by member of fraternal benefit society as ground for fine or expulsion, see Fraternal Associations §§ 8, 9.

¶ 1. Every false and malicious publication of language concerning a man or his affairs, which, as a natural or necessary and proximate consequence, occasions him pecuniary loss, is prima facie a libel, if the publication be by writing.—Weiss v. Whittemore, 28 Mich. 366.

¶ 2. In a civil action for libel no damages are recoverable for a libel that contains no falsehoods.—Sullings v. Shakespeare, 46 Mich. 408.

§ 2. Persons responsible or liable.

See also post ¶ 341.
What constitutes publication, see post § 48.
Evidence as to responsibility or authorship, see post § 76.
Evidence bearing on negligence of defendant as employer, see post § 84.
Responsibility of members of grand jury for statements made in report, see post ¶ 145.
Burden of proving negligence of newspaper proprietor in retaining employee who published the libel, see post ¶ 288.
Questions of law and fact as to responsibility, see post § 104.
Instructions as to responsibility for publication, see post § 117.
Capacity of corporation to commit libel, see also Corporations ¶ 409.
Responsibility of corporation for servant's slanderous words, see Corporations ¶ 517.

¶ 3. All persons who have been engaged in, or have been in any way connected with, the publication of libel, are responsible therefor.—Grinnell v. Cable-Nelson Piano Co., 169 Mich. 183.

¶ 4. A father-in-law who publishes and pays for publishing a false and defamatory article concerning his daughter-in-law is liable to her for libel even though the husband indicted and signed the libel, which was in the form of a notice not to give credit to her, and requested his father to publish it.—Smith v. Smith, 73 Mich. 445.

¶ 5. A clergyman could not recover damages resulting from the reading from his pulpit by himself of a letter derogatory of his character, sent by defendant under qualified privilege to church authorities, in an action for a libel consisting of such letter; since the defendants were not responsible for such publication.—Konkle v. Haven, 140 Mich. 472.

¶ 6. Though two or more persons cannot as a general rule be held jointly liable for an oral slander, yet, under circumstances where all are jointly concerned and interested, and participate in the general purpose, such concert and co-operation may be shown, although the false and malicious statements may have been made by one alone.—Chesebro v. Powers, 78 Mich. 472.

II. ACTIONABLE WORDS AND PUBLICATIONS.

A. IMPUTING CRIME, TURPITUDE OR UNCHASTITY.

§ 3. In general.

Charges injurious to professional reputation, see post § 17.
Statements that plaintiff was arrested on suspicion of felony, see post ¶ 412.
Construction and application of words, see post § 24 et seq.
Privilege of newspapers, see post § 30.
Privilege in publishing judicial pleadings and proceedings, see post § 31 et seq.
Statements made in course of trial, see post § 33.
Statements made in reports of grand jury, see post § 34.
Statements made in complaints to police officers, see post § 35.
Statements made in official reports, see post § 36.
Charging candidate for public office with crime, see also post § 38.
Presumption as to malice or intent, see post § 69.
Evidence to show malice or intent, see post §§ 78-85.
Sufficiency of evidence to justify charges of crime, see post § 101.
General law of crimes, see Crimes.

¶ 7. A publication imputing a crime is actionable per se.—McAllister v. Detroit Free Press Co., 85 Mich. 453.

¶ 8. An article published in a newspaper charging a person with having committed several crimes, such as burglary, forgery, embezzlement, assault, and other disgraceful and degrading acts is libelous per se.—Brewer v. Chase, 121 Mich. 526.

¶ 9. Language is actionable if, under the circumstances in which it was used, the hearer would reasonably understand that it was intended to impute a crime.—Line v. Spies, 139 Mich. 484.

¶ 10. A publication to the effect that a member of the board of supervisors charged a fellow member during a meeting of the board with being a liar, a thief and a perjurer, and stated that he could prove it, is libelous per se.—Orth v. Featherly, 87 Mich. 315.

§ 4. Imputations of particular acts and misdoings.

Words charging act of absconding, see post ¶¶ 13, 231.
Words imputing arson, see post ¶¶ 11, 259, 416, 418.
Words charging bastardy, see post ¶ 41.
Keeping of bawdy house, see post § 9.
Words imputing gambling, see post ¶ 12.
Words imputing homicide, see post ¶¶ 14, 416, 446.
Words charging the obtaining of money by false pretenses, see post § 6.
Words charging poisoning of cattle, see also post ¶ 234.
Charging the publication of seditious articles, see post ¶ 430.
Sufficiency of evidence of malice in charging arson, see post § 102.
Sufficiency of evidence to justify charges of murder, see post ¶ 462.

¶ 11. A charge of burning one's property to defraud insurers is actionable per se whether one is actually insured or not.—Fowler v. Gilbert, 38 Mich. 292.

¶ 12. Where two or more persons play at cards in a saloon where liquors and cigars are kept for sale, with the agreement that the one that is defeated at such game shall pay for the liquor or cigars for the party, such playing is within words imputing gambling.—Hay v. Reid, 85 Mich. 296.

¶ 13. A statement that "if the defendant hadn't gone away we should issue warrants for him" may mean, as charged by the innuendo, that he "had absconded, and had been guilty of some offense for which he was liable to arrest," and if so meant it is actionable.—Ayres v. Toulmin, 74 Mich. 44.

¶ 14. A newspaper article, after stating that P. had murdered a certain girl, said she was known as P.'s woman, and that he had told an alleged confederate that he need have no fears about her murder, and had hired him to steal a sack, which he received (to put the body in); that he had furnished a wagon in which to take her body to the river; that he had intimated to his wife that the girl had been murdered to get rid of her, and that he had confessed adultery to his wife, for which the wife had left him. Held, that these were all libelous charges, for which P. was entitled to damages unless it was proved that he had murdered the girl.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

§ 5. ——Bribery and corruption.

Good faith in imputing bribery, see post ¶ 116.
What constitutes bribery, see post ¶ 95.
Charges imputing misconduct in office, see post §§ 18, 38.
Construction and interpretation of terms used, see post § 24.
Sufficiency of evidence to justify charges of bribery, see post § 101.
Privilege in criticism of public officials, see post § 38.
Notice to warrant evidence of specific acts of bribery, see post ¶ 264.
General law of bribery, see Crimes, II.

¶ 15. It is libelous, if untrue, to state in a published article that a member of the legislature (naming him) accomplished the passage of a particular bill by "keeping open house, with liquors," or that "he did it by the use of boodle."—Randall v. Evening News Assoc., 79 Mich. 266.

¶ 16. A picture, the only meaning of which is to show that the monument of a member of the legislature should show that liquor and money were the source of his success in passing a particular bill, is libelous if not true.—Randall v. Evening News Assoc., 79 Mich. 266.

¶ 17. Where it is charged in an alleged libel that a franchise has been procured by the use of "boodle," the inference is that the persons granting the franchise were, as officials, bribed by money to make the grant.—Boehmer v. Detroit Free Press Co., 94 Mich. 7.

¶ 18. A publication made pending an election, attributing to plaintiff a remark that there was not one of a certain class of voters who could not be bought for a two-dollar bill, and charging plaintiff with being one of a ring's chief heelers, and stating that such remark was indicative as to how the ring expected to carry the coming election, was libelous per se as not only holding plaintiff up to public hatred and contempt, but charging him with the purpose of committing the offense of bribery.—Field v. Magee, 122 Mich. 556.

§ 6. ——Embezzlement, dishonesty, or breach of trust.

See also ante ¶ 8.
Imputation of dishonesty contained in affidavits, see post ¶ 137.
Charging lawyer with embezzlement, see also post § 17.
Violation of personal trust, see post § 14.
Words charging partner with obtaining secret commissions, see post ¶ 232.
Words imputing falsehood, see also post ¶ 50.
Sufficiency of declaration, see post § 58.
Use of inducement to show actionable character of charges of embezzlement, see post ¶ 222.
Scope of plea or notice, see post § 61.
Variance as to charges of embezzlement, see post § 63.
Presumption of malice from use of words charging dishonesty, see post ¶ 300.
Province of court and jury as to whether words used imply embezzlement, see post § 105.
General law of embezzlement, see Crimes, II.

¶ 19. A published letter being in answer to a published article, and stating that plaintiff had, against the wishes of the writer of the letter, got up a raffle for the benefit of the writer and his family; that the writer had received nothing from the raffle, and that the letter was published so that those who had purchased tickets would get their money back, was not libelous as imputing the crime of obtaining money by false pretenses and the crime of embezzlement.—Brown v. Boynton, 122 Mich. 251.

¶ 20. A charge in substance that the plaintiff had moved furniture from a rented apartment house, had wrongfully collected money from the tenants, and denied doing so, and had left the city with pockets filled with money, is not slanderous per se.—McCloy v. Vaughan, 185 Mich. 189.

¶ 21. To say to another, "You are a swindler," imputes degrading conduct and acts, and is indictable under How. St. § 9315, which provides that any person who shall falsely and maliciously, by word, writing, sign, or otherwise, accuse, attribute or impute to another the commission of any crime, felony, or misdemeanor, or any infamous or degrading act, shall be deemed guilty of a misdemeanor.—Schultz v. Huebner, 108 Mich. 274.

¶ 22. A letter stating that a designated person is "a liar and a dead beat of the first order, and I would like to sue him to get what he owes me," is libelous per se.—Morgan v. Andrews, 107 Mich. 33.

¶ 23. A publication charging plaintiff, who was the trustee of his father's estate, with having "got away with the property of" his parents and with having left them to starve, is libelous per se.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

§ 7. ——Larceny or theft.

See also ante ¶ 10; post ¶¶ 138, 146.

Obtaining money by false pretenses, see ante § 6.

Statements made to police officer upon request of plaintiff, see post ¶ 186.

Charges made by way of business communications, see post § 41.

Meaning of "rob" and "steal" when construed with the rest of the language used, see post ¶ 100.

Statements made by witness in criminal prosecution, see post § 33.

Words imputing swindling, see also post ¶ 233.

Privilege in publishing complaint for larceny, see post ¶ 135.

Sufficiency of declaration, see post § 53.

Allegations showing application to plaintiff of words charging theft, see post § 57.

Sufficiency of notice of justification, see post § 59.

Evidence to show application of charges to plaintiff, see post § 73.

Admissibility of evidence to show malice, see post § 79.

Presumption of malice from use of words charging larceny, see post § 69.

Proof to support charge of stealing whisky fines, see post ¶ 276.

Sufficiency of evidence of malice in imputing theft, see post § 102.

Sufficiency of evidence to justify charges, see post § 101.

Instructions as to meaning of words used, see post § 116.

General law of larceny, see Larceny.

¶ 24. Words charging another with the crime of larceny are actionable.—Bell v. Fernald, 71 Mich. 267.

¶ 25. To say of another "He is a thief," is prima facie actionable.—Line v. Spies, 139 Mich. 484.

¶ 26. Publishing words calling plaintiff a thief is actionable per se.—Schattler v. Daily Herald Co., 162 Mich. 115.

¶ 27. A railroad company supplied certain of its agents with a tabulated list of employees who had been discharged, stating in parallel columns the name and occupation of the employee, and under the heading "Why discharged," the reason. Held, where the reason given was "stealing," the statement was libelous, and its issue to agents was a publication.—Bacon v. Michigan Cent. R. Co., 55 Mich. 224.

¶ 28. The following words were held actionable per se and presumptively malicious: "For some months back I have missed things from my laundry—gentlemen's wear. Jennie [the plaintiff] has stolen them, and I have come to search your house."—Bell v. Fernald, 71 Mich. 267.

¶ 29. The publication of a statement that the party therein named, giving his street and number, has been arrested for theft, is libelous per se.—Davis v. Marxhausen, 86 Mich. 281.

¶ 30. Language imputing larceny to plaintiff, who was a member of an ice company to which also defendant and persons before whom the language was used belonged, was not privileged, although it was defendant's theory that plaintiff had fraudulently taken for his own use ice belonging to his copartners.—Ellis v. Whitehead, 95 Mich. 105.

¶ 31. To say to another, "You are a liar and a thief," is slanderous and actionable per se if unexplained.—Youngs v. Adams, 113 Mich. 199.

§ 8. ——Forgery.

General law of forgery, see Forgery.

¶ 32. Charging a son with having forged his mother's name to a note means a note

susceptible of forgery, and the words are actionable per se.—Beneway v. Thorp, 77 Mich. 181.

§ 9. ——Disorderly conduct and disturbance of peace.

See also post ¶¶ 147, 148.
Aggravated assault, see also post ¶ 266.
General law as to disorderly conduct and disorderly house, see Crimes, II.

¶ 33. Defendants addressed a petition to a police justice complaining that plaintiff was an obnoxious and peace disturbing neighbor and was quarrelsome and a general nuisance and asked that he be requested to move. Held, the subject-matter was libelous.—Flynn v. Boglarsky, 164 Mich. 513.

¶ 34. To say to a woman in another's hearing, "You are not a decent woman; you do not keep a respectable house," is slanderous per se as imputing the keeping of a bawdy house.—Loranger v. Loranger, 115 Mich. 681.

¶ 35. A newspaper article stating that an assemblage of disreputable citizens had held high carnival at the hall of a certain person is not libelous per se.—Weber v. The Detroit Daily Post, How. N. P. 119.

§ 10. ——Perjury or false swearing.

See also ante ¶ 10; post ¶¶ 265, 268.
Words imputing readiness to commit perjury, see also post ¶ 406.
Sufficiency of declaration, see post § 53.
General law of perjury, see Crimes.

¶ 36. To say of another "he has sworn to a damned lie, and I will put him through for it if it costs me all I am worth," is actionable per se, as the words imply that the party has forsworn himself under circumstances rendering him punishable.—Crone v. Angell, 14 Mich. 340.

¶ 37. If the proceeding is mentioned in which the false swearing is alleged to have taken place, and it is one in which there is no authority to administer an oath, the bystanders must be supposed cognizant of that fact; and to say of another he swore to a lie in such a proceeding would not be actionable per se.—Crone v. Angell, 14 Mich. 340.

¶ 38. To charge one with false swearing and with having been indicted before the grand jury therefor is charging him with the criminal offense of perjury, and is actionable as slander.—Brace v. Brink, 33 Mich. 91.

¶ 39. It is libelous to charge that jurors have perjured themselves in rendering a certain verdict.—Welch v. Tribune Publishing Co., 83 Mich. 661.

¶ 40. A publication alleging that the plaintiff would not hesitate to commit perjury to defend himself from certain charges of political treachery is libelous per se.—Sanford v. Rowley, 93 Mich. 119.

§ 11. ——Unchastity and immorality.

See also post ¶¶ 271, 408, 424.
Words imputing adultery, see also post ¶¶ 407, 487.
Words charging seduction, see also post ¶¶ 400, 415.
Words charging physician with illicit intercourse with patient, see also post ¶ 411.
Allegations of injury or damage, see post § 58.
Measure of damages, see post § 52.
Relevancy of evidence in action for slanderously charging adultery, see post ¶ 308.
Evidence bearing on character or reputation of plaintiff, see post §§ 87, 88.
Sufficiency of evidence to justify charges of immorality, see post § 101.
Province of court and jury as to meaning and construction of words used, see post § 105.
Imputing want of chastity to woman actionable per se, see Jud. Act, chap. XX, § 20; Comp. L. 1915, § 12756.

¶ 41. A publication charging a married man with bastardy involves a criminal charge, even though the publisher does not know the man is married.—Park v. Detroit Free Press Co., 72 Mich. 560.

¶ 42. Imputing want of chastity to a woman is actionable per se.—Burt v. McBain, 29 Mich. 260.

¶ 43. The publication of an article, without investigation, charging an estimable young woman with the grossest immorality, when a brief investigation would have reached the truth, is libelous.—Farrand v. Aldrich, 85 Mich. 593.

¶ 44. The words "you damned old bitch" are not slanderous per se as imputing a want of chastity to a woman, when used in an altercation over a matter foreign to such a charge.—Warren v. Ray, 155 Mich. 91.

¶ 45. Words charging that the maternal grandfather of a woman, plaintiff in a slander suit, was "a woman's man" and that plaintiff was "just like him" and that plaintiff's mother was like such grandfather and that plaintiff was no better, are actionable per se as meaning that plaintiff consorted with men of bad repute for immoral purposes.—Derham v. Derham, 123 Mich. 451.

¶ 46. Respondent imputed a want of chastity to the complaining witness, an unmarried woman, by charging that her employer had got himself into a nice scrape; that he had borrowed a doctor's instruments and committed abortion on her; and that she demanded $15,000, and his wife had kicked him out of doors. Held, language would sup-

port a conviction for criminal slander.—People v. Parsons, 163 Mich. 329.

¶ 47. In the course of a dispute over some wood which plaintiff was attempting to prevent defendant and his tenant from hauling away from premises claimed by her, defendant was alleged to have said to plaintiff, in the presence of the tenant: "You are not a decent woman; you do not keep a respectable house." Held, that defendant could not complain that the jury, in an action for slander, were permitted to find that the words used imputed to plaintiff a want of chastity.—Loranger v. Loranger, 115 Mich. 681.

B. INVOKING CONTEMPT, RIDICULE OR OSTRACISM.

§ 12. In general.

Imputing crime, turpitude or unchastity, see ante II, A.

Presumption as to plaintiff's good character, see post ¶ 296.

Construction and application of words used, see post § 24 et seq.

¶ 48. Any printed publication the natural result of which is to bring ridicule or contempt upon a person is, if untrue, libelous.—Orband v. Kalamazoo Tel. Co., 170 Mich. 387.

¶ 49. Any word published of another, the natural tendency of which is to hold him up to hatred, scorn, contempt or ridicule, and to beget an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse and society is libelous and actionable per se.—Van Lonkhuyzen v. Daily News Co., 195 Mich. 283.

¶ 50. A publication alleging that plaintiff was engaged to be married, that he had ordered his wedding supper and had employed a clergyman, that just before the time set for the marriage his fiancée was married to his youthful cousin (which was termed "a triumph of youth over middle age"), and that he denied both his relationship to the bridegroom and his engagement, is libelous if untrue; it tending to hold him up to ridicule, and also charging him with falsehood.—Hatt v. Evening News Ass'n, 94 Mich. 114, 119.

¶ 51. An article which falsely states a woman is engaged to a person who is in fact a drunken degenerate, falsely states that she walked and associated with him, and that she broke her alleged engagement with him because her dogs could not ride on the street car, is libelous per se.—Orband v. Kalamazoo Tel. Co., 170 Mich. 387.

§ 13. Neglect or desertion of spouse or family.

Notice not to give credit to wife, see post § 40.

¶ 52. In connection with a notice forbidding all persons to harbor or trust the advertiser's wife on his account, words charging her with deserting him in his sickness are libelous per se.—Smith v. Smith, 73 Mich. 445.

§ 14. Violation of personal confidence or trust.

¶ 53. It is libelous to publish to the injury of a newspaper reporter an untrue statement showing that he has violated a private confidence by tale-bearing.—Tryon v. Evening News Ass'n, 39 Mich. 636.

§ 15. Fraudulent, corrupt or improper conduct in public matters.

Criticism of public officers or candidates for office, see post § 38.

¶ 54. Articles were published in a daily newspaper charging a citizen with having favored and carried to a successful issue a scheme for his own and others' aggrandizement at the expense of the public, whose interests and desires were in opposition to it, through the acts of the board of estimates of the city where the paper was published, the names of the members of which the articles declared were to be held in reprobation by every citizen who believed in honest administration of the public finances. Held, that the implication from the articles is plain that the citizen named had induced corrupt or improper action for his private gain; that the tendency of such charges is to bring him into public hatred, disgrace, contempt, and obloquy; that they reflect on his character, and are actionable.—Randall v. Evening News Ass'n, 101 Mich. 561.

C. IMPAIRING OCCUPATIONAL OR BUSINESS CREDIT.

§ 16. In general.

Distinction between written and spoken words, see post § 25.

Rule of privilege as applied to business communications, see post § 41.

¶ 55. A statement made concerning a person that a bond on which the person was surety was no good, that he was not worth a dollar, his property is all in his wife's name is not slanderous per se unless the statement was one touching him in his business and tended to injure him therein.—Dallavo v. Snider, 143 Mich. 542.

¶ 56. Whether, where dismissal from employment as agent is the special injury complained of in a case of libel, the words, to be libelous, must impute some charge or matter in relation to the plaintiff's business, trade or avocation, which, if true, would render him unworthy of employment, quære.—Weiss v. Whittemore, 28 Mich. 366.

§ 17. Charges injurious to professional reputation.

Charging physician with misuse of trocar in vaccination, see post ¶ 403.
Words charging physician with illicit intercourse with patient, see post ¶ 411.
Charging minister with publication of seditious articles, see also post ¶ 430.
Charges injurious to attorney running for office, see post § 18.
Charges reflecting on plaintiff's conduct as city attorney, see also post ¶ 409.
Charging attorney with wrongful appropriation of client's money, see also post ¶ 398.
Sufficiency of evidence of malice in making charges against minister, see post § 102.
Statements made in grand jury report, see post § 34.

¶ 57. Spoken words are defamatory without allegation of special damages when the imputation cast by them on plaintiff is so injurious that the court will presume without proof that his reputation has thereby been impaired; which presumption arises when the words are spoken of plaintiff in the way of his profession.—Mains v. Whiting, 87 Mich. 172.

¶ 58. It is libelous to publish of a lawyer an article charging him with giving dishonest, unprofessional advice, with making false statements in professional dealings, with incurring loss of confidence by misconduct, with embezzling moneys, and with making false charges for services and extorting excessive compensation.—Atkinson v. Detroit Free Press Co., 46 Mich. 341.

¶ 59. The words "you are the dirty sewer through which all the slums of this embezzlement have flowed," and "if that $20 had been turned over to you or to ——— ——— [the person charged with the embezzlement] the company would never have seen twenty cents of it," addressed to an attorney who is at the time conducting the defense of a client charged with such embezzlement, are actionable per se if shown by plaintiff to have been spoken of and concerning him in the way of his profession.—Mains v. Whiting, 87 Mich. 172.

¶ 60. The following words are libelous per se of Smedley, an attorney, whose bill for services is mentioned therein: "Does any citizen believe that he (the mayor) did not have a 'divy' in the notorious fraudulent Smedley bill? * * * The notorious Smedley bill, that the mayor has included as one of the items the people are asked by him to bond the city to pay, don't have to be paid. Judge Padgham has taken care of that. The people will not have to stand that fraud."—Smedley v. Soule, 125 Mich. 192.

¶ 61. Publication of charges that plaintiff in a libel action had attempted to loot the village treasury, and had used his position of village attorney for the purpose of exacting illegal fees from the village, that he was incompetent as an attorney and a pettifogger, that he had misled the council by means of dishonest advice is libelous per se.—Smith v. Hubbell, 142 Mich. 637.

¶ 62. A newspaper statement to the effect that a designated city physician, appointed by the common council and not chosen at a public election, has caused the death of a patient by reckless treatment, is not privileged, and if false is libelous.—Foster v. Scripps, 39 Mich. 376.

¶ 63. Words in a newspaper article charging a minister as being an interloper, a meddler and a spreader of distrust, discontent and sedition held to be libelous per se.—Van Lonkhuyzen v. Daily News Co., 195 Mich. 283.

¶ 64. An article which, to the common understanding, charges that the principal of a school has been guilty of taking indecent and criminal liberties with the persons of his pupils, and that plaintiff, one of the teachers, assisted him in so doing, is actionable per se.—Thibault v. Sessions, 101 Mich. 279.

¶ 65. An article charging the superintendent of schools in a village with trickiness and dishonesty in avoiding the payment of his debts, of meanness in his treatment of students, and of responsibility for the loss of experienced and capable teachers, is, if false and malicious, libelous per se, and relieves plaintiff from the necessity of proving special damages.—McCormick v. Hawkins, 169 Mich. 641.

§ 18. Charges concerning candidate for office.

See also post ¶ 115.
Charging political treachery, see also post ¶ 405.
Criticism of candidates as privileged statements, see post § 38.
Meaning of "pettifogging shyster" as applied to candidate, see post ¶ 92.

¶ 66. A candidate for office has a right of action for aspersions upon his character and cannot be subjected to unwarranted and untruthful charges.—Eikhoff v. Gilbert, 124 Mich. 353.

¶ 67. Where one is a candidate for the office of representative in congress, it is libelous falsely and maliciously to publish in a coarse and blotted imitation of his handwriting the words, "I don't propose to go into debate on the tariff differences on wool, quinine, and all the things, because I ain't built that way," with an imitation of the candidate's signature attached; such a letter would show him to be ignorant, illiterate, and incapable of performing intelligently the duties of the office sought.—Belknap v. Ball, 83 Mich. 583.

¶ 68. Words of a circular addressed to voters charging that a candidate for public office had in his official capacity of representative championed measures opposed to the moral interests of the community, constitute an attack upon the moral character of the party charged and would be likely to bring him into public contempt and disgrace, are not privileged as constituting legitimate criticism, and are libelous per se.—Eikhoff v. Gilbert, 124 Mich. 353.

¶ 69. In an action for libel against a publishing company for charging a candidate for public office with having held the office of prosecuting attorney for two years when he was not a citizen "and as a lawyer he knew that he was illegally holding the office and receiving compensation for the same," held that, while a good deal of latitude must be allowed to newspapers and individuals in discussions of this character, the verdict for the defendant should be reversed.—Smurthwaite v. News Publishing Co., 124 Mich. 377.

¶ 70. In an action for slander where it is charged that defendant, a candidate opposing plaintiff, told that plaintiff offered to withdraw in his favor for a certain sum, it is held, that as such a statement was calculated to injure plaintiff in his profession as an attorney and as a candidate for office, the declaration states a cause of action.—Lewis v. Weidenfeller, 175 Mich. 296.

¶ 71. A circular addressed to voters charging a certain named candidate for office with being indecent and immoral and unworthy of support for that reason, concluding with a request that for reasons equally as good the voters should vote against plaintiff, is libelous per se.—Eikhoff v. Gilbert, 124 Mich. 353.

§ 19. Imputing misconduct in office.

Charging legislator with corrupt practices, see also post ¶ 419.

Privilege as extending to false or malicious charges concerning public officers, see post § 29.

Instructions as to meaning of words used, see post § 116.

¶ 72. An affidavit for leave to appeal from a justice's judgment alleged that the cause was tried on a certain day; that the testimony was not concluded until after dark, when the court announced an adjournment, but fixed no time, whereupon all the parties left the office; that affiant's attorney was sick several days thereafter, and was unable to attend to business; that judgment was rendered against affiant on the day of the trial, whereby affiant was deceived; that by reason thereof affiant was prevented from taking an appeal within the statutory time; and that the judgment is a fraud upon affiant's rights. Held, not libelous of the justice of the peace.—Murphy v. Nelson, 94 Mich. 554.

¶ 73. Personal misconduct in office is imputed, in an alleged libel against plaintiff, the president of the police and fire board, which in answer to his statement of present conditions refers to past conditions as regards gambling, and then asks how he could allow such a terrible state to exist in the past and why he is stopping it now, asking "who stopped putting up? who purchased immunity for this vice? how much did they pay? to whom was it paid?"—Weston v. Grand Rapids Publishing Co., 128 Mich. 375.

§ 20. ——Of sheriff or constable.

Evidence to show malice or intent, see post ¶ 347.

Sufficiency of evidence to justify charges that sheriff knew gambling was going on, see post § 101.

¶ 74. A newspaper article charging a sheriff with being drunk in a public place, while attending to his official duties, is libelous per se.—Aronson v. Baldwin, 178 Mich. 565.

¶ 75. Charging a public official, the sheriff, with intentional neglect of duty is actionable per se.—Scougale v. Sweet, 124 Mich. 311.

¶ 76. A publication that in its necessary meaning charges plaintiff with gross misconduct in the office of deputy-sheriff, with arresting and handcuffing men without right, merely to get the legal fees, and oppressing the poor and friendless under color of office, is libelous per se.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

§ 21. Charges injurious to plaintiff in his business or trade.

See also post ¶ 277.

Sense and meaning of words used, see also post § 24.

Allegations of damage or injury, see post § 58.

Allegations showing application of words used to plaintiff, see post § 57.

Province of court and jury as to meaning and construction of words used, see post § 105.

¶ 77. Words, spoken or written, injurious to a person in his business, and false and malicious, are actionable per se, and special damages need not be proved.—Haney Mfg. Co. v. Perkins, 78 Mich. 1; Oliver v. Perkins, 92 Mich. 304; Henkel v. Schaub, 94 Mich. 542.

¶ 78. It is libelous per se to publish of and concerning a merchant false statements touching him in his business and naturally tending to injure him therein.—Dallavo v. Snider, 148 Mich. 542.

¶ 79. A newspaper article charging a druggist with making as well as selling counter-

feit Haarlem Oil, and putting it in counterfeit wrappers, is libelous.—Steketee v. Kimm, 48 Mich. 322.

¶ 80. In business a reasonable latitude for puffing should be allowed. But this right must be so far limited that no agent, for the purpose of adding to his own sales and diminishing those of a rival agent, should be allowed to place his rival in the false position of having recommended the article supported by his opponent as better than his own, since both are supposed to be experts upon whose judgment the public will greatly rely. Nothing short of the truth of such a representation will justify its publication.—Weiss v. Whittemore, 28 Mich. 366.

¶ 81. The lessee of a stall in a market is not libelled, nor is his business, by a publication stating that such market is not a "howling success," and that at no time were more than a dozen persons therein on Saturday night.—McGraw v. Detroit Free Press Co., 85 Mich. 203.

¶ 82. Circulars issued by a rival manufacturer containing false statements, and charging the plaintiff with false statements and malicious motives, and unscrupulous attempts to injure the defendant's business, and with bad faith, fraud, and deceit are libelous per se.—Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417.

§ 22. Disparagement of financial responsibility or credit.

¶ 83. A statement that a merchant has conveyed $10,000 worth of real estate to his wife for $5,000; that his other real estate is heavily mortgaged; and that he is heavily indebted to banks, upon which indebtedness he is paying a high rate of interest, giving the rates,—if it has no significance further than a personal one, is not libelous per se.—Simons v. Burnham, 102 Mich. 189.

¶ 84. A statement that a merchant has conveyed real estate to his wife at half its value, though his property is heavily mortgaged and he deeply in debt to banks, sent to firms from whom the merchant is in the habit of purchasing goods on credit, would necessarily cause a loss of credit, and, if false, is actionable per se.—Simons v. Burnham, 102 Mich. 189.

¶ 85. A statement that the bond of the plaintiff was no good, that he was not worth a dollar and that his property was all in his wife's name, held, not to have been slanderous per se, not having been spoken of and concerning the plaintiff in relation to his business.—Dallavo v. Snider, 143 Mich. 542.

¶ 86. A newspaper article stating that plaintiff has turned over his assets and sought a new country, and that he is financially hard pressed and stating that business men generally agree that he has not defrauded any one, clearly tends to injure plaintiff in his good name, credit and business, and is libelous per se.—Gustin v. Evening Press Co., 172 Mich. 311.

¶ 87. The words, "Goes to Australia. Alpena Man Turns Over Assets and Seeks New Country," published as a newspaper headline in display type, contain in themselves the sting of libel and are libelous per se.—Gustin v. Evening Press Co., 172 Mich. 311.

D. SLANDER OF TITLE OR PROPERTY.

§ 23. In general.

See also post ¶ 414.

Malice as an element, see post ¶ 192.

¶ 88. The false statement of a lessor that his lessee has no right to sublet for saloon purposes is not actionable if made without malice, although an opportunity to sublet is thereby lost to the lessee.—Harrison v. Howe, 109 Mich. 476.

¶ 89. A levy of execution against one person upon lands belonging to another, and without going upon the land, creates no lien upon it and is not an actionable wrong, where there is no malice; and if not alleged to be malicious it will not sustain an action for slander to title.—Walkley v. Bostwick, 49 Mich. 374.

E. CONSTRUCTION AND APPLICATION.

§ 24. In general.

Evidence to show application of words to plaintiff, see post § 73.

Evidence as to meaning of words, see post § 77.

Words imputing bribery, see also ante § 5.

Construction words charging forging of name to note, see ante ¶ 32.

Words imputing perjury or false swearing, see also ante § 10.

Words imputing unchastity or immorality, see also ante § 11.

Time, place and attending circumstances as important considerations, see also post ¶ 301.

Allegations showing application of words to plaintiff, see post § 57.

Inducement, colloquium and innuendo to show meaning, application and actionable character of words used, see post §§ 54, 55, 56.

Presumptions as to understanding of words in foreign language, see post ¶ 295.

Evidence to show application of words to plaintiff, see post § 73.

Evidence as to meaning or understanding of words, see post § 77.

Province of judge and jury, see post § 105.

Instructions as to construction and meaning of words, see post § 116.

¶ 90. Where, in an action for libel, the alleged libelous words, standing alone, are unambiguous, they must be construed in their ordinary sense, in the light of such allegations of the circumstances surrounding the transaction as the declaration sets forth. —Simons v. Burnham, 102 Mich. 189.

¶ 91. A charge that the plaintiff "has left town" is not susceptible of the meaning that he had absconded and given up his business and is insolvent.—Ayres v. Toulmin, 74 Mich. 44.

¶ 92. The term "pettifogging shyster," as used in a newspaper article attacking a candidate for congress, means an unscrupulous practitioner who disgraces his profession by doing mean work, and resorts to sharp practice to do it.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 93. The statement that an officer had been thoroughly corrupt in the discharge of his official duties, and that there was no possible palliation for his many offenses, cannot be said to be a mere summing up of what had gone before, but rather stands out as an independent and further charge of corruption and other offenses in office.—Hay v. Reid, 85 Mich. 296.

¶ 94. The sense or meaning of a statement that a merchant has conveyed $10,000 worth of real estate to his wife for $5,000; that his other real estate is heavily mortgaged; and that he is heavily indebted to banks upon which indebtedness he is paying a high rate of interest if true, is not changed into a charge of fraud by the facts that the person therein referred to is a merchant, in the habit of dealing upon credit with the firms to whom the statement is sent; that the person sending the statement intended to injure the credit of said merchant with said firms; and that he accomplished his purpose. —Simons v. Burnham, 102 Mich. 189.

¶ 95. To bribe means to give a bribe to a person; to pervert his judgment or action by some gift or promise.—Randall v. Evening News Ass'n, 97 Mich. 136.

§ 25. Distinction between written and spoken words.

¶ 96. In determining whether words are slanderous per se, there is a distinction recognized between words written and words spoken; but an exception is made in the case of words affecting a person in his profession or business, in which case the distinction does not exist.—Dallavo v. Snider, 143 Mich. 542.

¶ 97. The rules which divest spoken words of an actionable quality do not necessarily apply to written or printed libels.—Foster v. Scripps, 39 Mich. 376.

§ 26. Construction as a whole.

Giving in evidence entire slanderous conversation, see post § 72.

Instructions as to construing publication as a whole, see post §§ 115, 116.

¶ 98. A published article, to test its libelous quality, must all be read together. Parts of it cannot be severed from the rest so as to give them a meaning which the whole would not justify; and the spirit of the whole article must be determined from the occasion that led to it.—O'Connor v. Sill, 60 Mich. 175.

¶ 99. To test its libelous quality, a publication must be considered as a whole, which would include, if it is published in a newspaper, the character of the display of the headlines as well as the words used in them. —Gustin v. Evening Press Co., 172 Mich. 311.

¶ 100. Where the words "rob" and "steal," as used in articles alleged to be libelous, are qualified by the rest of the language used, and it clearly appears that they are not used in the ordinary sense, the court, in an action of libel brought for the publication of the articles, should explain to the jury that the articles are to be interpreted as a whole, and that the ordinary and natural meaning of said words, in the connection in which they were used in the articles, should be taken.—Randall v. Evening News Ass'n, 101 Mich. 561.

§ 27. Words of double intendment, unintended meanings.

Innuendo to explain ambiguous language, see post § 56.

¶ 101. A person is responsible for such meaning of his language as is most natural, and is actually by his own fault accepted under the particular circumstances. But there is no responsibility for any other meaning than that which is shown to have been intended and actually understood.—Wieman v. Mabee, 45 Mich. 484.

III. PRIVILEGE AND JUSTIFICATION.

§ 28. In general.

Privilege of witness as to slander, see post § 33.

Loss of privilege by excessive publications, see post § 46.

Reiteration of charge after cessation of privilege, see post § 47.

Notice of justifications, see post § 59.

Truth as justification in criminal prosecutions, see also post § 122.

Negotiating privilege in declaration, see post § 53, ¶ 252.

Issues as to privilege, see post §§ 60, 61.

Burden of proof as to privilege and justification, see post §§ 66, 67.

Evidence in justification, see post § 89 et seq.

Sufficiency of evidence to justify charges, see post § 101.
Province of court and jury as to privilege, see post § 108.
Absolute privilege as warranting directed verdict, see post § 114.
Instructions as to privilege, see post § 118.
Instructions as to justification, see post § 119.
Constitutional provision as to freedom of speech, see Const. art. II, § 4.

¶ 102. An action for libel will not lie on a communication relating to personal character, if made in good faith and for an honest purpose by persons concerned, and to the proper person. Nor will it lie when such a communication is untrue, if it is not maliciously made.—Wieman v. Mabee, 45 Mich. 484.

¶ 103. Absolute privilege in uttering slanderous words applies more directly to matters of public concern, in regard to which it is considered for the general welfare that persons should be permitted to express their views more freely and fearlessly than in regard to private matters or persons.—Bolton v. Walker, 197 Mich. 699.

¶ 104. In slander it is the occasion which determines the question of privilege and the language is only proper to be considered in connection with the question of malice; and malice is negatived where there was no publicity except in answer to questions asked by one who has the right to ask them and to be answered.—Schultz v. Guldenstein, 144 Mich. 636.

¶ 105. Qualified privilege extends to all communications made bona fide upon any subject-matter in which the party comunicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and it embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.—Bacon v. Michigan Cent. R. Co., 66 Mich. 166; Pollasky v. Minchener, 81 Mich. 280.

¶ 106. A mercantile agency does not stand in such relation, either of interest or duty, with its subscribers generally, that communications from it to them generally are privileged.—Pollasky v. Minchener, 81 Mich. 280.

¶ 107. Qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty.—Madill v. Currie, 168 Mich. 546.

¶ 108. The rule of qualified privilege in the law of slander relates more particularly to private interests, where the occasion casts upon the defendant a duty, or right, to communicate to another in regard to some matter of special concern to one or both or to others for the protection of society, or some interest he represents.—Bolton v. Walker, 197 Mich. 699.

¶ 109. Where a party has an interest in the subject-matter of a slanderous communication, or owes a legal or moral or social duty to speak, he has a qualified privilege.—Trimble v. Morrish, 152 Mich. 624.

§ 29. Malice, intent and falsity affecting privilege.

Malice and intent in libel and slander generally, see post § 49.
Burden of proof as to malice or falsity, see post § 65.
Admissibility of fact of malice, see post § 78.
Evidence to show malice, see post § 79 et seq.
Instructions as to malice, see post § 120.

¶ 110. Where the privilege in uttering slanderous words is absolute the questions of good faith and absence of malice are immaterial.—Bolton v. Walker, 197 Mich. 699.

¶ 111. Communications absolutely privileged are not actionable slander, though spoken with malice.—Trimble v. Morrish, 152 Mich. 624.

¶ 112. A communication having qualified privilege is actionable slander, if actual malice is present.—Trimble v. Morrish, 152 Mich. 624.

¶ 113. Privilege does not extend to false publications made to persons who have no interest in the subject-matter.—Flynn v. Boglarsky, 164 Mich. 513.

¶ 114. If communications or publications, which upon occasions are privileged, are maliciously published and contain matter that is false, there is no privilege.—Smith v. Smith, 73 Mich. 445.

¶ 115. Publications of falsehoods are never privileged even though made concerning candidates for public offices.—Belknap v. Ball, 83 Mich. 583.

¶ 116. The publication in a newspaper of a false charge of a criminal offense (e. g., attempting to bribe a member of the legislature) is not privileged, so as to relieve the publisher from responsibility, although he had reason to believe the charge to be true, and acted in good faith.—Owen v. Dewey, 107 Mich. 67.

¶ 117. Plaintiff had been a member of a police board, and had been active in getting up a card system to keep tab on the conduct of saloon keepers. The defendant newspaper published an interview to the effect

that plaintiff had devised the card system in order to blackmail saloonkeepers when his party should get into power. Held, the publication was not privileged, since plaintiff was a private citizen at the time of publication, and the wilful intent of defendant to injure plaintiff would destroy the privilege.—Lawrence v. Herald Pub. Co., 158 Mich. 459.

¶ 118. Where plaintiff and defendant were rival manufacturers and defendant issued circulars containing false statements, and charging malicious motives, and unscrupulous attempts to injure business, and charging bad faith, fraud, and deceit their relations are not such as to make their circulars privileged where they were untrue.—Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417.

§ 30. Privilege of the press.

Criticism of public officers or candidates for office, see also post § 38.
Newspaper criticism of books, see post § 43.
Matters published in reply to charges, see post § 44.
Repetition of matters published by others, see post § 45.
Publications recklessly and wilfully made, see also post § 50.
Privilege in publishing pleadings, see post § 31.
Evidence bearing on care or negligence in managing defendant's paper, see post § 84.
Right of corporation to freedom of the press, see Constitutional Law § 186.
Restriction of privilege of newspapers to public personages or proceedings, see also Damages ¶ 502.
Constitutional provision as to freedom of the press, see Const. art. II, § 4.

¶ 119. While the mischief which may be caused by an abuse of the press is such as to render its conductors responsible for great care in guarding against the danger, yet the necessities of civilization require that no unreasonable or vexatious restrictions should be imposed upon them.—Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

¶ 120. Newspapers have no privilege that will excuse them in printing libels of which any other publication would not be excused.—Foster v. Scripps, 39 Mich. 376.

¶ 121. All newspaper mention of private persons must be made under the private obligation of publishing no untruths to their prejudice, and the public obligation of saying nothing at all to their prejudice unless on adequate occasion. Otherwise the statements made may be libelous even though they would not be actionable if unwritten.—Tryon v. Evening News Ass'n, 39 Mich. 636.

¶ 122. It is the right and duty of newspapers to discuss measures relating to the health, welfare, comfort and happiness of the people. But this will not justify libelous statements.—Scripps v. Foster, 41 Mich. 742.

¶ 123. A newspaper statement imputing the commission of crime, but based on facts that have no legal tendency to prove it, is not privileged.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 124. The publisher of a newspaper, possesses no immunity from liability in publishing a libel, other or different from any other person. The law makes no distinction between the newspaper publisher, and any private person who may publish an article in a newspaper or other printed form; and if either abuses the right to publish his sentiments on any subject and upon any occasion, he must defend himself upon the same legal ground.—Bronson v. Bruce, 59 Mich. 467.

¶ 125. Private persons cannot lawfully be made the subject of ill-natured remarks in the public press, where they have done nothing to expose themselves to public censure; and where such things, having an injurious tendency, are published, the persons giving them publicity must find some justification, or be responsible for the mischief.—O'Connor v. Sill, 60 Mich. 175.

¶ 126. A newspaper proprietor is not as such privileged in the dissemination of news, but is liable for what he publishes in the same manner as any other individual is.—McAllister v. Detroit Free Press Co., 76 Mich. 338.

¶ 127. The publication of a report of matters of public interest is privileged, and not actionable unless express malice is proved.—Madill v. Currie, 168 Mich. 546.

§ 31. ——Reports of judicial proceedings and papers.

See also post §§ 32, 33.

¶ 128. Newspapers are not privileged in publishing pleadings or other proceedings in civil cases before trial.—Park v. Detroit Free Press Co., 72 Mich. 560.

¶ 129. It is matter of privilege to call public attention to the act of a judicial officer in ordering a person into confinement without a charge against him, or in requiring bail in an amount which, considering the prisoner's probable means and position in life, he is unable to pay; these are violations of the most important guaranties of constitutional freedom, and are matters of public concern.—Miner v. Detroit Post & Tribune Co., 49 Mich. 358.

¶ 130. The publication of court proceedings is not so far privileged as to justify a sensational accompaniment of defamatory

comments upon the characters of those in relation to whom the proceedings are taken.—Scripps v. Reilly, 38 Mich. 10.

¶ 131. The publication of judicial proceedings is not privileged to the extent of protecting statements made in connection therewith but drawn from other sources and without stating the judicial conclusion.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 132. A newspaper publication stating that a married man had eloped with another woman without regard for his family, is not justified as based upon a judicial proceeding where the information upon which it was based was obtained from a police officer at police headquarters after the wife and others had related to him the alleged family troubles, and from the wife and her companions before they left the police headquarters, complaint to a police officer not being a judicial proceeding.—Jastrzembski v. Marxhausen, 120 Mich. 677.

§ 32. Matter contained in pleadings and affidavits and process.

See also ante § 31; post ¶ 216.

¶ 133. Whether the publication of libelous allegations contained in a bill of complaint upon the files of a court is privileged, quære.—Scripps v. Reilly, 35 Mich. 371.

¶ 134. Whether statements made in pleadings are all absolutely privileged, quære.—Hartung v. Shaw, 130 Mich. 177.

¶ 135. A complaint for larceny, made before a justice of the peace, is privileged, and cannot be made the basis of an action for libel.—Graham v. Cass Circuit Judge, 108 Mich. 425.

¶ 136. Statements in a affidavit made in support of an answer to be used in opposition to an application for an injunction are privileged, provided they are not irrelevant and impertinent.—Hart v. Baxter, 47 Mich. 198.

¶ 137. Where a bill was filed by a mortgagor to reform the mortgage, and the bill charged an agent of the mortgagee with fraud in connection with the drafting of the mortgage, and the agent made his affidavit in support of the answer, and averred therein that the charge of fraud was wilfully and maliciously false, held, that an action counting on these words as a libel would not lie.—Hart v. Baxter, 47 Mich. 198.

¶ 138. In a suit for libel and slander in accusing plaintiff of stealing defendant's goods, it is error to receive in evidence a copy of the writ of replevin sued out by defendant against plaintiff, such evidence being privileged.—Wells v. Toogood, 165 Mich. 677.

§ 33. Statements made in course of trial.

See also post ¶ 217.

¶ 139. The testimony given as a witness that he had uttered certain words is so far privileged that it cannot be used as proof by way of an admission of the slander in an action therefor against himself.—Osborn v. Forshee, 22 Mich. 209.

¶ 140. Statements made in judicial proceedings, if relevant, material or pertinent to the issue, are absolutely privileged and their falsity or the malice of their author is not open to inquiry, and hence cannot be made the basis of an action for libel.—Hartung v. Shaw, 130 Mich. 177.

¶ 141. Public policy requires that a witness in a criminal proceeding should not be trammeled with fear of prosecution for slander.—Acre v. Starkweather, 118 Mich. 214.

¶ 142. Quære, whether the privilege, of a witness in a criminal proceeding, as to slander, is absolute or conditional.—Acre v. Starkweather, 118 Mich. 214.

¶ 143. A witness' answer to a general question in a criminal prosecution, as to why he believed an accused's reputation as to truth and veracity to be bad, to the effect that he was a thief and had stolen his paint clothes, brushes, and harness, held not to give rise to an action for slander, as no action will lie for slanderous words uttered in a criminal proceeding, in response to direct and leading questions put by the attorney for the accused on cross-examination.—Acre v. Starkweather, 118 Mich. 214.

§ 34. Report by grand jury.

Evidence of good faith in making report, see also post ¶ 834.

Practice in respect to grand jury reports, see Grand Jury.

¶ 144. A report made by a grand jury to the circuit court and filed therein containing reflections of the gravest character upon the official conduct of the prosecuting attorney, if not actually charging him with the commission of a felony, held not privileged, in an action by such attorney against the members of the jury for libel in making and filing such report.—Bennett v. Stockwell, 197 Mich. 50.

¶ 145. Where a report by a grand jury to the court, containing alleged libelous matter concerning plaintiff, in an action against the members of the jury for libel in making and filing such report, began "We, the members of the grand jury now in session, beg leave to report," was signed "The grand jury," etc., by the foreman, and was presented by him to the court in the presence of the other members of the jury, held that all of the members of the jury were prima facie re-

sponsible for such publication.—Bennett v. Stockwell, 197 Mich. 50.

§ 35. Reports or complaints to police officers.

Statements made to police officer at plaintiff's request, see post ¶ 186

¶ 146. In a suit for slander by charging the plaintiff with theft, statements made by the defendant by letter and verbally to detectives detailed to examine into the theft of defendant's property, are privileged and such letters and statements are therefore incompetent.—Shinglemeyer v. Wright, 124 Mich. 230.

¶ 147. Defendants addressed a petition to a police justice complaining that plaintiff was an obnoxious and peace disturbing neighbor and asking that he be requested to move. Held, such proceeding was privileged in so far as the proceeding before the magistrate was concerned.—Flynn v. Boglarsky, 164 Mich. 513.

¶ 148. In an action for slander against defendant for charging plaintiff with theft of goods, it is error to permit the plaintiff to introduce the evidence of a deputy sheriff as to the complaint made by defendant to said sheriff, in which defendant accused plaintiff of the theft, the communication to said officer being privileged.—Wells v. Toogood, 165 Mich. 677.

¶ 149. Reports made to police officers charging persons with crime are not privileged and any one publishing such reports does so at his peril.—Jastrzembski v. Marxhausen, 120 Mich. 677.

§ 36. Official reports or communications.

See also post § 218.
Province of court and jury, see post § 108.
Instructions as to privilege, see post § 118.
What constitutes the "record" of proceedings of the county board, see Counties § 8.

¶ 150. A resolution introduced into a city council by a member thereof for the withdrawal of the city's money from a bank on account of the rendition of judgment against the principal surety on the bank's bond as a depository of city funds, which resolution recited the facts and suggested that the bank was no longer safe without additional security, is absolutely privileged.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 151. A mayor's written message to the common council of his city giving his reasons for vetoing a resolution adopted by the council is absolutely privileged at least so far as it is pertinent to the subject.—Trebilcock v. Anderson, 117 Mich. 39.

¶ 152. In communicating to the common council his reasons for vetoing a resolution allowing to a "taxpayers' union," the use of the council rooms, the mayor has a right to state any matters bearing upon the previous relations with the city of the individuals who compose the association, and upon their unfitness—as alleged—to influence public affairs.—Trebilcock v. Anderson, 117 Mich. 39.

¶ 153. Defendant in a suit for libel was appointed by the county board of supervisors, upon petition of several hundred electors, as chairman of a committee to investigate accounts of plaintiff as county treasurer. On his own responsibility he published a report of the findings of the committee. Held, on the question of his liability for imputing crime to plaintiff, he was entitled to the benefit of the rule of qualified privilege, and such privilege was not destroyed by his failure to file the report with the county clerk.—Madill v. Currie, 168 Mich. 546.

¶ 154. Words spoken by the president of the poor commission of the City of Detroit, who is ex officio member of the city board of estimates, with power to participate in the deliberations and proceedings of such board, but without right to vote upon measures brought before it, imputing that a member of such board was susceptible to improper influences, by bribery or otherwise, are absolutely privileged, since such board has a function in taxation demanding the exercise of semi-legislative discretion.—Bolton v. Walker, 197 Mich. 699.

§ 37. ——Concerning schools.

¶ 155. Where the president of a state normal school, charged with the duty of looking after the students attending the school and their environment, and approving the rooming houses in which they lived, upon complaint against the plaintiff, one of such students, by four out of six roomers at the house where she lived, investigated such complaint and reported his conclusions to the keepers of the house, held that the occasion was privileged and an action for slander would not lie against him for language used by him in such report in regard to plaintiff without malice and in good faith.—Everest v. McKenny, 195 Mich. 649.

¶ 156. A superintendent of public schools, who, in order to vindicate himself from a newspaper attack emanating from a member of the board of education and involving his opposition to a certain teacher, authorizes the publication of an article critizing the teacher's method and her conduct toward him, cannot be held responsible for libel unless he makes serious false charges of fact or wanton or irrelevant assaults on such teacher.—O'Connor v. Sill, 60 Mich. 175.

¶ 157. A communication, representing that a certain person was of bad moral character, and wholly unfit to teach and have the

care of a district school, was made to a township superintendent, by persons interested in a particular school within his jurisdiction, for the sole purpose of preventing the issue to the person so charged of a license to teach the school. Held, that it was a privileged communication, and abundantly justified by proof that he was an habitual blasphemer and profane person, and an open violator of the Sabbath.—Wieman v. Mabee, 45 Mich. 484.

§ 38. Criticism of public officers or candidates for office.

Imputing bribery and corruption to public officer, see also ante § 5.
False statements concerning candidates, see also ante ¶ 115.
Charges imputing misconduct in office, see also ante § 19.
Charging improper conduct of judicial officer, see also ante ¶ 129.
Statements concerning city physician, see ante ¶ 62.
Privilege of the press, see ante § 30.
Privilege in criticizing public officers, see ante § 19.
Words charging officer with presenting a false claim to supervisors, see post ¶ 333.

¶ 158. The public conduct of public men is properly subject to legitimate discussion. —Lawrence v. Herald Pub. Co., 158 Mich. 459.

¶ 159. An article in a newspaper falsely charging a public officer with gross misconduct in office cannot be claimed to be privileged on the ground of its publication being a public good.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

¶ 160. A publication in a newspaper falsely imputing a charge of crime against a candidate for an elective office is not privileged though made in an honest belief of its truth; though the fact that it was published in good faith and after reasonable investigation may go in mitigation of damages. —Bronson v. Bruce, 59 Mich. 467.

¶ 161. One who attacks the character of a candidate for office, must be as careful to ascertain the truth of the facts charged as in any other case of libel.—Austin v. Hyndman, 119 Mich. 615.

¶ 162. Pending plaintiff's candidacy for the appointive office of city controller, defendant, a citizen, said in an interview with a reporter that he "shouldn't wonder if the city would have the same experience with plaintiff that England had with Cyprus, in which England thought it secured a great bargain, but which turned out a huge graveyard." There was an innuendo that this meant the plaintiff's honesty was sham and that he was morally corrupt. The interview being published in a newspaper, held, that the publication was not privileged.—Wheaton v. Beecher, 66 Mich. 307.

¶ 163. The right of criticism upon the conduct of a public officer does not embrace the right to make a false statement of his acts involving his integrity or faithfulness in the discharge of his duties. So held where an alleged libelous article charging an officer with neglect of duty stated, among other things, that the censure visited upon the officer was for making a certain arrest in a fit of temper and failing to arrest dozens of others who more deserved arrest than the one so arrested. Such statement is not mere comment and criticism on the acts of a public officer, but, if false, is objectionable.— Hay v. Reid, 85 Mich. 296.

¶ 164. Plaintiff was a candidate for county treasurer. The defendant stated editorially that he was an unfit candidate; that he had been given reason to expect, two years before, that he would be appointed deputy in the same office; that the reason why he was not so appointed was that the treasurer's bondsmen seriously objected, not wishing to be held in any way responsible for the public funds if plaintiff had any share in the handling of them. On the trial, four of said bondsmen testified that, after investigation, they refused to sign the treasurer's bond if he appointed plaintiff. Held, that the gist of the article was the refusal of the bondsmen to become responsible if plaintiff should be appointed, which was proved to be true; and that all else in the article was justifiable criticism based upon that fact.—Dunneback v. Tribune Printing Co., 108 Mich. 75.

¶ 165. Newspapers have a right to state, for the guidance of electors, any fact which affects the fitness of a candidate for a public office. While the law of libel requires, in such cases, that, in their statements of facts, they observe an honest regard for the truth, when they have done so, they are not responsible.—Dunneback v. Tribune Printing Co. 108 Mich. 75.

§ 39. Charges made in association or lodge proceedings.

Communications to board of a church derogatory of its pastor, see also post ¶ 286.
Evidence to show malice and intent, see post § 79.

¶ 166. Statements made by a member of a church quarterly conference called for the purpose of electing trustees, concerning a nominee for trustee whom he opposed, made in response to an inquiry as to the reason for his opposition, are privileged where made in good faith and without malice.—Howard v. Dickie, 120 Mich. 238.

§ 40. Notice not to give credit to wife.

Notice not to give credit to daughter-in-law, see ante ¶ 4.

¶ 167. Where a husband has permitted his wife to trade upon his credit, notice to the public not to give her credit upon his account is justifiable and to that extent privileged; but defamatory words concerning the wife in such a notice are not privileged.—Smith v. Smith, 73 Mich. 445.

§ 41. Communications respecting business between persons interested therein.

Statements contained in lists of employees furnished by railroad company to its agents, see ante ¶ 27.

Rule as to qualified privilege, see ante § 28.

Words imputing larceny of ice by employee, see ante ¶ 30.

¶ 168. The defendant had an arrangement with a doctor by which he was to pay a part of the latter's office rent in consideration of the doctor's agreement to turn over to him all prescriptions to be filled. The defendant told the doctor of certain rumors calling in question the character of his clerk, the plaintiff. Held, the communication was under a qualified privilege.—Trimble v. Morrish, 152 Mich. 624.

¶ 169. The "discharge lists" which each division agent of a railroad company sends monthly to his fellow agents to put them on their guard against men whom he has discharged and stating the reasons for discharge, are qualifiedly privileged.—Bacon v. Michigan Cent. R. Co., 66 Mich. 166.

¶ 170. Where the cashier of a bank, who suspected that a minor employed as janitor and under clerk was in the habit of taking small sums of money from the bank, and that this occasioned the shortage in the bank accounts which occurred from day to day, accused the boy of the theft in the presence of the bookkeeper, who was the only other person who had access to the funds, and who, as well as the cashier, was interested in their safekeeping, and later in the same day informed the boy's father, in a private conversation, that his son had taken the money, the communications were qualifiedly privileged, and not actionable in the absence of proof of express malice.—Livingston v. Bradford, 115 Mich. 140.

§ 42. Reports by commercial and credit agencies.

¶ 171. Communications from a commercial agency are privileged, not generally, but qualifiedly, and only so far as they are furnished on special request to persons interested in obtaining the particular information.—Pollasky v. Minchener, 81 Mich. 280.

§ 43. Criticism of literary productions.

¶ 172. An author who places his book before the public, invites criticism; and, however hostile that criticism may be, and however much damage it may cause by preventing the sale of the book, the critic is not liable in an action for libel, if he does not misstate material facts contained in the book, and does not attack the author's character.—Dowling v. Livingstone, 108 Mich. 321.

¶ 173. It is not libelous to ridicule literary composition; and, in a newspaper review of a book, a critic who correctly states the author is the sole judge of the language of his criticism.—Dowling v. Livingstone, 108 Mich. 321.

¶ 174. Where a newspaper review of a book criticized an argument therein in behalf of a minimum wage rate of two dollars per day by saying "of course, like all other quack remedies, the one suggested would intensify the trouble, if it had any effect at all," this was not libelous.—Dowling v. Livingstone, 108 Mich. 321.

¶ 175. It was not libelous for a book-review to say, in reference to a recommendation in the book of legislation restricting the acquirement of land, that it had not the merit of originality, as another person had advocated the same thing fifty years before; and this, even though it should appear that such other person never advocated such a doctrine.—Dowling v. Livingstone, 108 Mich. 321.

§ 44. Statements by way of defense or in answer to charges.

¶ 176. Where a party provokes a controversy by making libelous publications, the party charged may retort upon his assailant where such retort is a necessary part of his defense, or fairly arises out of the charges made.—Smurthwaite v. News Publishing Co., 124 Mich. 377.

¶ 177. A communication to a newspaper, called out as an answer to a libelous article published against the party sending it, and not going beyond what was fairly to be expected of a man who might very well have been exasperated, instead of being good-naturedly contemptuous, will not support an action for libel.—Myers v. Kaichen, 75 Mich. 272.

¶ 178. An article in a newspaper written in reply to an article in another newspaper, charging the author with corruption in office, which undertakes to show that the author of the first charge is an imposter, and has no interest in the public welfare, by showing his past history, and charging him with various crimes, and disgraceful and degrading conduct, is not relevant to the charge which called it forth, and therefore

is not privileged, as being made in self-defense, and being a denial or an explanation of the charge first made.—Brewer v. Chase, 121 Mich. 526.

¶ 179. If a published article is libelous and is untrue and is not a proper reply to articles published by the plaintiff which provoked its publication, the publication is actionable irrespective of the question of malice.—Smurthwaite v. News Publishing Co., 124 Mich. 377.

§ 45. Repetition or publication of charges made by others.

Proof of repetition admissible under declaration, see post ¶ 282.
Evidence of repetition as bearing on malice or intent, see post § 80.
As bearing on damages, see also post § 52.

¶ 180. No one can be justified in repeating a slander unless on such evidence as legitimately tends to establish its truth.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 181. A newspaper article which does not explicitly charge a person with having committed crimes and disgraceful and degrading acts, but which states that the author is informed that the person has committed such acts, and that the records show arrests for the crimes, is nevertheless libelous per se, as the author cannot shelter himself by showing that he only said what he had heard, and every repetition of a slander originated by a third person is a wilful publication of it rendering the person repeating it liable to an action.—Brewer v. Chase, 121 Mich. 526.

§ 46. Loss of privilege by exceeding occasion.

¶ 182. A qualified privilege exists in cases where some communication is necessary and proper in the protection of a person's interest, but this privilege may be lost if the extent of its publication is excessive.—Smith v. Smith, 73 Mich. 445.

¶ 183. Defendant addressed a petition to a police justice complaining that plaintiff was an obnoxious and peace disturbing neighbor and asking that he be requested to move. Defendants further gave publicity to the petition by circulating it around the neighborhood and publishing it in the daily press. Held, the privilege of the petition was destroyed, the extent of the publication being excessive.—Flynn v. Boglarsky, 164 Mich. 513.

§ 47. Reiteration of charge after cessation of privilege.

¶ 184. Privilege does not constitute a defense to an action for the reiteration of an alleged slander after the occasion for the privilege has ceased.—Wolff v. Smith, 112 Mich. 359.

¶ 185. Quære, whether a defamatory statement originally privileged loses that privilege when afterwards uttered, the occasion of privilege having passed, but the later utterance being made as an incident to a denial and explanation by defendant upon being charged with having made a slander in such original statement.—Wolff v. Smith, 112 Mich. 359, per Grant and Moore, JJ., dissenting.

IV. PUBLICATION.

§ 48. In general.

Persons responsible for publication, see ante § 2.
Loss of privilege by excessive publication, see ante § 46.
Statements made during church quarterly conference, see ante ¶ 166.
Evidence of other similar publications to show malice or intent, see post § 82.
Notice of justification as constituting a republication, see post ¶ 380.
Time, place and attending circumstances as important considerations, see post ¶ 301.
Proof of publication admissible under the declaration, see post ¶ 281.
Evidence as to publication, see post §§ 74, 80.
Province of court and jury, see post § 104.
Instructions as to publication, see post § 117.
Injunction to prevent publication of libel, see Injunctions § 94.

¶ 186. A statement made by the defendant in a slander suit, before a third person, charging plaintiff with theft, solicited by plaintiff for the purpose of having the charge reiterated before such third person who was a police officer whom plaintiff had called, is not a publication for which the law gives a remedy.—Shinglemeyer v. Wright, 124 Mich. 230.

¶ 186a. A clergyman could not recover damages resulting from the reading from his pulpit by himself of a letter derogatory of his character, sent by defendant under qualified privilege to church authorities, in an action for a libel consisting of such letter; since the defendants were not responsible for such publication.—Konkle v. Haven, 140 Mich. 472.

¶ 187. In an action for slander, where there is evidence tending to prove that a report or charge, for which defendant is responsible, came to the knowledge of plaintiff and her husband, in consequence of which, after some delay, the husband, to the knowledge of plaintiff, first called upon the defendant, but it does not appear that she directed or encouraged the interview, but rather discouraged it, and in answer to his questions the accusations were repeated, it cannot be said that there was no publication of the charges.—Schultz v. Guldenstein, 144 Mich. 636.

V. MALICE AND INTENT.

§ 49. In general.

See also ante ¶ 104.
Malice as gist of the action, see also post ¶ 298.
Malice and intent as affecting privilege, see ante § 29.
Malice as affecting damages, see also post § 52.
Burden of proof as to malice, see post § 65.
Presumptions as to malice and intent, see post § 69.
Evidence to show malice or intent, see post § 79 et seq.
Sufficiency of evidence to establish malice, see post § 102.
Province of court and jury as to malice and intent, see post § 111.
Error in directing verdict where some evidence of express malice appears, see post § 114.
Instructions as to malice or intent, see post § 120.

¶ 188. A publication is malicious in law if made without justifiable ends and knowingly, even if done without any actual personal ill will.—Davis v. Marxhausen, 103 Mich. 315.

¶ 189. Malice in a legal sense means a wrongful act done intentionally and without just cause or excuse.—Rabior v. Kelley, 194 Mich. 107.

¶ 190. Some degree of malice in defendant is necessary to sustain an action for slander. This malice is sometimes said to be either express or implied, but in both cases it is actual malice or malice in fact, the difference being only in the mode of proof.—Huson v. Dale, 19 Mich. 17.

¶ 191. Express malice is shown by some affirmative proof beyond that of the false and slanderous words, while implied malice is that which is naturally inferred as a presumption of fact from the proof of the publication of the false and injurious charge.—Huson v. Dale, 19 Mich. 17.

¶ 192. An action for slander to title must be grounded on malice.—Walkley v. Bostwick, 49 Mich. 374.

¶ 193. An admission that a slander had formerly been made cannot attach malice to such an admission for the purpose of renewing the slander.—Vickers v. Stoneman, 73 Mich. 419.

§ 50. Reckless and wilful publication.

¶ 194. The wilful publication of injurious statements involves the design to produce whatever injury must necessarily follow; and when done purposely, knowingly and for no good purpose or justifiable end, it is malicious in the sight of the law even if done without any actual personal ill-will.—Maclean v. Scripps, 52 Mich. 214.

¶ 195. A false and injurious publication made in a public journal "for sensation and increase of circulation" is, in a legal sense, malicious.—Maclean v. Scripps, 52 Mich. 214.

§ 51. Good faith of defendant.

See also ante ¶ 102.
Good faith as affecting damages, see also post § 52.
Good faith in charging candidate for office with crime, see also ante § 38.
Good faith as affecting privilege, see ante § 29.
Evidence of good faith in making charges, see also post § 78.

¶ 196. Good faith cannot protect a false publication, nor can one excuse himself for making a mistaken assault upon his neighbor's reputation by showing the absence of malice when, even had his charge been true, there was no proper purpose in bringing the matter to public notice.—Whittemore v. Weiss, 33 Mich. 348.

¶ 197. A printer's mistakes, made without wrongful intent in printing a self-laudatory article furnished for publication by the subject of it, cannot be held a malicious libel.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 198. Slander, like other wrongs, is actionable because injurious, and while intention may have much to do with the question of damages, it is not necessarily involved in the question of guilt.—Ellis v. Whitehead, 95 Mich. 105.

¶ 199. Where the libelous matter is actionable per se, good faith in its publication by a newspaper in no way relieves defendant's liability to compensate the plaintiff for actual damages to reputation or feelings.—Clair v. Battle Creek Journal Co., 168 Mich. 467.

VI. EXTENT, AGGRAVATION AND MITIGATION OF DAMAGES.

§ 52. In general.

Matters affecting damages, see ante § 58.
Good faith as affecting damages, see also ante § 51.
Good faith in publishing charges against candidate for public office, see also ante ¶ 160.
Evidence in aggravation or mitigation, see post § 95 et seq.
Evidence of good faith in mitigation, see also post § 78.
Evidence as to care in publishing paper as bearing on damages, see post § 84.
Evidence of retractions or refusal to retract as bearing on damages, see post § 86.
Evidence to show the extent of publicity of the words used, see post § 75.
Evidence of plaintiff's character or reputation as bearing on damages, see post §§ 87, 88.

Presumptions as to damage or injury, see post § 70.
Reputation of plaintiff as an issue bearing on injury, see post § 60.
Province of court and jury as to damages, see post § 112.
Jury question as to sufficiency of retraction to relieve defendant of exemplary damages, see post ¶ 505.
Amount and character of verdict, see post § 121.
[Note. The subject of damages is fully treated in Damages, yet it is difficult to draw an exact line between the elements of the injury and the elements of damages for the injury; and the word "damages" is not always used in its technical sense as distinguished from "injury." A few illustrative cases are therefore collected below which seem to illustrate the elements of injury. For other cases see Damages according to cross-references which follow.]
General measure of damages for defamation, see Damages §§ 124, 125.
Measure of damages for slander of title, see Damages § 125.
Injury to feelings as element of damages, see Damages § 25.
Mitigation and aggravation, see Damages §§ 175, 343, 344, 347.
Exemplary and punitive damages, see Damages § 197.
Propriety of nominal or substantial damages, see Damages § 219.
Pleading and evidence of damages, see Damages §§ 256, 271, 315, 343, 344.
Jury questions and instructions, see Damages §§ 374, 375, 400.
Adequacy and excessiveness of awards, see Damages § 230.
Statute denying full recovery on retraction as denial of due process, see Constitutional Law § 147.
Statutory measure of damages for libel or slander, see Jud. Act, chap. XX, § 21; Comp. L. 1915, § 12757.
Notice and demand for retraction as prerequisite to claim for exemplary damages for libel, see Jud. Act, chap. XX, § 23; Comp. L. 1915, § 12759.

¶ 200. Where the words are actionable per se no special damages need be shown.—Newman v. Stein, 75 Mich. 402; Haney Mfg. Co. v. Perkins, 78 Mich. 1; Simons v. Burnham, 102 Mich. 189; Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417; Schattler v. Daily Herald Co., 162 Mich. 115.

¶ 201. The actual damages for charging a woman with gross immorality may include worry of mind and illness of body.—Farrand v. Aldrich, 85 Mich. 593.

¶ 202. Actual damages for injury to feelings includes damages augmented by the slanderer's malice.—Rabior v. Kelley, 194 Mich. 107.

¶ 203. The damages include injury to credit and reputation from the libel and such injury to the feelings as must be inferred from the credit and reputation of the paper.—Scripps v. Reilly, 38 Mich. 10.

¶ 204. The fact that the defamatory article was copied from another paper does not necessarily mitigate the wrong; it depends on the circumstances.—Bronson v. Bruce, 59 Mich. 467.

¶ 205. Damages for falsely charging plaintiff with theft cannot be mitigated by defendant's good faith.—Schattler v. Daily Herald Co., 162 Mich. 115.

¶ 206. The injury is not mitigated by the fact that it was in fact beneficial, though that would affect the amount of the damages.—McCormick v. Hawkins, 169 Mich. 641.

¶ 207. Slander is mitigated by the fact that plaintiff had already suffered in good repute by a common rumor to the same effect as the slander.—Fowler v. Fowler, 113 Mich. 575.

VII. ACTIONS AND PLEADING.

Nonrevivableness of barred action for slander, see Limitations ¶ 329.
Averments in affidavit for capias, see Civil Arrest ¶ 48.
Affidavit to hold to bail for libel, sufficiency, see Civil Arrest ¶ 67.
Limitation of actions, see Limitations § 66.

§ 53. Declaration.

Failure to demur as waiver of objection that privilege is not negatived, see also post ¶ 252.
Variance between declaration and proof, see post § 63.
Joinder and misjoinder in libel and slander, see also Pleading, II.
Admissions by demurrer, see Pleading, IV.
Amendments of declaration, see Pleading, VI.
Omission of allegation as to malice aided by verdict, see Pleading, XI.
Impleading joint tort feasors to enforce contribution, see Jud. Act, chap. XX, § 25; Comp. L. 1915, § 12761.

¶ 208. A declaration for slander should be demurred to if the averments of the declaration are not formal enough; and if the language, set forth plainly, shows an intention to slander in the way complained of, it will be held sufficient if not demurred to.—Fowler v. Gilbert, 38 Mich. 292.

¶ 209. A declaration alleged that plaintiffs owned and kept for breeding purposes an imported, full-blooded, Percheron stallion, which had begotten many colts, was a good colt-getter, and was especially valuable to his owners; that plaintiffs represented and held the horse out as such, and that they are upright citizens of good standing in the

country; that defendant, maliciously intending to injure them in their good name, made false and malicious statements that their stallion was not imported, and was not a full-blooded Percheron, whereby plaintiffs have been damaged in their standing as honest business men. Held, that the declaration stated a cause of action not only for slandering the horse, but also for slandering plaintiff's business of keeping the horse for hire, gain and reward, and that it was not necessary to allege special damages.—Henkel v. Schaub, 94 Mich. 542.

¶ 210. A declaration for slander in charging plaintiff with burning his property to defraud insurers need not aver actual insurance, nor need such insurance be proved.—Fowler v. Gilbert, 38 Mich. 292.

¶ 211. A declaration in an action of libel alleged that defendant's newspaper falsely and maliciously reported plaintiff, a candidate for congress, as saying that he would refrain from discussing the tariffs on wool, quinine, etc., because "he wasn't built that way," which the innuendo explained as meaning that plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it. On demurrer it was held that as the demurrer admitted both the meaning implied by the innuendo and the malice charged, the declaration made out a case.—Belknap v. Ball, 83 Mich. 583.

¶ 212. A count for slander is sufficient which sets out the slanderous words as "M. stole it," and explains their connection with a general statement of loss of property of a corporation without specifically describing the articles taken.—McLeod v. Crosby, 128 Mich. 641.

¶ 213. Even if the words "M. stole it," in a count for slander do not imply larceny the further statement that the defendant was referring to personal property of a corporation is sufficient to raise that inference.—McLeod v. Crosby, 128 Mich. 641.

¶ 214. The mere fact that the occupation or profession of the plaintiff is stated in a declaration for libel is not sufficient to justify the inference that the words were uttered with reference to that business or profession, especially in the absence of any allegation of pecuniary damages to the profession or business and where the question of damages to the profession is not raised.—Smedley v. Soule, 125 Mich. 192.

¶ 215. Action based upon the publication of the following words: "It must be and is painful to all who feel the force of conscientious impulses, and who regard the solemn responsibility of an oath, to witness at our elections the frequent violations of truth, committed by those brought forward at the polls. The recurrence of false swearing is too common to pass unpunished. No casuistry can palliate or excuse it." The inducement set forth was that plaintiff was supervisor of the township; that there was a general election; that plaintiff was a member of the board of election; and also a candidate for re-election. Held, that the alleged libelous words were too vague and uncertain to constitute a charge of perjury; and that in connection with the intrinsic facts pleaded, the perjury was not sufficiently alleged.—Lewis v. Soule, 3 Mich. 514.

¶ 216. A declaration in an action of libel based upon statements made in an answer to a bill in chancery, with averment that such statements were false and malicious is fatally defective in failing to allege that the statements were not relevant, material or pertinent to the issue, since if they were they would be absolutely privileged.—Hartung v. Shaw, 130 Mich. 177.

¶ 217. An averment that defendant made slanderous charges under oath in a court contains no sufficient charge of an actionable wrong.—Ayres v. Toulmin, 74 Mich. 44.

¶ 218. A declaration charging defendant with publishing a false and defamatory libel in words and figures set forth, purporting to be a report of a council meeting, which did not aver that it was simply repeated by defendant, could not on demurrer be regarded as bad because showing that the publication was such report, or was a correct report, so as to justify a claim of privilege.—Boehmer v. Detroit Free Press Co., 94 Mich. 7.

§ 54. ——Inducement.

See also ante ¶¶ 215, 238.

¶ 219. It is the office of the inducement in a declaration for libel to narrate the extrinsic circumstances, which, coupled with the language published, affect its construction and render it actionable, where, standing alone, and not thus explained, the language used would appear either not to concern plaintiff, or, if concerning him, not to affect him injuriously. It is a statement of the facts out of which the charge arises, or which are necessary or useful to make the charge intelligible.—Randall v. Evening News Assoc., 79 Mich. 266.

¶ 220. Inducement is not in every case of slander, essential to the sufficiency of a statement of a cause of action, but in those cases only where, without the facts contained in the inducement, the publication would not naturally and per se refer to the plaintiff, nor convey the meaning plaintiff contends for, nor be construed as actionable.—Derham v. Derham, 123 Mich. 451.

¶ 221. Extrinsic facts or circumstances showing the actionable quality of words not actionable per se must be directly averred in the inducement of the declaration.—Taylor v. Kneeland, 1 D. 67.

¶ 222. A declaration in slander contained the usual inducement, without the averment of any extrinsic facts or circumstances showing the actionable quality of the words spoken, except that the plaintiff was postmaster at F., and one count charged the defendant with having spoken and published of and concerning the plaintiff as postmaster, etc., that "he did not think Marlatt's resignation or his petition had gone to Washington; he had no doubt they were embezzled at F."; adding by innuendo ("at the postoffice at F., of which the plaintiff was postmaster, meaning and intending thereby that the plaintiff had delayed and prevented the transmission of the said resignation and petition to the postmaster-general at Washington)," etc. Held, that the count was fatally defective, the words charged to have been spoken and published appearing not to be actionable; though the words would have become actionable had the inducement of the declaration further averred that the letters or papers referred to were placed in the postoffice at F., or entrusted to the care of the defendant as postmaster at F., or were passed through said postoffice to their place of destination; since the embezzlement by defendant of papers which so came into his possession is made criminal.—Taylor v. Kneeland, 1 D. 67.

§ 55. ——Colloquium.

See also post ¶ 238.

Necessity that allegations show application of charges to plaintiff, see also post § 57.

¶ 223. Where, in an action for slander, the declaration set forth the slanderous words, averring that they were uttered "of and to the plaintiff," no colloquium was held to be necessary that they were uttered "of and concerning the plaintiff."—Osborn v. Forshee, 22 Mich. 209.

§ 56. ——Innuendo.

See also ante ¶ 162.

Construction and application of words used, see ante § 24 et seq.

Demurrer as admission of allegations of innuendo, see ante ¶ 211.

Innuendo as limiting issues, see post § 62.

Evidence to show meaning of words, see post § 77.

¶ 224. The office of an innuendo is to aver the meaning of the language published; it cannot change the import of the words, or add to or enlarge their sense; and if the meaning of the publication is plain on its face, no innuendo is needed.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

¶ 225. In giving a construction to words declared upon as libelous resort cannot be had to the innuendo, the office of which is to explain the context, not to add to it.—Lewis v. Soule, 3 Mich. 514.

¶ 226. If the meaning of the publication is plain, no innuendo is needed; the use of it can never change the import of the words, nor add to or enlarge their sense.—Randall v. Evening News Assoc., 79 Mich. 266.

¶ 227. The office of an innuendo is merely to apply the different parts of the charge contained in the words to the different facts before averred in the inducement. Its truth must always appear from precedent averments, and it must be supported by the inducement and colloquium.—Taylor v. Kneeland, 1 D. 67.

¶ 228. The province of the innuendo is to explain and give meaning to ambiguous language. If extrinsic evidence is required to ascertain its meaning the jury must determine that question.—Belknap v. Ball, 83 Mich. 583.

¶ 229. In pleading in libel the innuendo is for the purpose of explaining equivocal language, and is not needed where the meaning of the language is not doubtful; and if one is put in in such a case it will be treated as surplusage, though it seeks to enlarge the language alleged to be libelous.—Sanford v. Rowley, 93 Mich. 119.

¶ 230. When the publication complained of is libelous per se no innuendo is necessary; and if the innuendo alleged is not borne out by the words it may be treated as surplusage and a recovery had on the words themselves.—Gustin v. Evening Press Co., 172 Mich. 311.

¶ 231. A charge that plaintiff "went to Lansing, and collected $1,400 of our money, and went west with it," sustains the innuendo that he absconded with money belonging to defendant's firm.—Ayres v. Toulmin, 74 Mich. 44.

¶ 232. A statement that plaintiff obtained commissions on the sale of typewriters for his own benefit exclusive of his partners cannot be made actionable by innuendo where no duty is averred to the contrary.—Ayres v. Toulmin, 74 Mich. 44.

¶ 233. An averment that plaintiff is trying to get and convert to his own use a named person's property without paying for it is properly connected with an innuendo that it means defrauding or swindling that person out of his property.—Ayres v. Toulmin, 74 Mich. 44.

¶ 234. A declaration in an action for slander was sufficient to charge defendant with having charged plaintiff with criminal poisoning of defendant's cattle; the want of averment of the statutory malice essential to the crime of poisoning cattle being aided by the innuendo to the charge that it was intentional, and there being no intentional poisoning like that charged which would be innocent.—Vickers v. Stoneman, 73 Mich. 419.

§ 57. ——Showing application of charges to plaintiff.

See also ante ¶ 214.
Use and purpose of colloquium, see ante § 55.
Evidence to show application of words to plaintiff, see post § 73.

¶ 235. To render a publication libelous it must indicate the person intended by name, or connect him with some fact or circumstance, known to those to whom the publication is addressed, by which they may understand who is meant. And to enable a jury to determine upon the application, such fact or circumstance should be in proof; and that cannot be unless it is pleaded.—Lewis v. Soule, 3 Mich. 514; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

¶ 236. Where, under the allegation in a declaration for libel, no other person than the plaintiff can be presumed to be meant, the declaration is sufficient, even if it does not show by name and in precise terms the application to him of the language claimed to be libelous. The rule of certainty applicable to a declaration never required it to negative every possible implication.—Weiss v. Whittemore, 28 Mich. 366.

¶ 237. In a particular case it was held that there was enough in the several counts in the declaration, after the first, to show that the slanders charged related to plaintiff in the character described in the first count.—Ayres v. Toulmin, 74 Mich. 44.

¶ 238. A declaration for slander in alleging that plaintiff was a thief and had stolen wood from the defendant states a cause of action as against a demurrer on the ground that such declaration contains no colloquium, inducement, or statement of facts which in any wise show that the alleged slanderous words apply to the plaintiff, where, such allegations of slander in the declaration contain the words: "as follows, to wit, 'Uncle Billy, don't you want to go and help catch a thief?' (meaning thereby that the plaintiff was a thief, and had stolen wood from the defendant * * *)"; and: "I (meaning defendant) saw Fred Blount (meaning plaintiff) take wood off from my pile, and he has it now on his wagon, and I (defendant) want you (Sherman) to go with me to the mill, and see it unloaded"; since the innuendos in such declaration do not extend the sense of the words used in such allegations of slander beyond their own meaning.—Blount v. Mason, 140 Mich. 1.

¶ 239. In an action by a trading stamp company against a newspaper for libel, a demurrer to the complaint was properly sustained, where declaration alleged the following publication "Two suits (meaning the suits brought against the city of Detroit et al. by these plaintiffs and another stamp company) brought by trading stamp concerns (meaning as one of these, these plaintiffs, etc.) call attention in emphatic manner to the fact that this particular form of get-rich-quick industry is now outlawed in this city." It was defective because the only suggestion made that the plaintiff had brought suit is in the innuendo, and there was no averment in the declaration that the plaintiff had brought suit against the city.—Watson v. Detroit Journal Co., 143 Mich. 430.

§ 58. ——Allegations of injury or damage.

Necessity of alleging special damage from charges bearing on professional reputation, see also ante § 17.
Province of court and jury, see post § 106.
[Note. The rules for pleading damages as distinguished from injury are treated in Damages, X. But wherever the words are not actionable per se, the necessary allegations of an injury will also be allegation of damages. For this reason in addition to the cases found in this section those collated in Damages §§ 256, 271, should be consulted.]
Pleading the damages, see Damages §§ 256, 271.

¶ 240. The test by which to determine whether special damages must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage.—Lewis v. Weidenfeller, 175 Mich. 296.

¶ 241. No averment of special damages to show a cause of action is needed where want of chastity has been imputed to a woman. The plaintiff may, without claiming special damages, show that in consequence of the slander she has been excluded from the society in which she had moved, and was affected in mind and health.—Burt v. McBain, 29 Mich. 260.

¶ 242. If a declaration for libel alleges that the publication deprived the plaintiff of divers great gains and profits which would have accrued to him, it is sufficiently clear to indicate the kind of injury to be proved, and to sustain judgment if admitted by the defendants. But such language would not apply to an agent on a salary, and if the plaintiff were an agent it would indicate that he received part of the profits or a commission on the sales.—Weiss v. Whittemore, 28 Mich. 366.

¶ 243. In a declaration for libel a general allegation of the loss of trade is sufficient, ordinarily, without setting out the names of the customers lost, and it may be supported by evidence of such general loss.—Weiss v. Whittemore, 28 Mich. 366.

¶ 244. In an action for slander, an averment in the declaration concerning the good reputation of the plaintiff and that the de-

fendant intending to injure the plaintiff in his good name, credit and reputation, uttered the words set out, and an allegation of the plaintiff's injury in his good name, credit and reputation is sufficient to allow the recovery for injury to the reputation.—Savlan v. Ayer, 129 Mich. 545.

¶ 245. Where the words of an alleged libel are actionable per se, the jury may be allowed to bring in general damages, though no special damages are alleged or proved.—Clair v. Battle Creek Journal Co., 168 Mich. 467.

§ 59. Pleas and notices.

Plea or notice of justification as evidence of malice, see post § 85.

Striking plea or notice from files, see Pleading, IV.

¶ 246. The notice of special matters to be given in evidence is required to contain all the requisites of a special plea in bar; and where, therefore, to a declaration in slander alleging that defendant charged plaintiff with having sworn falsely, defendant pleaded the general issue, and gave notice that he would prove on the trial "that the plaintiff was guilty of the acts charged on and imputed to him by the defendant in the several conversations in the declaration mentioned, and that if the words were uttered and published as charged in the declaration the defendant had good reason for uttering and publishing, and did it from good motives and for justifiable ends," held, that the notice was fatally defective, especially in omitting any averment that the plaintiff wilfully and deliberately swore falsely.—Thompson v. Bowers, 1 D. 321.

¶ 247. Under the statutory system of pleading (see Comp. L. 1857, §§ 4176-4178, which applies to actions for slander as well as to others) a notice of justification need not contain the substance of a special plea or be good on general demurrer; but it is enough if it briefly states the precise nature of the matter of defense.—Cresinger v. Reed, 25 Mich. 450.

¶ 248. The notice of justification attached to the plea in a libel suit stated that "the defendant would prove the truth of the allegations in said declaration contained." Held, that this evidently meant the allegations in the libels complained of, and that it was not too general.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 249. Where the notice of justification contained no specific averments, and was confined to the statements in the libel concerning the plaintiff, other acts not mentioned in the libel and not justified could not be proved either in justification or mitigation.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, per Campbell, C. J., Champlin and Sherwood JJ. Morse, J., contra.

¶ 250. Pleadings in a libel suit that simply put in issue plaintiff's general character for probity require that a notice of justification should be special so as to inform plaintiff what he has to meet.—Wheaton v. Beecher, 79 Mich. 443.

¶ 251. A notice in a plea of truth in an action of slander that the words, "M. stole it" referred to certain corporate property in the plaintiff's possession and control which the plaintiff fraudulently sold and converted and caused to be carried away and used and appropriated by others and sold and appropriated the funds to his own use and "in this sense" that the defendant would prove the statement to be true is insufficient in that it does not charge larceny or facts sufficient to establish embezzlement because of its failure to allege that the plaintiff was an officer, clerk, or servant of the corporation.—McLeod v. Crosby, 128 Mich. 641.

¶ 252. Failure to demur to a declaration in an action for libel alleged to have been uttered in an answer to a bill in chancery does not waive the objection that the declaration failed to allege that the publication was not privileged.—Hartung v. Shaw, 130 Mich. 177.

¶ 252a. In an action for libel in charging that plaintiff had been guilty of taking indecent and criminal liberties with the persons of his pupils, defendants gave notice that they would give in evidence in their defense that they had learned that the teachers in the school in which plaintiff was teaching were in the habit of sending to saloons for liquors to be taken to the school, to plaintiff's knowledge, that defendants had been credibly informed of plaintiff's grossly immoral conduct as such teacher, and of his habit of having intoxicating liquors in the school, and of his immoral conduct in other respects while engaged as such teacher; that a coteacher, who was referred to in said article, had prosecuted defendants for criminal libel, and they had been acquitted; and that, believing the facts alleged against plaintiff to be true, defendants published the article complained of as a matter of great public interest and concern, and therefore should insist that it was privileged. Held, that the facts set forth in the notice, if true, do not support the charge published.—Thibault v. Sessions, 101 Mich. 279.

§ 60. Issues under the pleadings.

Good faith or malice not material where publication absolutely privileged, see also ante § 29.

Allegations to sustain proof of application of words to plaintiff, see also ante § 57.

Necessity of plea of justification to admit evidence of truth of charges, see also post ¶¶ 429, 443.

Issues limited to facts declared on, see also post ¶ 380.

Notice of justification as evidence of malice, see post § 85.
Admissibility of evidence of character and reputation, see post § 87.
Matters to be submitted to jury, see also post § 108.

¶ 253. One who sues for libel puts his previous reputation in issue, and defendant can show that even if the charge was false it probably did not injure him.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 254. When an alleged libelous article is indivisible, and the facts asserted are dependent on each other to impute the defamatory charge, each material allegation must be justified, or the plaintiff will be entitled to his damages suffered on account of the unjustified portion.—McAllister v. Detroit Free Press Co., 85 Mich. 453.

¶ 255. In an action for libel against a newspaper publisher where the article complained of is to the effect that the plaintiff was arrested for crime, the plaintiff, the defendant having pleaded justification, may prove that the charge against him was a mere violation of the postal laws, was withdrawn shortly after having been made, and was followed by no further charge, also that the defendant's reporter, when preparing the item was fully aware of these facts.—McAllister v. Detroit Free Press Co., 95 Mich. 164.

¶ 256. Where the defendant in an action for libel, under a special notice of justification, has proved the truth of the charge that plaintiff was guilty of a criminal offense, which constituted the gist of the publication sued upon, the fact that the article averred that plaintiff had been held for trial for such offense when in fact he had been held for examination only, becomes immaterial.—McGuire v. Vaughan, 106 Mich. 280.

¶ 257. There is no question of privilege in a libel suit where the defendants admit that they had no ground for charging the plaintiff with being party to a corrupt agreement alleged to have been made between him and the mayor and where they admit that the plaintiff is in no way connected with their present controversy with the mayor.—Smedley v. Soule, 125 Mich. 192.

§ 61. ——Scope of plea or notice.
See also ante § 59.

¶ 258. Pleading the general issue in an action for slander admits the falsity of the words charged.—Fowler v. Gilbert, 38 Mich. 292.

¶ 259. In an action for slander in accusing plaintiff of burning defendant's barn, the plea of the general issue does not raise the question whether plaintiff burnt it or not; and evidence of threats by plaintiff that the barn would be burned are not admissible, except to show the bias of plaintiff, or in mitigation of damages, if communicated to defendant before the alleged slanderous words were spoken.—Hitchcock v. Moore, 70 Mich. 112.

¶ 260. That alleged slanderous words were privileged cannot be shown under a plea of the general issue.—Sanford v. Houghton, 184 Mich. 44.

¶ 261. In an action for libel, if the communication was privileged, the plaintiff is bound to prove both the falsity of the publication and the malice in making it, and the defendant is entitled to give evidence of its truth under the general issue without special notice.—Edwards v. Chandler, 14 Mich. 471.

¶ 262. It is not competent to prove distinct facts in defense that have not been made part of the issue as framed.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

¶ 263. Where plaintiff, in an action for libel, sets out the published article complained of in his declaration, such article containing charges against plaintiff, a public officer and also against other officers in the township, but the justification is specific on the charges against plaintiff alone, the court will restrict the evidence for the defense to the particular charges against plaintiff.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, per Campbell, C. J., Champlin and Sherwood, JJ. Morse, J., contra.

¶ 264. Defendant sued for libel for charging plaintiff with securing, while a member of the legislature, the passage of a bill by bribery, cannot, without having given notice in its plea, show specific acts of bribery committed by plaintiff at different political meetings prior to his nomination and election.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 265. Where in an action for slander consisting, as alleged, in charging plaintiff with having committed the crimes of perjury and larceny, defendant gives notice that under his plea of the general issue he will prove the truth of the charge as to the commission of the first-named crime, the court should exclude, not only such circumstances as tend to prove the truth of the other accusation, but all the circumstances which would tend to cast suspicion upon plaintiff as having been guilty of said offense.—McNaughton v. Quay, 102 Mich. 142.

¶ 266. In an action for libel in charging plaintiff with having committed an assault with intent to do great bodily harm, less than the crime of murder, the specific averment being that plaintiff had seized a pitchfork and thrust it into the thigh of a certain person, evidence that plaintiff ran the fork through the person's clothing, but that it did not penetrate his thigh, is admissible under

a special notice of justification setting up the facts.—McGuire v. Vaughan, 106 Mich. 280.

¶ 267. In an action for slander charging the defendant with saying "M. stole it" which words refer to corporate property, a notice under a plea setting out the appropriation of the corporate property and that the plaintiff became guilty of larceny or embezzlement is sufficient to give notice that the defendant relied upon proving embezzlement and such proof would establish the truth of the charge, as under the statute one who embezzles may be said to steal.—McLeod v. Crosby, 128 Mich. 641.

¶ 268. The defendant under a plea justifying libelous language that charges the plaintiff with political treachery and with readiness to commit perjury to defend himself against charges of such treachery, may show the plaintiff's general reputation not only for truth and veracity, but also for political integrity.—Sanford v. Rowley, 93 Mich. 119.

¶ 269. In an action for libel, where a plea of justification was filed, evidence of plaintiff's good reputation previous to the publication complained of held admissible, as such plea in effect puts upon the record a repetition of the defamatory charge and included a deliberate averment of its truth.—Cyrowski v. Polish-American Pub. Co., 196 Mich. 648.

§ 62. ——Innuendo as limiting issues or proof.

Nature and purpose of innuendo, see ante § 56.

¶ 270. If a plaintiff counts upon a publication as an entirety, he cannot, by confining the innuendo to a portion of it only, limit defendants' right to justify it as an entirety and show that he had no reputation that would be injured by any part of it.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 271. Where a publication complained of in its entirety as a libel charged the several offenses of seduction, adultery and abortion, which, while distinct in themselves, were parts of a single and continuous transaction, it was held that the plaintiff could not, by so using the innuendo as to confine his cause of action to the charge of abortion alone, limit defendants' right to show that plaintiff's previous reputation was such that nothing in the publication could have injured it.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

§ 63. Variance between declaration and proof.

See also post ¶ 292.

Sufficiency of declaration, see ante § 58 et seq.

Necessity of alleging special damage or injury, see ante § 58.

Variance as to charges of theft or larceny, see post § 63.

General law as to variance, see Pleading, X.

¶ 272. A count in slander alleging that the defendant uttered and published that the plaintiff, who was postmaster at F., embezzled certain papers, is not supported by proof that he said he had no doubt that the papers were embezzled at F., or he thought that the papers were embezzled at the post-office at F.—Taylor v. Kneeland, 1 D. 67.

¶ 273. Slanderous words, uttered in a conditional or hypothetical statement, will not support an averment of slanderous words laid as a positive and direct assertion.—Evarts v. Smith, 19 Mich. 55.

¶ 274. The rule that the use of slanderous words must be proved as alleged in the declaration does not exclude proof of other words not changing their effect.—Brown v. Barnes, 39 Mich. 211.

¶ 275. In an action for libel an allegation that a person has been "indicted" is supported by proof that he has been prosecuted and convicted in justice's court on information.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 276. A charge made against a justice of the peace that he stole whisky fines is not supported by proof that he has not paid over a fine which he had imposed for an assault.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 277. A declaration averring injury to plaintiff's business and reputation among his Holland fellow-citizens does not put plaintiff to proof that they are citizens in the technical sense. All persons are citizens in the ordinary popular sense.—Steketee v. Kimm, 48 Mich. 322.

¶ 278. An allegation in a declaration for slander that defendant charged plaintiff with larceny from a "butcher shop" is supported by proof that the charge was of larceny from a "meat market."—Wiest v. Luyendyk, 73 Mich. 661.

¶¶ 279, 280. Evidence that defendant in an action for slander stated to witnesses that he was confident that plaintiff had taken money and certain other articles, and made other statements fairly imputing a charge of larceny, supplemented by his admission that he intended to convey the idea that plaintiff had stolen, will support a verdict for plaintiff, although the words proved to have been uttered are slightly different from those set out in the declaration.—Hewitt v. Morley, 111 Mich. 187.

¶ 281. Under a declaration for slander alleging that the words complained of were used in the presence and hearing of divers persons besides plaintiff, plaintiff may establish publication by showing that one person other than the parties was present and heard the slanderous words.—Loranger v. Loranger, 115 Mich. 681.

¶ 282. Proof of the repetition of slanderous words need not show a verbatim repetition.—McCloy v. Vaughan, 185 Mich. 189.

VIII. EVIDENCE AND TRIAL.

Allowable arguments of counsel, see Argument of Counsel.
Provisions as to intervention of joint tort feasors in libel, see Jud. Act, chap. XX, § 25; Comp. L. 1915, § 12761.

§ 64. Burden and degree of proof.

As to publication, see also post ¶ 309.
Preponderance of evidence as sufficient to establish justification, see post § 101.
General law as to burden of proof, see Evidence, II.
Burden of proof of damages, see Damages § 289.

¶ 283. Where the charge is the uttering of slanderous words affecting business standing, it must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business, in order to make them slanderous per se.—Dallavo v. Snider, 143 Mich. 542.

¶ 284. Whether or not an oral slander in words that would be actionable as a libel would be actionable without proof of special damage, quære.—Weiss v. Whittemore, 28 Mich. 366.

§ 65. ——As to malice or falsity of charges.

See also ante ¶ 261.
Burden of proving truth or falsity, see post § 119.
Presumptions as to malice and intent, see post § 69.
Evidence as to malice, see post § 79.
Evidence bearing on truth or falsity of charges, see post §§ 91, 98.
Sufficiency of evidence to establish malice or falsity, see post §§ 101, 102.
Province of court and jury as to malice and intent, see post § 111.
Instructions as to malice, motive or intent, see post § 120.
Instructions as to degree of proof necessary in establishing crime imputed to defendant, see post ¶ 556.

¶ 285. The burden of proving malice, whether express or implied, rests upon plaintiff.—Huson v. Dale, 19 Mich. 17.

¶ 286. A letter derogatory of a clergyman's character, written by a member of his congregation, to the board of a church of which he is about to assume charge, and referring to persons to confirm such information, is a quasi privileged communication, and where made the basis of an action for a libel, plaintiff must prove both the falsity of the charge and malice.—Konkle v. Haven, 140 Mich. 472.

¶ 287. In an action for slander the burden of proof is on the plaintiff to prove the defendant's knowledge of the falsity of the charge made where the publication was qualifiedly privileged, and made in answer to questions asked by one who had the right to ask them and be answered.—Schultz v. Guldenstein, 144 Mich. 636.

¶ 288. The burden of proving the negligence of a newspaper proprietor in retaining employees through whose recklessness or malice a libel has been published is on plaintiff.—Scripps v. Reilly, 38 Mich. 10.

¶ 289. Where a communication is privileged, the plaintiff must prove not only the falsity of the communication, but also that it was published with express malice.—Trimble v. Morrish, 152 Mich. 624.

§ 66. ——As to privilege.

¶ 290. In an action of slander for words in a letter which contains nothing on its face to show that it is privileged, the burden of proof is on defendant to show that it is so; and where it was a reply to one written to defendant which defendant had not introduced, raising no objection, meanwhile, to plaintiff's failure to call for it, defendant cannot, on the basis of any presumption that his letter was strictly responsive to the other, raise the question of its admissibility unaccompanied by the other by a request to charge that if it was thus strictly responsive and without malice, and written in the ordinary course of business, he is entitled to a verdict.—Day v. Backus, 31 Mich. 241.

¶ 291. In a slander case where the publication was qualifiedly privileged the plaintiff has the burden of proving an abuse of privilege, and such abuse is not found in the words spoken, the manner of speech, or the presence in which they were spoken.—Schultz v. Guldenstein, 144 Mich. 636.

§ 67. ——As to justification.

Sufficiency of evidence to establish justification, see post § 101.

¶ 292. Where the defendant in a libel suit gives notice of a general justification without serving particulars, he must prove the truth of the libelous statements precisely as charged in the declaration.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 293. The following words were printed of a clergyman: "Then there was that Iowa Beecher business of his which beat him out of a station at Grass Lake." He sued for libel, alleging that they implied a charge of adultery. A general notice of justification was filed with the plea. Held, that to justify the words, the defendant must have shown a loss of position at Grass Lake upon some charge of immoral conduct affecting the plaintiff's clerical character.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 294. Plaintiff in an action for slander having shown the utterance of slanderous words in the presence of third persons, the burden is upon defendant to prove his justification.—Finley v. Widner, 112 Mich. 230.

§ 68. Presumptions.

General law as to presumptions, see Evidence, II.

¶ 295. It is presumed that an article in the Dutch language, printed in a local Dutch newspaper of large circulation, is understood by its readers without an English translation.—Steketee v. Kimm, 48 Mich. 322.

¶ 296. The law presumes that the character of a plaintiff is good until attacked, and he can safely rest upon that presumption, in an action for libel.—Cyrowski v. Polish-American Pub. Co., 196 Mich. 648.

§ 69. ——As to malice and intent.

See also ante § 49.

Evidence to show malice or intent, see post § 79 et seq.

Sufficiency of evidence to establish malice, see post § 102.

Instructions as to malice or intent, see post § 120.

¶ 297. Words charging another with the crime of larceny are actionable, and if used without warrant the law presumes malice.—Bell v. Fernald, 71 Mich. 267.

¶ 298. Malice is the gist of an action for slander, and is evidenced by the speaking of actionable words.—Ritchie v. Stenius, 73 Mich. 563.

¶ 299. A publication libelous per se is presumed to be voluntary and malicious.—Owen v. Dewey, 107 Mich. 67.

¶ 300. Printed matter charging a person with being dishonest is libelous per se, and legal malice is presumable from its publication.—People v. Talbot, 196 Mich. 520.

¶ 301. The time, place and attending circumstances are an important consideration in a charge of slander, and not only may the occasion and surrounding circumstances rebut the presumption of malice but a distinction must be recognized in many particulars between the same or similar defamatory words, when spoken in passion or in the heat of controversy and when deliberately written or printed.—Bolton v. Walker, 197 Mich. 699.

¶ 302. Express malice may be inferred from reckless charges of crime primarily intended for another than the plaintiff who is brought in incidentally, notwithstanding the plaintiff testifies that he never believed that the defendants had anything personally against him.—Smedley v. Soule, 125 Mich. 192.

¶ 303. An inference of actual malice may be drawn from the mere publication of a slanderous privileged communication, but it must contain on its face evidence of malice.—Trimble v. Morrish, 152 Mich. 624.

¶ 304. In an action of slander, actual malice in the defendant cannot be inferred from the fact that he declines to reveal his informant.—Trimble v. Morrish, 152 Mich. 624.

§ 70. ——Injury or damage.

See also post ¶ 515.

Extent, aggravation and mitigation of damages, see ante § 52.

Presumption of injury from charges bearing on professional reputation, see also ante § 17.

[Note. The presumptions as to damages (not injury) have been treated in Damages § 289 et seq. The so-called presumption of damages from words that are per se defamatory is merely the rule, stated in the form of a presumption, that the words are in themselves an injury without regard to extraneous facts; but because of the difficulty of making this distinction in the cases, those in Damages should be consulted as well as those found here.]

¶ 305. Newspapers may discuss what relates to the life, habits, comfort, happiness and welfare of the people, and in doing so may state facts, draw inferences therefrom and express views upon the facts. Their deductions, even if false, are not actionable unless they cause special damages, but damage is presumed if they impute the commission of crime.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

§ 71. Admissibility of evidence in general.

Communications to police officer excluded on ground of privilege, see ante ¶ 148.

Writ of replevin excluded on ground of privilege, see ante ¶ 138.

Evidence bearing on responsibility, see post § 76.

Evidence bearing on meaning or understanding of words used, see post § 77.

To show application of words to plaintiff, see post § 73.

To show publication of charges, see post § 74.

Evidence bearing on character and reputation, see post §§ 87, 88.

Evidence bearing on malice or intent, see post §§ 78-85.

Admissibility of retractions or refusals to retract, see post § 86.

Evidence in justification, see post §§ 89-94.

Evidence bearing on damages or injury, see post §§ 95-99.

Weight and sufficiency of evidence, see post § 100.

Evidence in criminal prosecutions for libel and slander, see post § 124.

General law as to evidence, see Evidence.

Mode and sufficiency of proof of marriage of slandered married woman, see Marriage, III.
Admissibility of evidence as to damages, see Damages § 315.
Proper mode of examination, cross-examination, and redirect examination, see Examination of Witnesses.

¶ 306. Repetition of a newspaper libel may be shown by proving the publication of the declaration containing the libelous articles in full.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 307. It is incompetent for defendant in a libel case to read at the trial a statement from plaintiff's affidavit for a change of venue that he believed a fair and impartial trial could not be had in his own county.—Sanford v. Rowley, 93 Mich. 119.

¶ 308. In an action for slanderously charging adultery, testimony that a certain witness had sent defendant a message offering to clear him for a sum of money is irrelevant to the main issue, though it would be proper on cross-examination of the witness himself.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 309. In an action for libel against a husband and wife based upon a letter signed with both their names, it was prejudicial error to permit the plaintiff to introduce damaging statements made by the wife and evidence of her conduct toward him before any evidence had been introduced connecting her with the alleged publication of the letter, there being evidence that the letter was written by the husband alone and that she knew nothing of it until after it was written, and the error was not cured by an order of the court striking it out at the close of the trial and directing the jury to disregard it.—Konkle v. Haven, 144 Mich. 667.

§ 72. ——Complementary and related parts or versions of slanderous statements.

Charges construed as a whole, see ante § 26.
Evidence of other slanderous statements as bearing on malice or intent, see also post § 82.
Right of defendant to introduce other articles to show good faith, see post § 82.
Whole conversation as res gestæ of defamatory words, see Evidence ¶ 2355.

¶ 310. Where the defendant admits using the slanderous words charged, but claims they were spoken of a person other than the plaintiff, the whole conversation may be given to show of whom they were spoken.—Newman v. Stein, 75 Mich. 402.

¶ 311. The whole of the conversation in which the alleged slanderous words were used is admissible as part of the res gestæ.—Ellis v. Whitehead, 95 Mich. 105.

¶ 312. After plaintiff has given his version of a slander defendant may give his version of the conversation alleged to have been slanderous, even though he has given notice of justification, and though such version includes statements not narrated by plaintiff, since the additional words may throw light upon the question of malice.—Georgia v. Bond, 114 Mich. 196.

§ 73. Evidence as to application of words to plaintiff.

Allegations showing application of words to plaintiff, see ante § 57.
Giving entire conversation in evidence, see ante ¶ 310.
Evidence as to meaning or understanding of words, see post § 77.
Sufficiency of evidence to show application of words to plaintiff, see post § 100.
Province of court and jury, see post § 106.
Instructions as to application of words used, see post § 116.

¶ 313. A newspaper article complained of as libelous did not name the plaintiff, but it was practically conceded that he was the person referred to. Held, that the exclusion of a subsequent article, naming him, when offered merely for the purpose of establishing identity and objected to as incompetent for that purpose, was not material error.—Peoples v. Evening News Ass'n, 51 Mich. 11.

¶ 314. Where the name of plaintiff in a libel suit is misspelled in the alleged libelous article, but in sound is very similar to the correct name, it is competent for the plaintiff to show by persons living in the vicinity, and who read the article, that they understood it to refer to the plaintiff.—Farrand v. Aldrich, 85 Mich. 593.

¶ 315. In an action for slander against a priest for words spoken from the pulpit, admission of testimony of witnesses who were present, to the effect that they understood defendant to mean plaintiff, because "he referred to a 'barber,' and made a motion with his hand about a razor," was not prejudicial, where defendant admitted that he used the word "barber" in his talk, and that plaintiff was the only barber in his church.—Provost v. Brueck, 110 Mich. 136.

¶ 316. In an action for slander for accusing plaintiff of theft, the defendant may properly be cross-examined as to whether, on a previous trial, he did not testify that to his mind the words "take" and "steal" mean the same thing, where defendant insists he did not use the word "steal" with reference to plaintiff.—Kelley v. Paulsen, 162 Mich. 169.

§ 74. Evidence as to publication.

See also ante ¶ 281.
Evidence of circumstances under which newspaper article published, see also post ¶ 399.

Evidence of repetition of charges or subsequent publications, see post § 80.
Province of court and jury, see post § 104.
Instructions as to publication, see post § 117.

¶ 317. In an action for slander there is no error in refusing to admit a neighbor's testimony that he never heard it.—Brown v. Barnes, 39 Mich. 211.

¶ 318. The testimony of ministers who in their ministerial office draw forth from a party statements of an ancient transaction, which is made the ground of a slander suit, is inadmissible to show publication of the slander.—Vickers v. Stoneman, 73 Mich. 419.

¶ 319. It is not proper, in an action for slander, to prove the utterance of slanderous words by reading to the plaintiff as a witness the words as laid in the declaration and by then interrogating him with regard to them; nor is it within the circuit judge's discretion to permit such mode of examination.—Osborn v. Forshee, 22 Mich. 209.

¶ 320. A witness called to prove the speaking of slanderous words upon which suit was brought was required on cross-examination to state the following remark of the plaintiff's: "God knows if H. [the defendant] beats me in this trial I am going to carry it up higher. I am going to beat him and I hope I will; then he will have to move out and I take possession of the premises." Held error, for irrelevancy, though it might perhaps have been proper cross-examination of the plaintiff if on the witness stand.—Proctor v. Houghtaling, 37 Mich. 41.

§ 75. ——Extent of publicity.
Business and social standing of defendant as bearing on influence of his word in community, see post § 97.

¶ 321. As showing the extent to which the public has taken notice of a libelous article it may be shown that various persons called plaintiff's attention to such article.—Park v. Detroit Free Press Co., 72 Mich. 560.

¶ 322. In an action for libel the circulation of the defendant's paper may be shown, as making it probable that the article has been read by several persons.—Park v. Detroit Free Press Co., 72 Mich. 560.

¶ 323. In an action for libel alleging special damage by reason of the libelous matter charged, testimony of statements made by third persons not produced as witnesses relating to remarks made by them, their conduct and opinions as exhibited and expressed by them concerning the plaintiff after some time had elapsed from the publication of such matter, held admissible.—Cyrowski v. Polish-American Pub. Co., 196 Mich. 648.

§ 76. Evidence as to responsibility or authorship.
Persons responsible or liable generally, see ante § 2.
Sufficiency of evidence to show authorship of slander, see post § 100.
Province of court and jury, see post § 104.

¶ 324. Where statements complained of as libelous were published in several papers besides the one against which suit was brought and then retracted, it was error to allow the plaintiff to show that the same correspondent gave the information to all the papers, when he was in no sense the general representative of any of them, and defendant was not responsible for what he might do except in so far as it adopted his statements and published them.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 325. Proof that defendant in a libel case made to a newspaper reported the statement complained of, and that such statement was afterward published, makes it allowable to ask defendant as a witness whether he had anything to do with the publication of the article.—Wheaton v. Beecher, 79 Mich. 443.

¶ 326. Where, in an action of libel, it appears that the statement complained of was made by defendant to a newspaper reporter and was afterward published, and where the reported testifies fully as to his interview with defendant and that he afterward wrote out the conversation without showing it to defendant and without his request, it is proper to ask the reporter whether he had anything to do with the publication of the article; for the question must be understood as relating to the procurement of publication or printing in the newspaper.—Wheaton v. Beecher, 79 Mich. 443.

¶ 327. The facts that a wife, codefendant with her husband in an action for a libel consisting of a letter defamatory of a clergyman, had made statements derogatory of the character of the plaintiff and his family to a third person, and that she and her husband did not attend church of which plaintiff was pastor after some difficulty arising therein, were not evidence that she signed such letter.—Konkle v. Haven, 140 Mich. 472.

¶ 328. In a civil action for newspaper libel, defendant, who was publisher of the paper, was properly allowed to state, on cross-examination, that the article complained of was not written by him.—Sullings v. Shakespeare, 46 Mich. 408.

§ 77. Evidence as to meaning or understanding of words.
Construction and application of charges, see also ante § 24 et seq.
Evidence to show application of words to plaintiff, see ante § 78.

Instructions bearing on meaning and application of words used, see post § 116.
Inadmissibility of opinion as to libelousness of words, see Evidence § 211.
Judicial notice of meanings of figurative expressions, see Evidence § 5.

¶ 329. In an action for slander it is not competent to ask a witness who has testified to a conversation held with defendant since the suit began what he understood defendant to mean by his remarks. That is a question for the jury.—Cresinger v. Reed, 25 Mich. 450.

¶ 330. One sued for libel may be permitted to testify that he had no ill-will against plaintiff when he made publication, and that the sole motive was the public good; but it is error to allow him to testify, where the article is unambiguous, that he did not intend to charge plaintiff with any crime or misdemeanor.—Hay v. Reid, 85 Mich. 296.

¶ 331. In an action for slander for saying of plaintiff "He is a thief," the surrounding circumstances as well as the connection in which the words were used, may be shown for the purpose of establishing that the words could not have been understood as imputing a crime.—Line v. Spies, 139 Mich. 484.

¶ 332. In an action for slander, testimony as to the understanding of the words used, by the bystanders cannot be used to aid an innuendo or to enlarge the meaning of the words actually used.—Line v. Spies, 139 Mich. 484.

¶ 333. In an action for libel imputing to an officer the presentation of a false claim to supervisor's evidence tending to show the opinions of the supervisors relative to the matter is incompetent.—Gripman v. Kitchell, 173 Mich. 242.

§ 78. Admissibility of fact of malice or good faith.

Malice and intent in general, see ante § 49.
Evidence to show malice or intent, see post § 79.

¶ 334. In an action for libel brought against members of a grand jury in making and filing a report containing libelous matters as to plaintiff not privileged, evidence of defendant's good faith in making such report held not admissible in bar of the action, but in mitigation of damages only.—Bennett v. Stockwell, 197 Mich. 50.

¶ 335. As a general rule, in actions of libel and slander, defendant may mitigate damages by showing any circumstances which tend to disprove malice.—Orth v. Featherly, 87 Mich. 315.

¶ 336. Where a libelous charge is made against a candidate for office, and there is only a technical variance between the charge and its justification, proof that the party making it honestly believed it should be received to show that there was no wrong intent.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 337. It is competent for defendant to offer testimony to show the want of actual malice, as that the publication was made through mistake, and that all proper precautions were observed by which the damages would be reduced to such a sum as would compensate for the injury which must inevitably have resulted.—Davis v. Marxhausen, 103 Mich. 315.

¶ 338. In an action for newspaper libel the motive of a subordinate in publishing the article complained of is irrelevant if not communicated to his principal, the defendant, and if a showing has been made of everything that passed between principal and subordinate before publication. And where defendant, besides testifying that he had no ill-will toward plaintiff and did not know him, and that he had put implicit confidence in his subordinate, had also been allowed to show all that took place before the publication, and the information on which he acted, there was no material error in excluding a question as to whether he had any purpose to injure plaintiff in assenting to the publication, especially where it was put by his own counsel in cross-examining him when called by plaintiff to show his control of the paper.—Maclean v. Scripps, 52 Mich. 214.

§ 79. Evidence to show malice or intent.

See also post ¶ 427.
Consideration of the occasion and surrounding circumstances, see also ante ¶ 301.
Malice and intent in general, see ante § 49.
Presumptions as to malice and intent, see ante § 69.
That insurance claim contested admissible in libel based on charges of arson to defraud insurer, see post ¶ 416.
Evidence of threats by plaintiff to burn defendant's barn, see ante ¶ 259.
Giving defendant's version of the slanderous conversation, see ante ¶ 312.
Testimony of defendant as to his motive or intentions, see also ante ¶ 330.
Malice as jury or court question, see post § 111.
Instructions as to malice or intent, see post § 120.
Notice of truth as justification not proof of malice, see Jud. Act, chap. XX, § 19; Comp. L. 1915, § 12755.
Plea of justification as evidence of malice in aggravation, see Damages § 347.
Res gestæ showing malice or knowledge, see also Evidence § 451.

¶ 339. In an action for slander brought by a servant of the owner of goods alleged to have been stolen against a person who, having been requested to recover such goods, accused plaintiff of theft, evidence of a mis-

understanding unknown to defendant, between plaintiff and her employer, which led to plaintiff's discharge, is inadmissible to show malice.—Moore v. Thompson, 92 Mich. 498.

¶ 340. Defendant was charged with saying of plaintiff "he is a damned, low-lived, thieving son of a bitch, and I have had a man watching him and seen him steal." Held, that in order to show malice, though not to prove the words charged, it was proper to permit a witness who had heard the latter part of the conversation, in which such words were used, to state that defendant in such part said that plaintiff "is a thief and I can prove it."—Ellis v. Whitehead, 95 Mich. 105.

¶ 341. In an action against a corporation for libel evidence tending to show malice against plaintiff on the part of one of defendant's stockholders who is not shown to have instigated the article complained of, or to have been connected with the publication thereof, is inadmissible.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 342. A letter sent by defendant to one of the firms to whom the alleged libelous statement had been sent, dated about the time of the sending of the same, informing said firm that the firm of which defendant was a member would withhold its patronage from any house or firm, etc., which might thereafter accept less than the full amount of its claim from any customer in the city where plaintiff and defendant resided, except it should be from an assignee or a court of equity, and for liquidation, is admissible as tending to indicate malice, and show a motive for injuring plaintiff's credit.—Simons v. Burnham, 102 Mich. 189.

¶ 343. Testimony that the statement containing the alleged slanderous words was made to a police officer in a public place, in the presence of others, is evidence for the jury on the question of malice.—Garn v. Lockard, 108 Mich. 196.

¶ 344. In an action for slander from the pulpit evidence of an altercation in the church so connected with the utterance of the alleged slanderous words as to form a part of the res gestæ is admissible as bearing upon the question of malice.—Provost v. Brueck, 110 Mich. 136.

¶ 345. The fact that a privileged statement is false is no evidence of malice in the absence of proof that the party making it knew of its falsity.—Howard v. Dickie, 120 Mich. 238.

¶ 346. The fact that one, making a statement at a quarterly church conference in regard to a candidate for trustee, alleged to be slanderous, had previously notified the pastor that he should oppose the election of the person in question, is no evidence of malice since he had a right to give such notice of his intention.—Howard v. Dickie, 120 Mich. 238.

¶ 347. In a libel suit by a sheriff, cross-examination as to statements made by the defendant during trial to the effect that he had made another sheriff smart and would make the plaintiff smart before he got through, is inadmissible to show malice, as it had no relation to the feelings of the defendant at the time of the publication in question.—Scoufale v. Sweet, 124 Mich. 311.

¶ 348. In an action of slander, evidence of prior dealings of the parties, their acts and treatment in regard to each other, and generally, evidence showing the state of their feelings, is admissible as tending to prove the motive in making a defamatory statement.—Rabior v. Kelley, 194 Mich. 107.

¶ 349. In an action for libel, testimony of third persons who advised the editor of the defendant publishing company to question the plaintiff about the truth or falsity of the alleged libelous article before publication, held admissible as bearing upon defendants' good faith and as showing malice.—Cyrowski v. Polish-American Pub. Co., 196 Mich. 648.

¶ 350. In an action for slander for speaking words accusing plaintiff of having set fire to defendant's house, the fact that defendant had previously signed and verified a complaint for arson against plaintiff is not evidence of defendant's malice where such complaint was made by defendant upon the request or advice of the examining officers, but it may be considered by the jury where it is one of a series of acts.—Rabior v. Kelley, 194 Mich. 107.

¶ 351. In an action for newspaper libel the judge instructed the jury that a portion of the article complained of was privileged, but permitted them to consider it with the rest in deciding from the general spirit of the article whether that part which was left to their consideration was malicious.—Held error.—Miner v. Detroit Post & Tribune Co., 49 Mich. 358.

§ 80. ——Repetition or republication of charges.

See also ante ¶ 282.
Evidence to show repetition of newspaper libel, see also ante ¶ 306.
Notice of justification as constituting republication, see post ¶ 380.
Showing other similar publications, see post § 82.
Repetition of charges made by others, see ante § 45.
Jury question as to effect of second publication, see post ¶ 506.

¶ 352. In an action for slander, proof of repetitions of the slander charged in the

declaration is admissible to show malice upon defendant's part.—Beneway v. Thorp, 77 Mich. 181.

¶ 353. Evidence of repetitions of slanderous words is competent only to prove malice, and not to prove the commission of the particular slander sued for.—Kelley v. Paulsen, 162 Mich. 169.

¶ 354. In an action of libel against a newspaper a republication, with comment, after suit began of the alleged libelous article, is admissible to show malice.—Welch v. Tribune Publishing Co., 83 Mich. 661.

¶ 355. In an action for libel, subsequent publications similar in character to that complained of are admissible upon the question of malice.—Owen v. Dewey, 107 Mich. 67.

¶ 356. Malice may be shown from the repetition of slanderous words of similar import to those alleged, and which are calculated to produce the same impression on the community as those originally spoken.—McCloy v. Vaughan, 185 Mich. 189.

§ 81. ——Privileged statements of same charge.

¶ 357. Privileged communications are not admissible in a slander suit for the purpose of showing malice.—Shinglemeyer v. Wright, 124 Mich. 230.

§ 82. ——Other or similar publications or statements.

Admission of subsequent newspaper article to establish identity, see ante ¶ 313.
Admissibility of articles published in other papers, see also post ¶ 417.
Statements of defendant when asked to retract, see post ¶ 386.

¶ 358. Other similar publications made by defendant on the same or the following day may be shown as bearing on the question of malice.—Whittemore v. Weiss, 33 Mich. 348.

¶ 359. Where an alleged libelous article is one of a series relating to a matter of public concern, defendant may introduce them all to show good faith on his part.—Scripps v. Foster, 41 Mich. 742.

¶ 360. In an action for slander, evidence of other slanderous statements than those alleged in the declaration, made during the course of the same conversations, and being of the same general character, is admissible to show malice and ill feeling on defendant's part.—Botsford v. Chase, 108 Mich. 432.

¶ 361. In an action for newspaper libel an offer was made to show that the declaration was afterward published with head-lines referring to the plaintiff's attorney but not to plaintiff. Held proper to exclude proof of the head-lines.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 362. In an action for newspaper libel the editor was properly allowed to testify that at the request of plaintiff's counsel he had previously published a synopsis of the declaration in a similar suit brought by the same plaintiff against another paper.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 363. In an action for libel against a newspaper publisher for publishing an article charging that gambling was going on in the village of which plaintiff was marshal, and that he, with knowledge of the fact, failed to suppress it, defendant testified that the first information that he had that gambling was being so carried on was from reading an article in a village paper, and that he was afterwards asked why he had not made as full a statement of the matter as the paper named, and that this led up to the publication of the alleged libelous article. Held, that under this testimony the other article was properly admitted in evidence, not as proof of the facts therein stated, but to show defendant's good faith and in mitigation of damages.—Hay v. Reid, 85 Mich. 296.

¶ 364. Where the libel complained of charges that the plaintiff has been guilty of political treachery and would commit perjury to defend himself from charges thereof, the defendant may introduce in evidence prior publications in his paper which refer to the same matters, in which publications the plaintiff is charged with political treachery, and which in general arraign him as a political traitor; notwithstanding that suit was brought on such publications.—Sanford v. Rowley, 93 Mich. 119.

¶ 365. In an action of slander for calling plaintiff a thief, evidence that at another time and place than as stated in the declaration defendant said that "he had called" plaintiff "a thief to his face, and that he could prove it," is admissible as bearing on malice.—Ellis v. Whitehead, 95 Mich. 105.

¶ 366. Other publications authorized by defendant and made prior to the one sued for are admissible when evincive of animus, if that is in issue in the case, as to which, quære, where the article was a political comment and justification was pleaded.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 367. In an action by a city attorney against a newspaper for a libelous publication an article printed in the same paper eight months after the publication of the alleged libel attacking his candidacy for office is admissible to prove malice, and an objection that it was too remote, incompetent and immaterial is properly overruled.—Smith v. Hubbell, 142 Mich. 637.

¶ 368. Previous statements of the defendant tending to show malice may be shown in an action for slander.—Sanford v. Houghton, 184 Mich. 44.

¶ 369. In an action against a newspaper company for charging a jury of which plaintiff was a member with perjury in their verdict, it is not an abuse of discretion to allow plaintiff to be asked on his cross-examination whether all the newspapers in the city did not publish articles severely criticizing the jury's action; the publications having characterized the verdict as extraordinary, and thus tending to show that the public so regarded it.—Welch v. Tribune Pub. Co., 83 Mich. 661.

§ 83. ——Common rumor or reports of similar imputation.

¶ 370. A witness to the uttering of slanderous words cannot testify that he had heard the same and similar remarks extending over a period not limited to the time before the slander, and not shown to have led to the defendant's belief in the truth of what he had said.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 371. That defendant, before publishing the libel complained of, had heard the same charges made by others, is admissible in mitigation of damages.—Orth v. Featherly, 87 Mich. 315.

¶ 372. Where, in the trial of an action for libel charging plaintiff with bribing other members of the legislature, a witness for defendant has testified to the badness of plaintiff's general reputation in respect to the corrupt use of money in political connections, such witness cannot be asked on cross-examination whether charges of corruption against prominent politicians are not common.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 373. In an action for newspaper libel, an alleged interview with plaintiff, published in another paper, and claimed by defendant to be the basis of the article in suit, is admissible to rebut the presumption of malice, but not to prove the truth of the publication.—Owen v. Dewey, 107 Mich. 67.

¶ 374. A defendant in an action for slander may show in mitigation of damages, as bearing on the quo animo, that, before uttering the words imputed to him, he had been informed that stories to the same purport as his subsequent statement were already afloat in the neighborhood.—Fowler v. Fowler, 113 Mich. 575.

¶ 375. In mitigation of damages, in an action for libel, it is competent to show that the defendant has heard that the charges contained in the article have been made by other persons, but it is unimportant whether other persons have heard them or not, as proof that the gist of the charges was true would tend to show belief as well as justification, but proof that others have heard rumors or statements tends to prove neither that the defendant has heard them nor that he has believed them.—Brewer v. Chase, 121 Mich. 526.

¶ 376. In an action for slander by imputing a crime the testimony of third persons, that they had heard a damaging report imputing a like crime to plaintiff some years before, is incompetent; where it appears that defendant's information was acquired from an entirely different source and that such report was not communicated to him; since it would not tend to show belief of the truth of the charge by defendant, and thus rebut malice and mitigate damages, and was inadmissible for any other purpose.—Wolff v. Smith, 112 Mich. 359.

§ 84. ——Negligence of defendant as employer.
Evidence bearing on gravity of injury, see post § 95.

¶ 377. In an action for newspaper libel an article published in the same paper more than a month after the article complained of is too remote to be admissible as bearing on the care and prudence with which the paper was managed at the time of the libel; its management afterwards is immaterial.—Scripps v. Reilly, 35 Mich. 371.

¶ 378. Copies of a newspaper containing specimen articles may be put in evidence to show the character it has established, as bearing on the question what degree of care and prudence was exercised in publishing an article complained of as libelous.—Scripps v. Reilly, 38 Mich. 10.

¶ 379. In an action for newspaper libel, the haste incident to issuing the paper, the time at which the libelous article was handed in, and the sufficiency of the force employed on the paper for gathering the news and preparing and supervising articles for publication, may be considered as bearing on the question of the publisher's negligence.—Scripps v. Reilly, 38 Mich. 10.

§ 85. ——Plea or notice of justification as evidence of malice.
Provisions that notice of justification not proof of malice, see Jud. Act, chap. XX, § 19; Comp. L. 1915, § 12755.

¶ 380. A notice of justification is not evidence of malice, nor can it be treated as a republication of the libel, and no facts are put in issue except those declared on.—Wheaton v. Beecher, 79 Mich. 443.

¶ 381. Under How. St. § 7776 providing that in actions for slander or libel, notice in justification that the statements were true, though not maintained by the evidence, shall not be of itself proof of malice, such notice may be considered as evidence tending to show malice since "proof" as used in the statute is not synonymous with "evidence."—Jastrzembski v. Marxhausen, 120 Mich. 677.

¶ 382. Notice of justification, though not maintained by the evidence, is not of itself proof of the malice charged in the declaration for malice under Comp. L. 1897, § 10415, How., 2nd Ed., § 13129 but such unsustained notice may be evidence tending to show malice when taken in connection with other facts established.—Rabior v. Kelley, 194 Mich. 107.

§ 86. Admissibility of retractions and demands for and refusals thereof.

Province of judge and jury as to retraction, see post § 110.
Provisions as to retraction, see Jud. Act, chap. XX, § 23, Comp. L. 1915, § 12759.

¶ 383. In an action of slander in which plaintiff was an infant suing by her next friend, it was held not error to exclude evidence that, on the trial of a former cause between the same parties on the same subject-matter, the parties came to and executed an understanding that the two defendants should under oath disclaim all belief in the reports, and that this should be considered a satisfaction of the plaintiff's cause of action and the suit should be discontinued; it was not admissible in mitigation of damages, as a retraction or apology, or as proving an accord and satisfaction.—Burt v. McBain, 29 Mich. 260.

¶ 384. Retractions are not evidence of the circumstances under which the original publication was made, or of the good faith of such publication, but when published before suit and immediately after the libel they are admissible in mitigation of damages.—Davis v. Marxhausen, 103 Mich. 315.

¶ 385. A subsequent article published by defendants, containing a letter from plaintiff demanding a retraction, which was refused, was properly admissible on the issue of malice.—Thibault v. Sessions, 101 Mich. 279.

¶ 386. In an action for newspaper libel, an article subsequently published in another paper, containing plaintiff's explanation of the circumstances constituting the foundation for the charge complained of, and shown to have been read by defendant at the time of his refusal to publish a retraction, is admissible, upon the question of motive; and, for a like purpose, it is competent to show what was said by defendant when asked to retract.—Long v. Tribune Printing Co., 107 Mich. 207.

¶ 387. A notice to retract all of a libelous article is good as to a portion thereof, and hence such notice is properly admitted after the plaintiff by amendment had eliminated portions of the article claimed to be libelous.—Aronson v. Baldwin, 178 Mich. 565.

¶ 388. Where plaintiff, on being shown a writing asking defendant to retract the alleged libelous charge, testifies that he signed it, it is proper to admit such paper conditioning its reading to the jury upon proof that it be shown to have reached defendant.—Welch v. Tribune Publishing Co., 83 Mich. 661.

§ 87. Admissibility of character and reputation.

Showing reputation under plea of justification, see ante ¶¶ 268, 269.
General reputation as sufficient justification for charges, see post § 101.
Plaintiff's general reputation for dishonesty, see also post ¶ 549.
Evidence to show character and reputation, see post § 88.
Evidence bearing on gravity of injury or in mitigation, see also post § 95 et seq.
Rebuttal testimony as to general reputation of plaintiff, see also Trial, V, B.

¶ 389. The plaintiff in an action for slander cannot introduce evidence of his general good character and reputation unless it has been attacked; and this is so even though on cross-examination inquiries have been made of him as to specific facts that may tend to affect his good character.—Hitchcock v. Moore, 70 Mich. 112.

¶ 390. The general reputation only of a plaintiff, and not specific acts, can be shown in libel and slander.—Wells v. Toogood, 165 Mich. 677.

¶ 391. Plaintiff's general reputation only can be shown in mitigation of damages.—Thibault v. Sessions, 101 Mich. 279.

¶ 392. In an action for slander in charging plaintiff, a stock buyer, with cheating in the weight of defendant's hogs, evidence of plaintiff's bad reputation for honesty and uprightness in a place where he had formerly lived is admissible on the question of damages.—Georgia v. Bond, 114 Mich. 196.

§ 88. Evidence to prove character and reputation.

Reputation as issue, see also ante § 60.
Evidence bearing on damages, see also post § 95 et seq.

¶ 393. In showing that the reputation of the plaintiff in a libel suit was such that the charge could not have injured him, the defense is properly confined to the testimony of witnesses who could testify that they knew plaintiff's reputation before the charge was published.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 394. In an action for slander in charging plaintiff with being a woman of gross unchastity, her character for chastity can only be assailed by testimony of general reputation, and not by proof of particular acts or particular suspicions.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 395. It is proper on authority of Proctor v. Houghtaling, 37 Mich. 41, to exclude evidence of alleged orgies of a plaintiff in an action for libel, and of other matters affecting her character, offered to reduce damages.—McGee v. Baumgartner, 121 Mich. 287.

§ 89. Evidence in justification.

Justification in general, see ante III.
Sufficiency of evidence in justification, see post § 101.
Province of court and jury, see post § 109.
Instructions as to justification, see post § 119.
Order of proof as to justification and privilege, see Trial, V, B.
Impropriety of proving justification by cross-examination of adversary witnesses, see Examination of Witnesses § 44.

¶ 396. Irrelevant slanders are not admissible in evidence by way of colorable justification.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 397. Evidence to justify statements published after the commencement of a suit for libel is not admissible.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 398. A lawyer brought an action for libel based on a newspaper article which charged him with having appropriated more than a fair share of the moneys which a client had caused to be placed in his charge just after departing for a foreign jurisdiction where his creditors could less easily trouble him. Under a plea of justification evidence was admitted of the statements of a couple of creditors who had pursued their debtor and who professed that he had intimated some suspicion as to the safety of his funds. There was no evidence that plaintiff had done anything to have the money sent back to him, but the evidence was admitted as res gestæ and on the ground that the lawyer and client and the go-between who carried the money were "all together in the transaction." Held error. Such declarations could not be treated as res gestæ, nor could the conduct of creditors among themselves out of the plaintiff's presence and not communicated to or acted on by him.—Atkinson v. Detroit Free Press Co., 46 Mich. 341.

§ 90. ——Partial justification.

¶ 399. In a civil action for libel based on a newspaper article tending to throw ridicule upon plaintiff, it is competent for defendant to show how far the facts alleged or any part of them were true, and how far their truth would leave any cause of action remaining. It is also admissible to show under what circumstances the article was prepared and published.—Sullings v. Shakespeare, 46 Mich. 408.

§ 91. ——Truth or falsity of charge.

See also post ¶ 429.
Evidence of truth under the general issue, see also ante § 61.
Truth of charges in mitigation of damages, see also post § 98.
Cross-examination of plaintiff respecting facts of character involved in the defamation, see Examination of Witnesses § 52.
Inadmissibility of plaintiff's bad repute on justification, see also Evidence § 351.
Admissibility of negative evidence on truth of words, see also Evidence § 80, ¶ 411.

¶ 400. A person charged with seduction sued for libel. Held admissible to show, as bearing upon the probability of an alleged arrangement between him and the girl's mother, that she and her mother were paupers and in extreme poverty and dependence.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 401. In an action for libel based on a newspaper article imputing the murder of a girl, defendant sought to justify by proving it. Held, that plaintiff, on producing evidence that tended to show that the girl was the victim of an abortion procured by some one else, was entitled to have the case submitted on that theory, and it was error to exclude a question put to a competent witness as to whether the facts shown were inconsistent with death by abortion.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 402. Testimony that plaintiff after the alleged libel suit was commenced was employed to collect a claim against the village trustees, upon commission, was properly excluded on failure of counsel to connect it with the relations of plaintiff with the claimant before the libel suit was begun, and while he was still village attorney.—Smith v. Hubbell, 151 Mich. 59.

¶ 403. A newspaper charged a city physician with causing death by the careless use of the trocar in vaccination after its use had been forbidden by the board of health. Held, that in an action for libel defendant might show that plaintiff had, in his presence, justified its use.—Scripps v. Foster, 41 Mich. 742.

¶ 404. Where a defendant sued for slander for calling plaintiff a thief seeks to show that the latter fraudulently took ice belonging to his copartners, testimony bearing upon plaintiff's conduct in taking the ice is admissible on the question of fraud.—Ellis v. Whitehead, 95 Mich. 105.

¶ 405. Evidence that nineteen years before the publication of a libel charging plaintiff with political treachery, a certain number of his party bolted his nomination for the legislature and published a letter giving their reasons, is inadmissible to prove the truth of the libelous charges.—Sanford v. Rowley, 93 Mich. 119.

¶ 406. Where the publication complained of in a libel case charges the plaintiff with

political treachery and readiness to commit perjury, testimony that it has been generally understood that he is a professional lobbyist is incompetent.—Sanford v. Rowley, 93 Mich. 119.

¶ 407. In an action for libel by a woman against a newspaper for publishing an article which it was claimed charged plaintiff with adultery, where the evidence tended to show circumstances well calculated to arouse suspicion on the occasion stated and also tending to show previous acts of intimacy, it was error to refuse to admit testimony as to acts of familiarity and intimacy committed three months subsequently.—Matthews v. Detroit Journal Co., 123 Mich. 608.

¶ 408. In an action for slander specific acts of lewdness cannot be proved to support a plea of justification in the statement "You can't imagine how low this woman is."—Smitley v. Pinch, 148 Mich. 670.

¶ 409. In an action of libel against defendant for the publication of matter reflecting on plaintiff's conduct as village attorney, plaintiff cannot, on cross-examination, be questioned as to a matter which took place two or three years before, and was in no way connected with the case under investigation, in order to show misconduct.—Smith v. Hubbell, 151 Mich. 59.

¶ 410. Cross-examination of a witness at length in a suit for libel, consisting of general inquiry regarding rumors and publications and testimony upon other trials, and the opinion of the witness as to the effect upon the plaintiff's character, is not competent. A defense like that of truth would be more orderly if made after the plaintiff's case is closed, and if a defendant desires to show that he published an article upon information and an honest belief of truth, the natural course would be to show in an orderly way his information, reliance upon it, and the rectitude of his intentions, rather than to enter upon a general investigation of the plaintiff's history, and the opinion of members of the public regarding it.—Brewer v. Chase, 121 Mich. 526.

¶ 411. A physician accused of illicit intercourse with a patient sued his defamer for libel. Held, that he could show the patient's physical condition as bearing on the probability of the charge. But in contradicting the patient's testimony that she was weak and sick at home, the defense was properly confined to that issue, and it was not error to exclude their testimony as to her mode of employment there and her visiting elsewhere.—Maclean v. Scripps, 52 Mich. 214.

§ 92. ——Acts and statements of third persons and coparties.

¶ 412. Where, in a suit for libel for publishing a statement that the plaintiff was arrested on suspicion of having committed a felony, it appeared that such arrest was in fact made, evidence of the manner in which the arrest was made, and of the indignities to which plaintiff was subjected at the hands of the officers making it, is inadmissible against defendant.—McAllister v. Detroit Free Press Co., 85 Mich. 453.

¶ 413. In an action for libel against defendant newspaper for charging plaintiff and his wife with stealing a purse left on a train, since the plaintiff could be found guilty of larceny only if he himself formed the intent feloniously to appropriate the purse, or aided and abetted his wife in so appropriating it after she had communicated to him her intent to do so, her secret resolve to steal the purse and its contents would have no tendency to prove guilt on the part of the plaintiff.—Schattler v. Daily Herald Co., 162 Mich. 115.

¶ 414. In a suit for defamation of title by the execution of a deed containing a statement that plaintiff had fraudulently and without consideration obtained possession of the land described in the deed, and that he pretends to own it, etc., which statement is found to have been malicious and upon no foundation of right, plaintiff should be allowed to make full proof of the acts and conduct of all of the defendants,—they having all participated and actively engaged in the execution and delivery of the deed,—in their continued claim of title under the deed and the recital therein, not only to show their continued claim of pretended rights in the premises, but also their motive in inserting the recital in the deed, and in their pretended claims thereunder.—Chesebro v. Powers, 78 Mich. 472.

¶ 415. In a trial for libel based on a charge of seduction it was not clearly error to exclude the fact that the girl alleged to have been seduced committed suicide just as the trial was about to take place.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 416. Where a libel suit was based on an article charging the plaintiff with arson to defraud insurers and with murder, it was proper to permit the defendant, in justifying, and as bearing upon the malice of the libel, to show that plaintiff's claim for insurance on the house that was burned was contested.—Peoples v. Evening News Ass'n, 51 Mich. 11.

¶ 417. In a suit for libel against defendant newspaper for charging plaintiff with theft, other articles concerning plaintiff's arrest published by another paper contemporaneously with the libel complained of are inadmissible.—Schattler v. Daily Herald Co., 162 Mich. 115.

§ 93. ——Other and distinct acts and deeds of plaintiff.

¶ 418. Suit was brought for slander upon a charge that plaintiff had burned his prop-

erty to defraud insurers. Held, that proof of alleged frauds by him against third persons concerning agreements regarding insurance was inadmissible.—Fowler v. Gilbert, 38 Mich. 292.

¶ 419. In an action for libel for charging plaintiff with corrupt practices while a legislator, evidence of statements made by plaintiff as to his purpose in being elected to the legislature, of his connection with a bill of which he is charged with having by bribery secured the passage, of his reputation while there, of his entertainments, of his keeping "open house," whether or not the members visited it and partook of his hospitality, and whether this was done for the purpose of improperly influencing their action, is inadmissible.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 420. In an action for libelously charging plaintiff, a school teacher, with having taken indecent liberties with the persons of his pupils, evidence that he had liquor in the school and gave it to the pupils is inadmissible unless supplemented by evidence connecting such facts with the acts alleged in the libel.—Thibault v. Sessions, 101 Mich. 279.

§ 94. ——Explanation and rebuttal evidence.

¶ 421. In an action for libel for publishing a statement in substance that plaintiff, who was then agent for a certain piano alone, had formerly been agent for both that and another, and while agent for both had invariably recommended such other as superior in every respect, it was held competent, where defendant had undertaken to prove the publication to be true, to show in rebuttal the comparative number of each sold by plaintiff during the period he was engaged in selling both.—Whittemore v. Weiss, 33 Mich. 348.

¶ 422. Where sworn statements, made before a justice, apparently furnish legal cause for an arrest, but the justice does not issue a warrant, it is proper, in an action for libel based on a report of the facts stated, to ask him why he did not issue it.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 423. Where the alleged libel is that plaintiff, who had taken charge of his father's estate, "got away with the property" and left his parents to starve, evidence that plaintiff had taken charge of the property with his father's consent is irrelevant, having no tendency to show how he managed the property.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

¶ 424. In an action for slander consisting of words charging the plaintiff and a woman with having been at night in a compromising position in a shop where they were employed, if the plaintiff and the woman have testified that they went to their shop to get the pay that was due them, testimony by them on redirect examination intended to show how much was due them and how long it had been due, is immaterial and inadmissible.—Beers v. Payment, 95 Mich. 261.

¶ 425. In a suit for slander the court properly refuses to let defendant tell his reasons for requesting plaintiff to get his name off a certain note, where such inquiry is immaterial.—Kelley v. Paulsen, 162 Mich. 169.

¶ 426. In a suit for libel against defendant newspaper for charging plaintiff with theft, the testimony of the prosecuting attorney that the case against plaintiff was dropped on account of plaintiff's ill health is inadmissible.—Schattler v. Daily Herald Co., 162 Mich. 115.

¶ 427. Testimony of the financial condition of the church and the number of members admitted under plaintiff's pastorate was inadmissible, in an action for a libel consisting of a letter written calling in question the professional fitness of a clergyman to take charge of a new pastorate, since such evidence had no legitimate tendency to disprove the truth of the charges or to show malice.—Konkle v. Haven, 140 Mich. 472.

¶ 428. Where, in an action for libel, the only material fact to be established is that gambling was going on in a particular room, and that an officer knew it, it is improper to ask a witness who has testified to playing cards in the room how much he lost between certain dates, that being immaterial.—Hay v. Reid, 85 Mich. 296.

¶ 429. A slander is admitted to be false if there is no plea of justification, and evidence of its truth is inadmissible. But where such proof was inadvertently admitted, it was held proper to let it be answered.—Fowler v. Gilbert, 38 Mich. 292.

¶ 430. In an action by a minister against a newspaper company for alleged libel in publishing an article in defendant's newspaper charging plaintiff with the publication of seditious articles relating to the conduct of the European War, held that the admission in evidence of the notes exchanged between the United States and Germany regarding the Lusitania incident as showing the basis upon which the editorial comments of the defendant were founded was not prejudicial error.—Van Lonkhuyzen v. Daily News Co., 195 Mich. 283.

§ 95. Evidence bearing on gravity of injury or in mitigation.

Evidence to show extent of publicity of words used, see ante § 75.
Evidence of threats by plaintiff to burn defendant's barn, see ante ¶ 259.
Evidence as to plaintiff's character or reputation, see also ante §§ 87, 88.
Plaintiff's reputation for dishonesty as bearing on damages, see also post ¶ 549.

Admissibility of retractions and refusals to retract, see ante § 86.
Evidence bearing on negligence of defendant as employer, see ante § 84.
Evidence of damages or bearing on extent of damages, see Damages §§ 315, 343, 344, 347, 348.

¶ 431. Where a full and complete justification cannot be made of each item which goes to make up the libelous article, the facts as they exist may be shown in mitigation of damages, and if such facts are substantially the same, or not materially variant from those alleged, they will reduce the damages to a minimum.—McAllister v. Detroit Free Press Co., 85 Mich. 453.

¶ 432. Evidence of the relations of the parties is admissible as bearing on damages for slander.—Loranger v. Loranger, 115 Mich. 681.

¶ 433. Where the gravamen of the claim laid by plaintiff in an action for slander is that, by reason of defendant's false and defamatory statements, plaintiff's neighbors and friends have refused to have business dealings with him, and that he has been compelled to resign his position as manager of a corporation, and to sell his stock therein, but not that he had to sell below its value, evidence that upon such sale plaintiff received the full value of his stock is properly excluded as immaterial.—Botsford v. Chase, 108 Mich. 432.

§ 96. ——Effect of charges upon plaintiff's feelings.

¶ 434. The effect of alleged slanderous words on the feelings of the plaintiff may be shown in an action for slander.—Sanford v. Houghton, 184 Mich. 44.

¶ 435. Testimony was received of the conduct, exclamations and acts of the plaintiff in a libel suit when she first read the libelous article. No testimony was offered as to what she said afterwards, but her uncle and aunt, with whom she lived the most of the time for about two months after such publication, testified to her appearance and conduct during that time, and that they often heard her cry and sob in the night. Held competent, the judge having carefully instructed the jury in regard to its consideration and effect.—Farrand v. Aldrich, 85 Mich. 593.

§ 97. ——Financial, business or social standing of defendant.

Evidence to warrant submission of defendant's financial standing to jury, see post ¶ 516.

¶ 436. The pecuniary condition of defendant in slander may be shown, not to swell the damages, but as bearing on the influence his word would have in the community.—Brown v. Barnes, 39 Mich. 211.

¶ 437. In action for slander it is proper to show that defendant is a director in a national bank, as bearing upon the influence his word would have in the community.—Ellis v. Whitehead, 95 Mich. 105.

¶ 438. Evidence of financial standing of person sued for slander is admissible to show the influence his word would have in the community.—Botsford v. Chase, 108 Mich. 432; Loranger v. Loranger, 115 Mich. 681.

¶ 439. It is not competent to enter into the details of the finances of a defendant in a libel or slander suit. The inquiry should be directed to his reputed financial standing in the community. So held where the plaintiff was allowed to introduce the assessment rolls of the township and wards in which the defendants were assessed, for the purpose of showing their standing.—Farrand v. Aldrich, 85 Mich. 593.

¶ 440. It is the reputed and not the actual wealth of defendant which may be shown in an action for slander.—McCloy v. Vaughan, 185 Mich. 189.

¶ 441. The reputed wealth of the defendant may be shown in an action for slander. —Sanford v. Houghton, 184 Mich. 44.

¶ 442. Evidence of the reputed wealth of a defendant corporation is not admissible.—Randall v. Evening News Ass'n, 97 Mich. 136.

§ 98. ——Truth of charges or reports substantiating belief.

Truth or falsity of charges as bearing on justification, see also ante § 91.
Instructions as to truth of charges, see post § 119.

¶ 443. Though there is no plea of justification, yet reports coming to the knowledge of the defendant and tending to substantiate the truth of his statements and to warrant his belief may be shown in mitigation of the wrong.—Huson v. Dale, 19 Mich. 17.

¶ 444. Where the notice of justification is of the truth of the charges but is not as broad as the innuendo makes them, and hence is not good as a complete justification, the evidence of the truth of the charges is admissible as tending to show grounds of belief and good faith on defendant's part and so to mitigate the wrong, provided, however that defendant had knowledge and founded his belief thereon.—Simons v. Burnham, 102 Mich. 189.

¶ 445. Under the settled rule of Huson v. Dale, 19 Mich. 17, that evidence of the truth is admissible to mitigate damages for libel by showing belief and therefore want of malice, but that for this purpose it must have been known to defendant at the time

of publication in order to have affected his belief, it was not error to reject evidence of the truth of charges made where there was no foundation laid by showing knowledge at the time and where the issues were not so drawn as to let it in as on a plea of justification.—Simons v. Burnham, 102 Mich. 189.

¶ 446. Two newspapers accused a man of murder and he sued them separately for libel. The affidavit of a convict that he was present when the murder was committed was procured for one of the cases, but it conclusively appeared that he was elsewhere at the time sworn to, and the affidavit was not used. Held, that though it might perhaps be admissible in the other case to show defendant's good faith, it could not be used as proof of the murder.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 447. Common reports in circulation that plaintiff was "suspected" previous to the speaking of slanderous words, of having committed the crime of arson imputed to him, cannot be given for the purpose of contradicting the statement in the declaration that he had not been suspected, until the speaking of the words, of being guilty of the offense charged, but can be received only in mitigation.—Moyer v. Pine, 4 Mich. 409.

¶ 448. It is not error to allow defendant to show on what ground he based his information, the plaintiff having been a candidate for office and the matter pertinent thereto.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

§ 99. ——Provocation or invitation of charges.

¶ 449. In an action for slander whatever has occurred at or about the time to provoke the words complained of may be shown in mitigation of damages.—Ritchie v. Stenius, 73 Mich. 563.

¶ 450. The jury may consider in mitigation of damages evidence showing that plaintiff provoked the defendant to utter the words charged as slanderous.—Newman v. Stein, 75 Mich. 402.

¶ 451. Where, in order to show provocation in mitigation of damages in slander, the fact that defendant had an interest in a certain company, a partnership, is to be shown, which firm it is alleged was defrauded by plaintiff as copartner, and where it clearly appears that defendant is one of the company—so that he has presumably a one-fifth interest—it is not prejudicial to exclude evidence that his interest is one-third; for the difference between one-fifth and one-third would not make any appreciable difference in the degree of irritation.—Ellis v. Whitehead, 95 Mich. 105.

¶ 452. An article charging a person with corruption in office is admissible in mitigation of damages, as showing provocation, where the person accused replies with another article charging the author of the first article with being guilty of various crimes and other disgraceful conduct.—Brewer v. Chase, 121 Mich. 526.

¶ 453. In an action for libel against a publishing company, articles written by and published with the consent of the plaintiff relating to the defendant and some of the stockholders, are admissible for the defense to show that the publications complained of were in reply to such articles by plaintiff.—Smurthwaite v. News Publishing Co., 124 Mich. 377.

¶ 454. In an action for libel against a newspaper, articles reflecting on the shareholders of the defendant company published in a rival newspaper owned by the plaintiff are not admissible as tending to show provocation or excuse for the libelous article where they did not relate to the same subject-matter.—Weston v. Grand Rapids Publishing Co., 128 Mich. 375.

§ 100. Weight and sufficiency.

Admissibility of evidence, see ante § 71 et seq.
Burden of proof, see ante § 64.
Province of court and jury, see post § 103 et seq.
Sufficiency of proof of damages to business, see Damages ¶ 1340.

¶ 455. A civil action for newspaper libel was based on the publication of an article shown by defendant to have been handed to him for publication by plaintiff himself, but which was illegibly written, and was not published as written; there was no showing that it had been intentionally altered nor any plain proof of negligence; and it was also shown by defendant that plaintiff had said he would be satisfied if it could be corrected and put in the weekly edition. Plaintiff did not deny this and was not examined as to the article, and there was no testimony indicating what words were changed. Held, that the article could not go to the jury as a basis of damages.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 456. The fact that a landlady has had trouble with a tenant about rent, and said to her, "You will be sorry"; and the further fact that a woman who lived with and worked for the landlady afterwards spoke slanderous words of the tenant in the presence and hearing of the landlady,—will not justify a jury in finding that the landlady was the author or instigator of the slanderous words so spoken, it appearing that she neither said nor did anything militating against the tenant, and the only evidence of her having heard the slanderous words, which she denies, being the inference drawn from her presence within hearing distance.—Schuyler v. Anderson, 91 Mich. 635.

¶ 457. The testimony of a third person, the only one within hearing, that he did not hear defendant utter the alleged slanderous words is not conclusive that there was no publication, if the evidence shows that he was in a position to have heard them; the jury being at liberty, his denial to the contrary notwithstanding, to find that he did hear the words.—Loranger v. Loranger, 115 Mich. 681.

¶ 458. Where a publication in a newspaper refers to a class of persons engaged in the trading stamp business, and calls them "the get-rich-quick industry," "the trading stamp fake," "the trading stamp blood suckers," without referring to all of them engaged in that business, a case of libel of one particular concern engaged in that business is not sustained.—Watson v. Detroit Journal Co., 143 Mich. 430.

¶ 459. Where in an action for libel it appears that plaintiff was generally known as J. D. F., having adopted the middle initial to distinguish him from a person known as J. F. (the name given in the alleged libel), and where there is no evidence that plaintiff was the person referred to in said article, the verdict should be for defendant.—Finnegan v. Detroit Free Press Co., 78 Mich. 659.

§ 101. ——To justify charges or prove falsity.

¶ 460. General reputation is sufficient to justify the charge that a lawyer is a pettifogging shyster.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 461. A charge of bad moral character, if made generally, is not fully justified by proof of profanity and Sabbath-breaking.—Wieman v. Mabee, 45 Mich. 484.

¶ 462. Evidence that one accused of murder was in the neighborhood where it took place at the time it was committed, and was in such a situation that he might have committed it, is not sufficient to show that he did it, if no stronger motive is alleged than that he wished to hide an unlawful intimacy indulged before his marriage and to escape liability on a note.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 463. In justifying the publication of a statement that a village marshal had knowledge that "gambling was being carried on before his very eyes, and yet he made not the least effort to suppress it," it is not necessary to prove that the officer was in the room, and saw the persons gambling there, but the expression "carried on before his very eyes" is fully met by proof that he knew that gambling was going on in a certain room in the building, while he was in the building, and that he knew where the room was located.—Hay v. Reid, 85 Mich. 296.

¶ 464. Proof that a village marshal was present in a saloon in the village, and saw persons playing cards there for a wager of five cents, or any other sum, or for the wager that the party losing should pay for the drinks or cigars of the parties playing, and that he took no steps to suppress it, justifies the publication of the charge afterwards made that gambling was being carried on before the marshal's very eyes, and yet he made no effort to suppress it.—Hay v. Reid, 85 Mich. 296.

¶ 465. Evidence that a member of the legislature keeps for the entertainment of members "open house" where they may partake of light refreshments, wine, beer, liquors and cigars, does not establish a case of bribery charged in an alleged libelous article.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 466. A newspaper, the circulation of which was limited to subscribers, each of whom received all issues, published an article stating that a certain named person, giving the number and street where he resided, had been arrested for larceny. Plaintiff resided at the place designated, but another person bearing the same name had been arrested for the offense mentioned. In the next issue but one of the paper appeared a correction in so far as the residence was concerned. Six days later the publisher received a notice from plaintiff's attorney that he had been retained by him to bring a suit for libel in publishing the article. On the same day an article was published in the newspaper, in which it was stated that the residence of the alleged thief was erroneously given in the article complained of, and that in the house designated lived a party of the same name, who was a thoroughly honest man, and to whom, on account of the error, an unfortunate injury had been done. Held, that it was not conclusively shown by the facts stated that the publication was made for justifiable ends, and that the article was made to point to plaintiff through a mistake.—Davis v. Marxhausen, 103 Mich. 315.

¶ 467. In an action for libel charging crime, justification is established by a preponderance of evidence and need not be proved beyond a reasonable doubt.—Owen v. Dewey, 107 Mich. 67.

¶ 468. In an action for the utterance of slanderous words imputing the commission of a felony, justification may be established by a preponderance of evidence.—Finley v. Widner, 112 Mich. 230.

¶ 469. Justification for the utterance of slanderous words imputing the commission of a felony may be established by a preponderance of the evidence only: it being unnecessary to produce a record of conviction, or to show plaintiff's guilt by evidence sufficient to convict him if he were on trial for the crime charged.—Finley v. Widner, 112 Mich. 230.

¶ 469a. The defense of justification is not established, in an action for slander in calling one a thief, by proof of cheating, trickery, and fraud, not amounting to actual theft.—Youngs v. Adams, 113 Mich. 199.

¶ 470. A village attorney who had applied for a mandamus against the village authorities to compel the payment of a claim for the payment of which they had made themselves personally liable and then claimed pay for services cannot be held as matter of law to have committed perjury where he had sworn to the bill as a just and legal one, since if he believed it was he did not wilfully swear falsely.—Smith v. Hubbell, 142 Mich. 637.

¶ 471. Where the publication of a slander was made in answer to questions asked by one who had the right to ask and be answered, and therefore qualifiedly privileged, the defendant is protected unless the charge was false and he knew it to be false; and evidence that the charge was repeated does not tend to prove the fact that it was false, neither does it prove that he knew it to be false.—Schultz v. Guldenstein, 144 Mich. 636.

¶ 472. Where a suit for libel is based on the ground that defendant imputed the commission of crime to plaintiff, the defendant in order to establish the defense of truth is not required to prove the commission of said crime beyond a reasonable doubt, but only by the preponderance of the evidence. Madill v. Currie, 168 Mich. 546.

§ 102. ——To establish malice.

Malice and intent in general, see ante § 49.
Admissibility of evidence to show malice, see ante § 79 et seq.
Burden of proof as to malice or intent, see ante § 65.

¶ 473. In an action against the general manager of a commercial agency for an alleged libelous communication, the facts that a notice from a local representative, stating that a chattel mortgage of $10,000 had been filed against the stock of goods of plaintiffs in favor of C. N. Bank, Detroit, and expressed the opinion that it was the forerunner of failure, and the further fact that the chief clerk of such manager, acting according to his custom and authority, opened the letter containing such notice, and, although he knew that there was no such bank in Detroit, published the contents of such notice to the patrons of the agency, advising prompt action on the part of creditors, were circumstances from which the jury might infer malice.—Polasky v. Minchener, 81 Mich. 280.

¶ 474. The mere fact that defendant cashier, for the purpose of determining whether the suspected employee was responsible for the shortages, placed marked coins where the latter might take them if he were so disposed, was not sufficient to establish express malice in an action for slander in charging theft of such coins.—Livingston v. Bradford, 115 Mich. 140.

¶ 475. Malice on the part of a defendant in a libel suit is sufficiently shown by evidence that a defendant did not act merely as a disinterested and voluntary amanuensis for two other defendants, but that he was actuated by a desire to assist such other defendants and procure the discharge from employment of the person libeled, that the defendant knew that the other defendants were not acting in the interest of good morals but were trying to "get even" with the person libeled, especially as the defendant testified that he knew nothing about the character of the person libeled until the charges were made by the other defendants, but pleaded that the charges were matters of common report and were true.—McGee v. Baumgartner, 121 Mich. 287.

¶ 476. Remarks by a wife in the absence of her husband derogatory of the character of a clergyman, and the fact that she and her husband did not attend church during plaintiff's pastorate, did not show malice on the part of her husband, in an action for a libel consisting of a letter derogatory of the character of such clergyman.—Konkle v. Haven, 140 Mich. 472.

¶ 477. In an action for slander for using words accusing plaintiff of having burned defendant's house, evidence held insufficient to prove any actual malice of defendant in uttering the words or in pleading justification.—Rabior v. Kelley, 194 Mich. 107.

§ 103. Questions of law and fact.

See also post ¶ 544.
Words imputing crime actionable per se, see also ante § 3.
General law as to province of court and jury, see Trial, VI.
Jury questions on damages and effect of retraction, see Damages §§ 374, 375.

¶ 478. It seems that Const. Art. VI, § 25, providing that the jury in all prosecutions for libel shall have the right to determine the law and the fact, applies to criminal cases only. At any rate, such provision does not deprive the trial judge of the power to rule upon the admission of evidence in libel cases.—Thibault v. Sessions, 101 Mich. 279.

¶ 479. A jury cannot be permitted to say that an article libelous per se is not libelous, and in the case of the publication of such an article, the only questions to be submitted are the truth or falsity of the statements, and the question of damages.—Brewer v. Chase, 121 Mich. 526.

¶ 480. In a libel suit the truth of the innuendoes, the colloquium, and of the induce-

ment or extrinsic matter, is a question for the jury.—Orband v. Kalamazoo Tel. Co., 170 Mich. 387.

§ 104. ——Publication and responsibility therefor.

Persons responsible generally, see ante § 2.

¶ 481. One Smoke, a dealer in pianos in Michigan, wrote a letter to defendant Proctor, the agent of defendant piano manufacturing company located at Chicago, stating that plaintiffs had tampered with the pianos manufactured by defendant for the purpose of giving them a bad reputation in his community. Defendant Proctor and defendant company's president solicited Smoke to put his letter in the form of an affidavit and Proctor actively co-operated with Smoke in getting up the same. Plain white envelopes were sent some time thereafter from Chicago to various musical dealers in Michigan containing copies of said affidavit. Defendant's president admitted that said affidavit was placed in the hands of one of defendant's officers to be used as the latter saw fit. Held, there was sufficient evidence of publication and circulation to require the submission of the question to the jury.—Grinnell v. Cable-Nelson Piano Co., 169 Mich. 183.

¶ 482. On evidence that a libelous newspaper publication was based in part on information which only the defendants possessed, that they had paid for advertising but none was published in the paper unless it was the libelous article, that corresponding stories were circulated by defendants or their servants, and that the article was written in a communication from some undisclosed person and by none of the reporters, plaintiff was entitled to have the alleged libelous article placed before the jury; and, under proper instructions, it was a question of fact for the jury whether its publication was within defendants' knowledge, or whether they were responsible for it.—Haney Mfg. Co. v. Perkins, 78 Mich. 1.

¶ 483. In an action against the head of a commercial agency and against a general district manager thereof, for an alleged libelous communication, the testimony was sufficient to be submitted to the jury upon the question whether such manager published, or caused to be published, the publication complained of, where it appeared that such libelous communication came to the office of such manager in an envelope addressed to him, was opened by his chief clerk, and by him published, and that it was the business of such chief clerk to open such letters addressed to such manager, and to incorporate in the notification sheets the items of news without consulting the manager, unless there was something exceptional in connection with the matter.—Pollasky v. Minchener, 81 Mich. 280.

¶ 484. In an action for libel against a publishing company and its general manager, who was also a stockholder and director, and who allowed the libelous article to be published after reading it and made no effort to see that a retraction demanded by plaintiff was published, held that the manager's connection with the company was such that the court was justified in submitting his liability to the jury.—Cyrowski v. Polish-American Pub. Co., 196 Mich. 648.

§ 105. ——Construction, meaning and effect of words used.

See also ante ¶ 329.

Construction and meaning of words used generally, see ante § 24 et seq.

¶ 485. Whether ambiguous words in a letter imply a charge of embezzlement or larceny is a question for the jury in an action for libel.—Edwards v. Chandler, 14 Mich. 471.

¶ 486. A letter contained the following language concerning plaintiff: "It is wondered at how he can live in more than ordinary style, as he does, while having merely the honorable receipts of his agency to live upon." The letter had previously accused him of vexatious acts, and of charging unusual rates. Held, that this did not necessarily imply that he had embezzled or stolen, but was ambiguous, and was properly submitted to the jury.—Edwards v. Chandler, 14 Mich. 471.

¶ 487. Defendant was sued for publishing of a clergyman: "Then there was that Iowa Beecher business of his which beat him out of a station at Grand Lake." This was set forth in the declaration as intended to charge adultery, and a general justification was put in. Held, that it was error for the court to leave such a charge to the jury as one that they might regard as not involving an accusation of adultery.—Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¶ 488. Where an action of libel is based on a newspaper article casting ridicule upon plaintiff, and there is evidence tending to show that it arose out of mutual banter, and that defendant told plaintiff he was going to publish it, and that plaintiff assented, it is for the jury to find under proper instructions whether the article is really libelous, even though it would be if unexplained.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 489. If there is any doubt as to the meaning of the publication, so that extrinsic evidence is needed to determine its character as actionable or otherwise, it is a question for the jury, under proper instructions.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

¶ 490. Where the language of an alleged libel is ambiguous and capable of being understood in an innocent and harmless, as well as in an injurious, sense, the true interpreta-

tion of it is for the jury. So held where an article charging a supervisor with receiving unlawful compensation for his services was ambiguous as to whether the services for which the extra compensation was charged to have been received were done in the board of supervisors or were committee work.—Ewing v. Ainger, 96 Mich. 587.

¶ 491. The question whether an intimation that a merchant is in failing circumstances or unworthy of credit is contained in the words, "In time of peace, prepare for war," used in connection with a true statement, sent to firms from whom the merchant is in the habit of purchasing goods on credit, that said merchant has conveyed certain real estate to a woman bearing the same surname for $5,000, is for the jury.—Simons v. Burnham, 102 Mich. 189.

¶ 492. It is a question for the jury whether or not the defendant in a slander suit intended to charge the plaintiff with want of chastity by a statement that if she had been a decent and respectable woman the defendant (who was her father-in-law) would have put her (and her husband) up on a farm, but that she was not decent and respectable.—Derham v. Derham, 123 Mich. 451.

¶ 493. Whether publications will bear the construction placed upon them by the plaintiff in his declaration in a libel suit is a question for the jury.—Orband v. Kalamazoo Tel. Co., 170 Mich. 387.

¶ 494. Where the meaning of alleged slanderous words was uncertain, held that the question was properly submitted to the jury.—Maciejewski v. Rychart, 192 Mich. 530.

§ 106. ——Application of charges to plaintiff.

Allegations applying charges to plaintiff, see ante § 58.

Evidence to show application of charges to plaintiff, see ante § 73.

¶ 495. The publication complained of charged that a certain franchise was signed by the members of the township board and by plaintiff as highway commissioner; it stated generally that "boodle was used," and charged the "township board" with granting the franchise. Held, that whether the language used applied to plaintiff as well as to the township board was for the jury.—Boehmer v. Detroit Free Press Co., 94 Mich. 7.

§ 107. ——Correctness of translation of words.

¶ 496. Where slanderous words were spoken in a foreign language, held that the question whether the English translation of them was corect was properly submitted to the jury.—Maciejewski v. Rychart, 192 Mich. 530.

§ 108. ——Privilege.

Instructions as to privilege, see post § 118.

¶ 497. Where the occasion and attending circumstances are not in dispute the question of privilege in uttering slanderous words is for the court.—Bolton v. Walker, 197 Mich. 699.

¶ 498. It is for the court to determine whether the subject-matter of a libel, and its author's interest in and relations to it, make it a privileged communication; but it is for the jury to decide as to his good faith, belief in the statement and actual malice.—Bacon v. Michigan Cent. R. Co., 55 Mich. 224.

¶ 499. It is a law question whether words in a veto message by a mayor to the council are so pertinent as to be entitled to privilege.—Trebilcock v. Anderson, 117 Mich. 39.

¶ 500. The question whether a writing is one within a qualified privilege is for the court.—Brewer v. Chase, 121 Mich. 526.

¶ 501. Whether defendant's statement imputing a charge of larceny against plaintiff were for the purpose of making an investigation which he had a right to make, or of imparting information to one who had a right to know, and were therefore privileged, is a question for the jury, under proper instructions.—Hewitt v. Morley, 111 Mich. 187.

§ 109. ——Justification and truth of charges.

See also ante § 103.

Instructions as to justification, see post § 119.

¶ 502. It is error to withdraw the subject of justification from the jury in an action for libel where many witnesses give testimony tending to prove the truth of the charges against plaintiff, since the subject of justification and partial justification should be submitted.—Kovacs v. Mayoras, 175 Mich. 582.

¶ 503. In an action of libel by a minister who was of foreign birth and had not become a naturalized citizen, and had published an article criticizing the government in its stand on the European War, and had been the leader in the circulation of a petition to the President of the United States protesting against the sale of ammunition and the conduct of the war in general, against a newspaper company which had charged him with the publication of seditious articles, held that it was a question for the jury whether the libelous language was justifiable.—Van Lonkhuyzen v. Daily News Co., 195 Mich. 283.

¶ 504. In an action for libel for charging the plaintiff while a candidate for public office with having in his official capacity as representative championed measures opposed to the moral interests of the community, where the undisputed evidence showed that

such candidate had introduced or at least approved and supported measures calculated to change the liquor laws by permitting sales on legal holidays and election days and by repealing the act prohibiting screens in saloons; the question as to whether plaintiff's support of these measures was opposed to the moral interests of the community as a matter of fact, or in other words, the truth of the charge, is one for the jury.—Elkhoff v. Gilbert, 124 Mich. 353.

§ 110. ——Retraction and sufficiency thereof.

Evidence as to retraction, see ante § 86.
Reasonableness of retraction to mitigate damages, as court or jury question, see Damages § 375.

¶ 505. Where under section 10425, Comp. L. 1897, a defendant newspaper retracts a libelous publication, it is for the jury to say whether the retraction was adequately made as to space and position in the paper so as to relieve defendant of exemplary damages. ——Lawrence v. Herald Pub. Co., 158 Mich. 459.

¶ 506. In an action for libel it is for the jury to say from the evidence what was the effect of a second publication subsequent to the libel complained of, modifying it and explaining that there was no criminality.—McAllister v. Detroit Free Press Co., 95 Mich. 164.

§ 111. ——Malice and intent.

See also ante ¶¶ 343, 498, 506.
Instructions as to malice or intent, see post § 120.

¶ 507. In an action for libel where the publication is not privileged, the question of malice is for the jury.—Smedley v. Soule, 125 Mich. 192.

¶ 508. Where the evidence in an action for slander was sufficient to warrant a finding that the defendant had not observed due caution, and had assisted considerably in spreading the injurious report, it was held not error to submit to the jury the question whether there was actual malice in the utterance, even though no actual design to injure was shown.—Burt v. McBain, 29 Mich. 260.

¶ 509. The reasonableness of a publisher's investigations into the truth of the charges against plaintiff published by him and alleged to be libelous, was for the jury, under all the circumstances, from which they were to deduce the fact whether the publication thereof was made in good faith, and with an honest purpose to enlighten the public upon the character and fitness of the plaintiff for the position he sought.—Bronson v. Bruce, 59 Mich. 467.

¶ 510. The words "thief," "rogue" and "robber" are not actionable unless the party using them intended to impute crime; such intention will be presumed if not explained, but defendant may show as evidence of want of deliberation and malice that the words were spoken in the heat of passion and under strong provocation, and this is a question for the jury under proper instructions.—Ritchie v. Stenius, 73 Mich. 563.

¶ 511. Where it appears in an action for slander of title based upon a statement that the premises could not be sublet for saloon purposes, that the lease authorized the plaintiff to sublet for business purposes, and that he himself had, to the lessor's knowledge, sold liquors while occupying under such lease, the question of malice is for the jury.—Harrison v. Howe, 109 Mich. 476.

¶ 512. A communication made in good faith to a public officer, in relation to matters within the scope of his duties, is privileged, in the absence of express malice. The question whether the occasion was privileged is for the court; but, if the circumstances surrounding the publication are such that an inference of malice may be drawn from them, the question of malice is one for the jury.—Garn v. Lockard, 108 Mich. 196.

¶ 513. Defendants addressed a petition to a police justice complaining that plaintiff was an obnoxious and peace disturbing neighbor and was quarrelsome and a general nuisance and asked that he be requested to move. They further gave publicity to the petition by circulating it around the neighborhood and publishing it in the daily press. Held, the question of excess of privilege and of malice were for the jury.—Flynn v. Boglarsky, 164 Mich. 513.

¶ 514. In an action for libel and slander it appeared that plaintiff had been in defendant's employ as a servant and that she had been discharged. Defendant met and informed a prospective employer of plaintiff's shortcomings but the employer accepted her. Defendant thereafter wrote a letter to such employer further expressing herself as to plaintiff's habits. As a result plaintiff was discharged. Held, that the question of defendant's malice should have been submitted to the jury.—Carroll v. Owen, 178 Mich. 551.

§ 112. ——Extent of injury or damage.

See also ante ¶ 479.

¶ 515. The circulation of vile, defamatory or slanderous language concerning another, and especially concerning a woman's chastity, is not excused by a protest at the time of disbelief, or by a showing that those who had heard the slander did not believe it to be true; it is actionable, and the question of the extent of the responsibility is for the jury, and not to be solved by any presumption of harmlessness.—Burt v. McBain, 29 Mich. 260.

§ 113. ——Influence or financial standing of parties.

Evidence of financial or business standing of parties, see ante § 97.

¶ 516. In the absence of evidence of the reputed wealth of the defendant in an action for slander, that question should not be submitted to the jury.—McCloy v. Vaughan, 185 Mich. 189.

§ 114. ——Directing verdict.

General law as to directing verdict, see Directing Verdict.

¶ 517. Where in a "discharge list" sent by one division superintendent of a railroad company to another for information, the reason given for the discharge of an employee was "stealing," and it appeared that he was turned off because he had taken a good coat of a passenger from a train on which he was also riding, and left his own, much worn, in its place, and that on investigation he explained that he did it by mistake while hurriedly leaving the cars at his station, that the investigation was incomplete and prejudiced, there was evidence tending to show express malice on the company's part, and it was error to direct a verdict in its favor.—Bacon v. Michigan Cent. R. Co., 66 Mich. 166.

¶ 518. In an action of libel for a publication of a newspaper interview given by defendant to a reporter and not privileged, it is error to direct a verdict for defendant where plaintiff's evidence tends to show that defendant authorized the publication and also to show express malice on defendant's part in so doing.—Wheaton v. Beecher, 66 Mich. 307.

¶ 519. Where the article published by defendant describing the arrest of plaintiff was confessedly untrue in several particulars, which tended, in the connection used, to convey the impression that plaintiff was guilty of safe breaking and felony the publication was not privileged, and the case should have been submitted to the jury.—McAllister v. Detroit Free Press Co., 76 Mich. 338.

¶ 520. A newspaper article which, construed most strongly, meant only that a certain prisoner was willing to part with a gold watch to obtain five dollars to pay his fine, and that plaintiff, who was the jailer, took it to enable him to do so, and that it developed that the watch was stolen, is not slanderous and a verdict should have been directed for the defendant.—Steyskal v. Detroit Journal Co., 119 Mich. 246.

¶ 521. In a slander suit, proof of words: "You took my money and went to Owosso, and swore to a God damn lie, and I can prove it, and damn you, you are getting ready to swear to a lie again," taken together with testimony that an action was tried at the place named, where the parties in question were witnesses upon opposite sides and that shortly thereafter such accusation was made, was sufficient to have the case go to the jury on the question as to whether the talk referred to the judicial proceeding testified to.—Dell v. McBride, 133 Mich. 649.

¶ 522. The court should have directed a verdict in favor of a wife who was made codefendant with her husband, in an action for a libel consisting of a letter defamatory of plaintiff, and purporting to have been signed by both defendants, where there was no evidence that her signature was placed upon such letter by her, or afterwards received her sanction.—Konkle v. Haven, 140 Mich. 472.

¶ 523. A plaintiff sued defendant for slander for words made actionable per se by Comp. L., § 10401. Held, it was error for the trial court to direct a verdict for plaintiff and assess the damages at six cents, since the question of damages was for the jury, and that judgment would be reversed at the instance of the plaintiff.—Richter v. Stolze, 158 Mich. 594.

¶ 524. Where a privilege in uttering slanderous words is found by the court to be absolute a verdict should be directed for the defendant.—Bolton v. Walker, 197 Mich, 699.

§ 115. Instructions.

Instructions on damages, see Damages § 400.
Necessity of conformity of instructions to issues and evidence, see also Instructions, IV.
Instructions as to consideration of evidence bearing on acts of plaintiff on reading libel, see ante ¶ 435.
General law of instructions, see Instructions.

¶ 525. An instruction, in a libel suit, that an article is libelous per se, followed by a series of requested instructions, covering nearly every charge contained in the article, and stating that the jury is to consider the whole article together, and if it does not believe that an ordinary person reading the same would fairly understand that the defendant intended to charge that the plaintiff had been guilty of crime, then the plaintiff could not recover, is erroneous as permitting the jury to find that the article was not libelous, contrary to the first portion of the charge.—Brewer v. Chase, 121 Mich. 526.

¶ 526. In slander for calling plaintiff a thief it is not error to refuse a charge that makes the slander depend entirely upon defendant's intention, and that in effect says vituperation is not slander when provoked, though it transcends the bounds of truth and propriety.—Ellis v. Whitehead, 95 Mich. 105.

¶ 527. In an action for libel for publishing words charging plaintiff with theft, an instruction that the burden is on plaintiff to

prove the falsity of the words is erroneous.—Schattler v. Daily Herald Co., 162 Mich. 115.

§ 116. ——Construction, meaning and application of words used.

Construction and application of words generally, see ante § 24 et seq.
Construction of publication as a whole, see also ante ¶ 525.

¶ 528. Where a publication is plainly libelous upon its face, or manifestly wanting in defamatory meaning, the court should so instruct the jury.—Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425.

¶ 529. Where the libel complained of does not charge specific facts, but makes the general charge that plaintiff is corrupt and unworthy of confidence, an instruction that proof of one part of the charge cannot deprive plaintiff of his right to damages for the part not shown to be true is properly refused.—Wheaton v. Beecher, 79 Mich. 443.

¶ 530. A statement contained in an article charging a village marshal with neglect of his official duty generally, and particularly in failing to suppress gambling in the village, that "he was called to the place from the bar and gamblers' table, and nothing better could have been expected of him," is held to mean that the officer was a drinking man and a gambler before he was appointed marshal, and can have no other interpretation, and the court should so have instructed the jury instead of leaving it to them to determine the meaning.—Hay v. Reid, 85 Mich. 296.

¶ 531. The charge of the court that certain statements in the various publications declared upon, and which are set forth in the opinion, are not libelous per se, is sustained.—Hanaw v. Jackson Patriot Co., 98 Mich. 506.

¶ 532. In slander for calling plaintiff a thief requests to the effect that if the language was used in relation to circumstances which could not or did not constitute larceny, and was so understood by all its hearers, no slander was proved, were properly refused where the substance was correctly given.—Ellis v. Whitehead, 95 Mich. 105.

¶ 533. In an action for libel in imputing to public officers a purpose to "steal and rob" the public by a wasteful appropriation for private gain, the charge on the meaning to be given the article as published should have explained that the sense was to be taken from it as a whole and that the ordinary and natural meaning of the words in the connection in which they were used should be taken; and a charge that the "ordinary sense" of the words should be taken is misleading in that it might induce the jury to believe that "steal and rob" were used in their ordinary sense.—Randall v. Evening News Ass'n, 101 Mich. 561.

¶ 534. The words "You broke in there and stole some goods the other day, out of that house," are actionable per se and circumstances which might give them another meaning would not justify the court in charging that they were not actionable per se where such circumstances were not known to the persons in whose presence the words were spoken.—Hinchman v. Knight, 132 Mich. 532.

¶ 535. In an action of libel where under the evidence the article complained of clearly refers to plaintiff, describing him both by name and residence, it is error to instruct the jury that if from the evidence they believe another person of the same name was libeled, there can be no recovery.—Davis v. Marxhausen, 86 Mich. 281.

§ 117. ——Publication and responsibility therefor.

¶ 536. Where the evidence in an action for slander does not show the use of the substance of the language alleged in the declaration, a charge requested by the defendant to that effect should be given.—McCloy v. Vaughan, 185 Mich. 189.

¶ 537. Where a portion of alleged slanderous words are not proven the jury should be so instructed.—McCloy v. Vaughan, 185 Mich. 189.

¶ 538. In action for slander where charges of theft were instituted by others on which defendant acted, a request for an instruction concerning defendant's nonresponsibility for acts of others, not his agents was wrongly refused.—Moore v. Thompson, 92 Mich. 498.

¶ 539. Where the statement complained of was made by defendant to a newspaper reporter, an instruction that defendant had nothing to do with reducing it to writing or with its publication is not objectionable in case the main issue—whether defendant was responsible for the publication—was presented by the court to the jury with the instruction that they were to pass on all the testimony; the jury could not have understood that the word "publication" meant more than the actual printing in the paper.—Wheaton v. Beecher, 79 Mich. 443.

¶ 540. Where a newspaper is sued for libel because of its reporter's mistake in reporting the contents of a legal document, it is error to charge that defendant's liability is to be determined by the care which reporters usually take, since reporters, like others, must use such degree of care as is reasonably certain to prevent mistake.—Park v. Detroit Free Press Co., 72 Mich. 560.

¶ 541. Where an alleged libelous letter written to a minister is read by him to his congregation from the pulpit, the author of the letter is not responsible for such publication and no damages can be recovered for such, and the defendant is entitled to have such an instruction given to the jury.—Konkle v. Haven, 144 Mich. 667.

§ 118. ——Privilege.

Province of court and jury, see ante § 108.

¶ 542. An instruction in a libel case brought by a candidate for public office, defining actual and implied malice, was not equivalent to stating that the case was tried precisely the same as if no privileged occasion existed; where the court had previously instructed the jury that the occasion was privileged, but that the publication, if untrue, was not.—Austin v. Hyndman, 119 Mich. 615.

¶ 543. Defendant in a libel suit was appointed chairman of the committee by a board of supervisors to investigate the accounts of plaintiff as county treasurer, and on his own responsibility published a report of the findings of the committee in a newspaper. Held, the trial court was in error in instructing the jury that the defendant could not be privileged in imputing to the plaintiff the commission of a crime.—Madill v. Currie, 168 Mich. 546.

¶ 544. In case of a quasi or qualified privilege, the questions of slander or no slander, malice or no malice, are usually matters of fact for the jury, but it still remains for the court to instruct the jury as to the nature and legal effect of the qualified privilege and its bearing upon the consideration of the facts in issue.—Bolton v. Walker, 197 Mich. 699.

§ 119. ——Justification or truth of charges.

Province of court and jury, see ante § 109.
Instruction as to burden of proving falsity, see also ante ¶ 527.

¶ 545. Where defendant in an action for slander consisting, as alleged, in charging plaintiff with having committed the crime of perjury, proves the truth of the charge to the satisfaction of the jury, plaintiff is not prejudiced by a statement in the charge that defendant admits speaking the words charged in the declaration, it appearing that the words admitted by him to have been spoken were not actionable per se.—McNaughton v. Quay, 102 Mich. 142.

¶ 546. A plaintiff in a libel suit for the publication of an article containing several libelous charges is entitled to an instruction to the jury that the effect of defendant's justifying as to a portion of the charges and not as to the whole is only to mitigate or reduce the damages which plaintiff would otherwise be entitled to recover.—Hay v. Reid, 85 Mich. 296.

¶ 547. In an action for slander brought by a former servant charged with stealing her employer's goods, it is proper to charge that the verdict should be for defendant if it is found that he had no malice against plaintiff and that he had just cause or excuse for making the accusation, and made the charges simply to recover what he supposed plaintiff had taken.—Moore v. Thompson, 92 Mich. 498.

¶ 548. The publication of an article imputing the commission of a crime is not justified by the existence of reasonable grounds for a belief in the guilt of the person accused; and therefore, in an action for libel founded upon such publication, a request for an instruction that if, from such facts stated in the article as were true, there was reasonable ground to suspect the plaintiff of being implicated in the offense charged, the jury, in determining the damages, can only consider such portions of the article as they may find to be untrue to the extent that the statements made therein would tend to confirm or strengthen such suspicion of guilt, is properly refused.—Long v. Tribune Printing Co., 107 Mich. 207.

¶ 549. In an action by a horse jockey for charging him with theft in retaining the winnings of defendant's horse, evidence of plaintiff's general reputation for dishonesty in failing to account to the owners for the winnings of horses driven by him is admissible as bearing on the damages; but it is not competent in support of a plea of justification, and it is error to refuse so to instruct the jury.—Finley v. Widner, 112 Mich. 230.

¶ 550. Refusal to instruct that if the plea of justification was not proved the jury might take proved common rumor of the truth of the charge into consideration as showing a reputation already disparaged, was not justified by the fact that plaintiff claimed defendant was himself responsible for some of the rumors; since the proposed instruction was proper in the abstract, and might have been qualified, if desired by plaintiff, so as to exclude rumors started by defendant himself.—Fowler v. Fowler, 113 Mich. 575.

¶ 551. An instruction, in a suit for libel, that the plaintiff cannot recover if the defendant has fairly established the truth of the publication sued upon substantially as the publication is set forth in the plaintiff's declaration, operates so that the jury may conclude that it is unnecessary for the defendant to show that the plaintiff has been guilty of the acts charged him, and that it is sufficient to find that he has been accused of them, and this would not be proof of the substance of the charge, and would not constitute a justification.—Brewer v. Chase, 121 Mich. 526.

¶ 552. In libel by a sheriff, for charging him with intentional neglect of duty in failing to prevent playing of a public baseball game on Sunday, it is error to instruct the jury that the mere fact that a game of ball was to be played at a certain park upon Sunday, does not impose upon the sheriff the duty of going there to stop the game.—Scougale v. Sweet, 124 Mich. 311.

¶ 553. In an action for libel based upon the publication in a newspaper consisting of a criticism of a village attorney for his action in trying to compel the village authorities to pay a certain claim for which the members of the council had made themselves personally liable, the defendant is entitled to have a requested instruction to the effect that the councilmen were personally liable on the claim, and for that reason the allowance of the claim was invalid and the attempt to bind the village for the services of the attorney in the proceedings to compel the payment thereof was futile.—Smith v. Hubbell, 142 Mich. 637.

¶ 554. Where a city attorney had sued a newspaper for a libelous charge that he put in an improper claim for services, a requested charge for defendant, that it was plaintiff's duty as attorney for the village when an attempt was made to enforce the payment of a certain claim presented to the council to make a full investigation and if this would disclose to plaintiff that the bill was invalid it was his duty to so inform the council, is held to have been substantially covered by a charge given, that if plaintiff knew or if an investigation would have disclosed that the claim was invalid his services in attempting to enforce payment would not constitute a legal charge against the village.—Smith v. Hubbell, 142 Mich. 637.

¶ 555. In an action for libel for the printing of matter reflecting on plaintiff's conduct as village attorney, it was attempted to show that the article charged perjury in making out an affidavit of services to the village. The only possible view that would sustain the theory of perjury was that plaintiff falsely stated that the services were performed for the village. Held, although the instruction complained of did not bring out this point, but was ambiguous, it cannot be complained of if cured by a later instruction.—Smith v. Hubbell, 151 Mich. 59.

¶ 556. An erroneous statement in the charge of the trial court in a libel suit to the effect that defendant in establishing the defense of truth must prove beyond a reasonable doubt the commission by the plaintiff of the crime imputed to him, is not cured by a correct statement of the rule in a later portion of the charge requiring defendant to make such proof by a preponderance of the evidence.—Madill v. Currie, 168 Mich. 546.

§ 120. ——Malice, motive or intent.

See also ante ¶ 351.

Instruction defining actual and implied malice, see also ante ¶ 542.

¶ 557. Defendant to mitigate damages testified that he believed the facts stated in the libelous article to be true, and that he had heard the same charges made by others. Held, that the court's failure to instruct the jury that defendant's testimony should be considered in determining whether he was malicious and so liable to exemplary damages was not prejudicial error where the publication showed malice upon its face, and where the jury was instructed to consider the mitigating circumstances.—Orth v. Featherly, 87 Mich. 315.

¶ 558. In case for slander, it is proper to charge that if defendant communicated to others a criminal charge against plaintiff, and in so doing acted wantonly and recklessly, his conduct might be considered as bearing upon the question of malice.—Moore v. Thompson, 92 Mich. 498.

¶ 559. It is error to charge that there is no evidence from which improper motives could be inferred, where the only evidence is that a retraction was made stating that the address which identified plaintiff with the publication was erroneous.—Davis v. Marxhausen, 103 Mich. 315.

¶ 560. While How. St., § 7776 providing that in actions for slander or libel, notice in justification that the statements were true, though not maintained by the evidence, shall not be considered as proof of malice, does not forbid the use of such notice as evidence of malice, an instruction under which a finding of malice may be based on such notice alone is erroneous.—Jastrzembski v. Marxhausen, 120 Mich. 677.

¶ 561. Where plaintiff in an action for slander requested an instruction that malice is to be inferred from slanderous words, and the court gave such instruction, and added that good faith was no defense to the action, plaintiff's contention that the modification of his request was error, is without merit.—Hammond v. Porter, 150 Mich. 328.

¶ 562. In an action of slander an instruction restricting the jury to the consideration of the question whether defendant uttered the words in good faith with good reason to believe them to be true at the time he uttered them, held to be in fact a correct statement as to what constitutes malice.—Rabior v. Kelley, 194 Mich. 107.

¶ 563. In an action for slander an instruction advising the jury that if they found the defendant guilty of slander they must award plaintiff actual damages, that malice of defendant might increase and augment natural damages recoverable, that if, when he filed notice of justification, defendant had not reason for hope or expectation of proving the truth of it, they might consider that as evidence tending to show malice, held not open to the objection that it told the jury that they might consider the unsustained notice as evidence of malice.—Rabior v. Kelley, 194 Mich. 107.

¶ 564. In an action for slander for speaking words charging plaintiff with having set

fire to defendant's house, held that it was not reversible error to refuse to charge the jury that malice means the doing of an act or the secreting of some facts or circumstances which ought to be disclosed and from which it could be reasonably determined that the acts and conduct were not in good faith, where the court, during the course of an argument in which the effect of complaints made by defendant charging plaintiff with the violation of the liquor law as evidence of malice was being presented by counsel to the jury, had instructed the jury that such complaints could not be considered as evidence of malice and a complaint in a criminal case against plaintiff for arson made by the defendant was properly admitted in evidence to show malice.—Rabior v. Kelley, 194 Mich. 107.

§ 121. Verdict and judgment.

Necessity of alleging special damages, see ante § 58.
Directing verdict, see ante § 114.
Amount recovered as limiting amount allowable as costs, see Costs § 56.
Judgment in action for slander as bar to future action, see Former Adjudication ¶ 241.
New trial, see New Trial.
General law as to verdicts and findings, see Verdicts.
Separation of items of injury or damage, see Verdicts.
Authority of jury to order retraction, see Verdicts.

¶ 565. Where a defendant sued for libel is entitled to an instruction that the alleged libelous words, as set forth in some of the counts of the declaration, are not susceptible of the construction alleged in the innuendo, but fails to ask that such instruction be given except by a request which applies equally to all of the counts, and does not assign error upon language in the general charge upon the subject which made it possible for the jury to find defendant guilty upon all of the counts, and where his counsel fails to make the point in his brief that the court erred in using such language, a general verdict of guilty, which is sustainable under the good counts, will not be set aside.—Simons v. Burnham, 102 Mich. 189.

¶ 566. An attorney is not entitled to recover verdict for damages for injuries in his profession on account of a libel where there is no positive evidence of such injury.—Smedley v. Soule, 125 Mich. 192.

¶ 567. A verdict in an action for slander itemizing separately damages for character and damages for suffering, held in compliance with Comp. L. 1897, § 10424, How. 2nd Ed., § 13137.—Maciejewski v. Rychart, 192 Mich. 530.

¶ 568. In an action for libel there is no reason for the jury to specify in the verdict the amount awarded for injury to feeling where they were specifically limited to a verdict for injuries to feelings.—McArthur v. Sault News Printing Co., 148 Mich. 556.

IX. CRIMINAL LIBEL AND SLANDER.

§ 122. In general.

See also ante ¶ 21.
Criminal libel based on words imputing unchastity, see also ante ¶ 46.
Criminal libel and slander, see Comp. L. 1915, § 15573 et seq.

¶ 569. A libel criminal at common law, but not enumerated in Laws 1879, Act No. 192 (How. St., § 9315), which enumerates criminal libels and specifies their punishment, is not punishable.—Glassmire v. Manistee Circuit Judge, 84 Mich. 447.

¶ 570. Prior to the passage of Laws 1879, Act No. 192 (How. St., § 9315), the statutes contained no express provision for the punishment of libel and slander, but they were punishable as misdemeanors under How. St., § 9261, since they were such at common law.—Glassmire v. Circuit Judge of Manistee County, 84 Mich. 447.

¶ 571. It was evidently the intention of the legislature in enacting Laws 1879, Act No. 192 (How. St., § 9315), to exclude from its operation nonenumerated cases of libel and slander known to the common law, namely such cases as where one is held up to contempt and ridicule, and possibly where one may be charged with having a loathsome disease.—Glassmire v. Circuit Judge of Manistee County, 84 Mich. 447.

¶ 572. One who circulates a libel may be guilty of an offense under Comp. L. 1897, § 11762.—Mack v. Sharp, 138 Mich. 448.

¶ 573. In a criminal prosecution for libel, the truth alone, if not published with good motives and for justifiable ends, is not always a complete defense.—Sullings v. Shakespeare, 46 Mich. 408.

¶ 574. It is not libelous to publish of and concerning one who is a druggist: "The above druggist in the city of Detroit refusing to contribute his mite with his fellow merchants for watering Jefferson avenue, I have concluded to water said avenue in front of T.'s store, for the week ending June 27, 1846."—People v. Jerome, 1 Mich. 142.

§ 123. Indictment, information or complaint.

General law as to indictment and information, see Indictment and Information.
Requisites of indictments for libel, see Comp. L. 1915, § 15756.

¶ 575. An indictment for a libel is bad for uncertainty if it contains no prefatory statement that the person libeled is engaged in

the particular business of, and concerning which, the alleged libelous statements were made.—People v. Jerome, 1 Mich. 142.

¶ 576. A complaint for criminal libel is bad for duplicity which sets out three articles as published in consecutive issues of defendant's newspaper, each of which charged a degrading act within the meaning of the statute; to wit, having had an arm broken under dishonorable and disgraceful circumstances, bearing marks of adventure at disreputable places, and that a statement by another, that the libeled person's arm was broken when he was ejected from a house of prostitution, was true.—People v. Jackman, 96 Mich. 269.

¶ 577. A complaint charging defendant with publishing in a newspaper that complainant's arm was broken while being ejected from a house of ill-fame alleges the imputation of a degrading act within the meaning of How. St., § 9315.—People v. Jackman, 96 Mich. 269.

¶ 578. In an information for criminal libel, asserting the truth of a doctor's statement that one's arm was broken while being ejected from a house of ill-fame in setting forth the doctor's explanation as to the cause of defendant's broken arm it is not necessary to give the exact words claimed to have been used by him.—People v. Jackman, 96 Mich. 269.

¶ 579. In information for criminal libel the complaint properly introduces extrinsic matter to explain the character of the charge complained of, where the meaning would otherwise be doubtful.—People v. Jackman, 96 Mich. 269.

¶ 580. In a prosecution for criminal slander for imputing a want of chastity, an averment that the complaining witness was unmarried sufficiently negatives the idea that said witness might have become lawfully pregnant and might have been a recently divorced woman.—People v. Parsons, 163 Mich. 329.

§ 124. Evidence and trial.

Province of judge and jury, see also ante ¶ 478.
Evidence in civil cases, see ante VIII.
Constitutional provisions in respect to truth as defense, see Const. Art. II, § 18.

¶ 581. One prosecuted for criminal libel cannot be allowed to show that the facts complained of as criminally libelous and published on the strength thereof without investigation had long been currently reported and believed in the community, and had been so reported to him.—People v. Jackman, 96 Mich. 269.

¶ 582. Under the Constitution, Art. II, § 18, providing that in all prosecutions for libel the truth may be given in evidence to the jury and that the accused shall be acquitted if it shall appear to the jury that the matter charged as libelous was true and was published with good motives and justifiable ends, a defendant may only show his good faith and that he published the libel complained of for justifiable ends after he has shown its truth.—People v. Talbot, 196 Mich. 520.

LIBERTY to LICENSEES.

Cross-References.

Liberty—
- Of worship, speech and press under the constitution, see Constitutional Law, VII.
- Privilege in libel, see Libel, III.
- Of contract or person under due process clause, see Constitutional Law § 139.
- Actionable restraint, see False Imprisonment.
- Retraint on liberty as justification for assault, see Assault §§ 6, 15 et seq.

Libraries—
- See generally Schools and Education, XII.

Licensees—
- See generally Licenses to Enter; Licenses.
- Measure of duty to licensee on premises, see Highways §§ 239, 240; Buildings § 4 et seq.; Railroads, VIII, B.

LICENSES.

TREATS of public permission to do some act or pursue some trade or occupation which otherwise would be unlawful, of the issuance, transfer and revocation of licenses, and of rights and liabilities dependent on licenses. Licenses for certain specific occupations and trades are treated in specific topics, e. g., Intoxicating Liquors, II; Highways, XIV (motor vehicles); Attorneys § 3; Ferries § 2; Fish and Game § 4 et seq.; Medicine and Surgery; Insurance, I; Shipping. Regulative and licensing power of municipalities is treated in Municipal Corporations, IX, C. Franchises and operating permissions of similar nature are treated in Franchises; Gas; Electricity; Railroads, I; Street Railways, I; Telegraphs and Telephones; Toll Roads; Waters, VI. Permission to enter on another's land is treated in Licenses to Enter.

Analysis.

§ 1. Nature in general.
§ 2. Distinction from tax or other charge.

§ 3. Power to impose or grant.
§ 4. Rates, graduations and prorating.
§ 5. Acts, persons and occupations subject.
§ 6. Issuance and revocation or withdrawal.
§ 7. Rights and liabilities dependent on license or want of license.
§ 8. Refunding or recovery of fees wrongfully collected.

§ 1. Nature in general.

Distinction from tax or other charge, see post § 2.
Power to impose or grant, see post § 3.
Acts, persons and occupations subject, see post § 5.
Nature of licenses granted by municipal corporations for regulation of business, see Municipal Corporations, IX, C.
Permission to enter upon another's land, see License to Enter.
Crime of engaging in occupation, profession or business without license, see Crimes, II; Indictment.
Blue Sky Law as a licensing act, see also Corporations § 353.
Payment of franchise fee as prerequisite to formation of corporation, see Corporations § 6.
Exclusive license as monopoly, see Combinations § 5.
Licenses affecting interstate commerce, see Commerce.
Licensing as regulation of commerce, see Commerce §§ 7-10.

¶ 1. A license is a permission to do something which without the license would not be allowable.—Chilvers v. People, 11 Mich. 43; Youngblood v. Sexton, 32 Mich. 406.

§ 2. Distinction from tax or other charge.

Measures regarded as taxing or licensing measures within provisions for majority or two-thirds votes, see Municipal Corporations, IV.
Licensing of business by municipal corporations, see Municipal Corporations, IX, C.
Measures regarded as licensing or revenue ordinances within municipal powers, see Municipal Corporations, IX, C.
Judicial notice that amount derivable is in excess of cost of regulation and therefore a tax, see Evidence ¶ 65.

¶ 2. An act imposing a license fee in excess of the amount necessary to defray the expenses of regulation is not an exercise of the police power but is a revenue measure.—Vernor v. Secretary of State, 179 Mich. 157.

¶ 3. To be sustained as a police regulation an act imposing a fee must be plainly intended as such and the revenue derived therefrom must not be disproportionate to the cost of regulation.—Vernor v. Secretary of State, 179 Mich. 157.

¶ 4. In determining whether a fee imposed by an enactment claimed to be an exercise of the police power is reasonable, the absence or amount of regulative provisions, and the nature of the subject of regulation must be considered, and if the amount is wholly out of proportion to the expense involved the fee will be declared a tax.—Vernor v. Secretary of State, 179 Mich. 157.

§ 3. Power to impose or grant.

Rates, graduations and prorating, see post § 4.
Acts, persons and occupations subject, see post § 5.
Issuance and revocation or withdrawal, see post § 6.
Refunding or recovery of fees wrongfully collected, see post § 7.
Permission to enter on another's land, see License to Enter.
Power of municipal corporations to license business, see Municipal Corporations, IX, C.
General police power of the state, see Constitutional Law, III.
Abridgment of privileges and immunities of citizens, see Constitutional Law § 229.

¶ 5. Where a business is subjected to the payment of a fee, it must be with a view to taxation, or to cover the expense of regulation under the police power.—City of Saginaw v. Saginaw Circuit Judge, 106 Mich. 32.

§ 4. Rates, graduations and prorating.

Refunding or recovery of fees wrongfully paid or collected, see post § 7.
Rates and graduations of municipal fees and licenses for regulation of business, see Municipal Corporations, IX, C.

¶ 6. Where a license fee is imposed on a business presumably for the purpose of regulation and not for revenue, a variable sum may be demanded to meet the different conditions under which the license operates. —People v. Brazee, 183 Mich. 259. Affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

¶ 7. The fact that section 1, of Act No. 301, Public Acts 1913, provides for the payment of an annual license fee by private employment agencies, does not prevent the Commissioner of Labor prorating the fee according to the period covered by the license.—People v. Brazee, 183 Mich. 259. Affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

¶ 8. An ordinance requiring a license for hawking and peddling, fixing graduated fees

for licenses greater if horse-drawn vehicles were used, and making all licenses expire on the first of the next ensuing June without any difference in fees for parts of a year is not in restraint of trade or discriminatory.—People v. Hotchkiss, 118 Mich. 59.

¶ 9. A license fee of $10 for one week and $50 per year for peddling tea, coffee, spices, etc., is not unreasonable or excessive so as to void the ordinance.—City of Muskegon v. Zeeryp, 134 Mich. 181.

§ 5. Acts, persons and occupations subject.

Issuance and revocation or withdrawal, see post § 6.
For keeping of animals see Animals § 3.
For ferries, see Ferries § 2.
Liquor licenses, see Intoxicating Liquors, II.
Permission to enter upon another's land, see License to Enter.
Licensing attorneys, see Attorneys § 3.
License to hunt and fish, see Fish and Game § 4 et seq.
Physician's license, see Medicine and Surgery.
Licensing insurance companies, see Insurance, I.
Licensing foreign insurance companies, see Insurance § 7.
License for shipping, see Shipping.
Persons and occupations subject to municipal licenses, see Municipal Corporations, IX, C.
Licenses or permissions in nature of franchises, see Franchises; Gas; Electricity; Railroads, I; Street Railways, I; Telegraphs and Telephones; Toll Roads; Waters, VI.
Laws exempting farmers and producers as class legislation, see Constitutional Law § 217.
Denials of equal protection, see Constitutional Law § 225.
Liability for injury by unlicensed dog which may be lawfully killed, see Animals ¶ 54.
Nature of liquor licenses and rights of licensees, see Intoxicating Liquors § 7.
Power to tax business which may not be "licensed," see Intoxicating Liquors § 31.
Motor vehicle license, see Highways, XIV.
License to marry, see Marriage.
Documentary proof of license by "official register," see Indictment ¶ 1319.

¶ 10. In determining whether a person comes within an ordinance made in the exercise of a power to regulate sales from house to house, and providing that any person who shall go about from house to house and sell or offer to sell any article of trade or commerce shall be deemed to be a hawker and peddler, decisions as to who is a huckster or hawker and peddler, resting upon a judicial construction of statutes or ordinances in which the words are employed without qualification, are not controlling.—Allport v. Murphy, 153 Mich. 486.

¶ 11. The license fee imposed by Act No. 301, Public Acts of 1913, on private employment agencies of twenty-five dollars per annum in cities under two hundred thousand population and one hundred dollars in larger cities, is not excessive.—People v. Brazee, 183 Mich. 259. Affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

¶ 12. A statute or ordinance relative to "hawkers and peddlers" includes persons traveling from place to place for the purpose of taking orders for the purchase of goods, wares, or merchandise by sample, lists, or catalogues on the authority of City of Muskegon v. Zeeryp, 134 Mich. 181.—City of Alma v. Clow, 146 Mich. 443.

¶ 13. Pub. Acts 1899, No. 212, § 6, providing that applicants for license as a barber shall pay five dollars, excepting barbers "now engaged in the business of a barber in the state" and who have been so engaged for two years; and section 7 providing that persons "now engaged in the business of a barber in the state" and who have been "so engaged" for two years or more shall file a statement, and upon payment of one dollar receive a certificate, construed to mean that the words "so engaged" referred to the words "engaged in the business of a barber in this state" and that an applicant who had for part of the period of two years preceding his application worked outside the state, must pay a license fee of five dollars.—Wass v. Board of Examiners of Barbers, 123 Mich. 544.

¶ 14. An ordinance of the City of Detroit provided that no person should drive or use a vehicle for hauling earth or other named articles without procuring a license of the mayor. Defendant, a corporation engaged in the cement and sand business, was convicted for failure to take out a license for one of its wagons. Held, said ordinance was passed under paragraph 186 of the City Charter of Detroit, relating to licensing vehicles for hire, and did not apply to defendant's business, and that the conviction should be reversed.—City of Detroit v. C. H. Little Co., 163 Mich. 444.

¶ 15. An ordinance providing that persons going about from house to house for the sale of articles to be delivered then or in the future shall be regarded as hawkers and peddlers, and subject to license as such, applies to local retail merchants who conduct stores, and who also perform the acts which the ordinance in terms prohibits.—Allport v. Murphy, 153 Mich. 486.

¶ 16. An ordinance requiring licenses for peddlers, etc., and expressly applying to persons taking orders for future delivery is not invalid in its application to one who takes orders for teas, coffee, etc., which he himself subsequently fills by ordering sufficient supply from the domestic warehouse of a foreign corporation.—City of Muskegon v. Zeeryp, 134 Mich. 181.

§ 6. Issuance and revocation or withdrawal.

Issuance or revocation of municipal licenses, see Municipal Corporations, IX, C.

Power of revocation as involving judicial power, see Constitutional Law § 59.

Injunction to prevent enforcement of ordinance revoking trader's license, see Injunctions § 97.

Enjoining revocation of license to construct windows extending into street, see Injunctions ¶ 287.

§ 7. Rights and liabilities dependent on license or want of license.

Criminality of and prosecutions for acts done without requisite license, see Crimes, II; Indictment.

Recovery of municipal fees or licenses wrongfully paid, see Municipal Corporations, IX, C.

Invalidity of contracts in violation of licensing laws, see Contracts, IV, B.

Indictment for practice of profession or pursuit of business without license, see Indictment § 43u.

Arrest without warrant for peddling without license as false imprisonment, see False Imprisonment § 6.

¶ 17. A contractor and builder who has agreed to employ an architect to draw plans and specifications for the owner, and employs an unlicensed architect, cannot recover the contract price for drawing the plans and specifications, where an ordinance requires a license of architects, and it is immaterial whether the contractor himself is an architect.—Wedgewood v. Jorgens, 190 Mich. 620.

¶ 18. Claimant took charge of the stock of goods turned over to a legatee and sold drugs, medicines, and poisons as a part of the business. He was not a registered pharmacist, as required by Act No. 134, Pub. Acts 1885, as amended by Act No. 332, Pub. Acts 1905. Held, he was acting unlawfully and could not recover against the legatee's estate for services rendered.—In re Reidy's Estate, 164 Mich. 167; Shattuck v. Watson, Id.

Absence of vehicular license as affecting right of driver, owner or occupant, to recover for injuries, and as affecting their liability for injuries inflicted upon others, see note, 9 N. C. C. A. 828-838, 16 N. C. C. A. 58-70.

§ 8. Refunding or recovery of fees wrongfully collected.

¶ 19. One Smith, the agent of plaintiff company, paid certain fees for a peddler's license to defendant city. The license was issued to Smith as an individual, and not to plaintiff company. Upon paying said fees, Smith filed a written protest with defendant protesting that it had no right to collect said fees and stating that the fees were being paid to avoid repeated arrests and to await the decision of the courts regarding the legality of said fees, and further stating that the payments were made for the purpose of preserving plaintiff's business and with the distinct understanding that in case the courts should hold the fees illegal the plaintiff would demand them back of defendant. This protest was signed in the name of plaintiff company, by Smith as agent. At the time of the suit Smith had left plaintiff's employ and never made any assignment of his claim to plaintiff. Held, the fees having been exacted of and the license having been issued to Smith, as an individual, and threats of arrest having been directed to Smith and not to plaintiff no duress was established sufficient to entitle plaintiff to recover the fees paid.—Grand Union Tea Co. v. City of Ionia, 165 Mich. 67.

LICENSES TO ENTER ON LAND.

TREATS of permission from the owner of land to another to enter upon the land and do acts thereon which otherwise would be a trespass but without passing any interest in the land.

Analysis.

I. Nature, creation and implication.

§ 1. In general; nature and distinctions.
§ 2. ——License or easement.
§ 3. ——License or franchise.
§ 4. ——License or lease.
§ 5. ——License or sale.
§ 6. ——License or contract.
§ 7. Creation and acts constituting license.
§ 8. ——Creation by acquiescence or consent of licensor.
§ 9. Necessary implications arising from license.
§ 10. Presumptions and evidence of license.

II. Rights and liabilities of parties; revocation.

§ 11. In general; extent, operation and effect of license.
§ 12. Rights of licensor.
§ 13. Duty and liability of licensor.
§ 14. Rights of licensee.
§ 15. ——Right of licensee to assign or transfer.
§ 16. Liabilities of licensee.
§ 17. Duration of license.
§ 18. Right and authority of licensor to revoke.
§ 19. ——License coupled with interest.
§ 20. What constitutes revocation.
§ 21. ——Assignment or conveyance of licensor's interest.
§ 22. ——Death of one of parties.
§ 23. ——Misconduct or unlawful acts of licensee.
§ 24. ——Estoppel to claim revocation.
§ 25. Forfeiture of license.
§ 26. Rights after termination.

I. NATURE, CREATION AND IMPLICATION.

§ 1. In general; nature and distinctions.

License or easement, see post § 2.
License or franchise, see post § 3.
License or lease, see post § 4.
License or sale, see post § 5.
License or contract, see post § 6.
Creation and acts constituting license, see post §§ 7, 8.
Necessary implication arising from license, see post § 9.
Presumptions and evidence of license, see post § 10.
Necessity of formal requisites, see post ¶ 16.
Duration of license in general, see post § 17.
License as defense in action for trespass, see Trespass, II.
Captious refusal of license to remove goods as a conversion, see Conversion § 4, ¶ 18.
Adverse possession founded on entry under license, see Adverse Possession, III.

¶ 1. A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it. It is founded on personal confidence, and is therefore not assignable; it may be in writing or by parol; or without consideration or subject to revocation.—Morrill v. Mackman, 24 Mich. 279.

¶ 2. A license is a permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it. It is founded on personal confidence, and therefore not assignable, quoting the definition cited in Morrill v. Mackman, 24 Mich. p. 282.—Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315.

§ 2. ——License or easement.

Easement distinguished, see Easements § 2.
General law of easements, see Easements.
Construction of deed as to whether easement or license passes, see Deeds § 46.
Imprescriptibility of use of land begun and continued under license, see Easements § 12.

¶ 3. Where something is promised beyond a mere temporary use of the land, and the promise is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, so that the right to revoke at any time would be inconsistent with the evident purpose of the permission, the interest is something more than a license, if the proper formalities for conveyance have been observed. It may be an easement or a leasehold interest or otherwise, according to the character of the possession, occupancy or use of the promisee, the time it is to continue, and perhaps the mode in which compensation, if any, is to be made for it.—Morrill v. Mackman, 24 Mich. 279.

§ 3. ——License or franchise.

Licenses and rights of way for private railroads and sidings, see Railroads, III.
Franchises and operating permissions of similar nature, see Franchises; Gas; Electricity; Railroads, I; Street Railways, I; Telegraphs and Telephones; Toll Roads; Waters, VI.
General law of franchise, see Franchise.

¶ 4. Rights acquired in the public streets of a city by an electric lighting and power company under Act No. 264, Public Acts 1909, How. St., 2nd Ed., § 2941, constitute a franchise and not a mere license.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

§ 4. ——License or lease.

Law of leases in general, see Landlord and Tenant.

¶ 5. Oral permission to the trustees of a church to build, upon premises contingently contracted to be conveyed to them, sheds for the convenience of attendants upon worship, was held to be a revocable license, not a lease.—Druse v. Wheeler, 22 Mich. 439; Druse v. Wheeler, 26 Mich. 189.

§ 5. ——License or sale.

Sales of personalty, see Sales.

Sale of real property, see Vendor and Purchaser.

¶ 6. A written agreement permitting the establishment of a dam, granting a right of flowage, providing for a perpetual use and for the settlement of damages, and containing no clause of forfeiture on default, is not a revocable license, but an absolute sale on time for credit.—Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

¶ 7. The following letter accepted by the purchasers going into possession and making improvements is sufficient to show a contract to sell and not a mere license; and a subsequent grantee in a quit-claim deed from the vendor, takes subject to the rights of the vendee: "You ask me what I would do with you about my place. If you want it, I will let you have it for $150, and you pay the back taxes. I will give you five years to pay it in, but I can't give you a contract until I come home. I don't expect to come home for two years, but you can go on and build a house, and I will give you a contract then. You will have to pay the taxes this summer."—Garvey v. Parkhurst, 127 Mich. 368.

¶ 8. An instrument gave a right to the grantee to cut and remove timber for a term of fifteen years for consideration of two dollars per acre, all uncut timber at the end of the period to remain the property of the grantor. The parties were called licensor and licensee. Held, the instrument was a mere license and did not convey, in præsenti, the title to all the timber, but title to the timber passed only as it was cut and removed.—Scott v. Sullivan, 159 Mich. 297.

¶ 9. A land contract, unless so conditioned, does not operate as a license to use the land.—Druse v. Wheeler, 22 Mich. 439; Druse v. Wheeler, 26 Mich. 189.

¶ 10. An oral permission by the owner of land to cut timber thereon is a mere license. —Estelle v. Peacock, 48 Mich. 469.

¶ 11. Oral permission by the vendor of land to the vendee to take possession at any time is a mere license, revocable at pleasure so long as the terms of the sale are unfulfilled.—Gault v. Stormont, 51 Mich. 636.

¶ 12. Where the vendor and vendees in a land contract enter into a parol agreement whereby the latter are allowed to remove the timber in violation of the terms of the contract, such permission amounts, so long as it remains unperformed, to a mere license.—Stickney v. Parmenter, 35 Mich. 237.

§ 6. ——License or contract.

Contract void under statute of frauds operative as license, see Frauds, Statute of § 129.

¶ 13. Where defendants entered into an agreement with a development company, at such company's solicitation, by the terms of which said defendants paid a valuable consideration for certain lots and the privileges of shooting on the lake near by, such agreement is not a mere license, revocable at will, but a valid contract, which might be enforced in a court of equity.—St. Helen Shooting Club v. Barber, 150 Mich. 571.

¶ 14. A parol agreement to extend the time limited for the removal of standing timber sold by a written instrument was to be regarded as a contract for waiver of a right of forfeiture, and was more than a revocable license.—Williams v. Flood, 63 Mich. 487, per Campbell, C. J., and Sherwood, J. Champlin and Morse, JJ., dissenting that it was void under the statute of frauds, but was a revocable license.

§ 7. Creation and acts constituting license.

Creation by acquiescence or consent of licensor, see post § 8.

Invitation by wife as license to enter, see Assault ¶ 18.

Statements to others as license, see also Assault ¶ 60.

Necessity of writing to create or transfer licenses to enter on land, see Frauds, Statute of § 44.

¶ 15. A parol extension of the time allowed by a contract of sale for taking off timber is valid as a license.—Haskell v. Ayres, 35 Mich. 89.

¶ 16. A license to enter upon land and cut timber thereon need not be in any particular form.—Wetherbee v. Green, 22 Mich. 311.

¶ 17. Where the owner of land along a lake through his agent orally permits a lot owner to erect a boathouse on the lake frontage, an oral license is created which is binding until revoked by the licensor.—Bell v. Reed, 199 Mich. 35.

¶ 18. A parol agreement for the sale of standing timber is good as a license so far as acted upon.—Greeley v. Stilson, 27 Mich. 153; Wetmore v. Neuberger, 44 Mich. 362; Sovereign v. Ortmann, 47 Mich. 181; Spalding v. Archibald, 52 Mich. 365.

§ 8. ——Creation by acquiescence or consent of licensor.

¶ 19. Acquiescence in the use of premises so as to create a license must depend upon some known customary use.—Sandstrom v. Minneapolis, St. P. & S. S. M. Ry. Co., 198 Mich. 99.

¶ 20. The consent of a riparian owner to the building of a bridge on his premises amounts to a revocable license.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

§ 9. Necessary implications arising from license.

Limitation and scope of license, see also post ¶ 36.
Right to use road for railroad purposes implied from permission to build it, see Railroads, III.

¶ 21. A license to do a particular thing carries with it, by implication, the right to do those things necessary to be done in order that the licensee may avail himself of his rights under the license.—Newberry v. Bunda, 137 Mich. 69.

§ 10. Presumptions and evidence of license.

General law of evidence, see Evidence.
Proof of license by parol evidence as best evidence, see Evidence § 114.
Presumption that license has been acted upon by licensee, see post ¶ 24.

¶ 22. The owner of the land enclosing a small lake has the exclusive right to take fish from such lake; but it having always been customary to permit the public to take fish in the small lakes and ponds in the state, one may be presumed to have a license to do so.—Marsh v. Colby, 39 Mich. 626.

¶ 23. A parol license to remove timber should be very clearly shown when relied on to avoid a forfeiture set up in defense to a bill for specific performance of a land-contract.—Stickney v. Parmenter, 35 Mich. 237.

II. RIGHTS AND LIABILITIES OF PARTIES; REVOCATION.

§ 11. In general; extent, operation and effect of license.

Rights of licensor, see post § 12.
Duty and liability of licensor, see post § 13.
Rights of licensee, see post §§ 14, 15.
Liabilities of licensee, see post § 16.
Duration of license, see post § 17.
Right and authority of licensor to revoke, see post §§ 18, 19.
What constitutes revocation see post §§ 20-24.
Forfeiture of license, see post § 25.
Rights after termination, see post § 26.
Nature and creation of license, see ante I.
License as defense in action for trespass, see Trespass, II.
Manner of pleading license as defense in trespass, see Trespass, II.
Infant's license as defense to action of trespass, see Infants ¶ 107.

¶ 24. A licensor's actual knowledge that his consent has been acted on is not necessary to the protection of the licensee; he is bound to assume that it has.—Spalding v. Archibald, 52 Mich. 365.

¶ 25. A parol license to cut timber is binding on the licensor if executed before revocation.—Wait v. Baldwin, 60 Mich. 622.

¶ 26. A mere license to enter upon land and cut timber will confer no legal right to do so.—Wetherbee v. Green, 22 Mich. 311.

¶ 27. A license to enter and cut standing timber and remove the same passes the title to so much timber as is severed from the soil before the license is revoked.—White v. King, 87 Mich. 107.

¶ 28. Where a tenant is obliged to cross his landlord's premises in going to and from those which he occupies, and is allowed to do so as a licensee without objection, the arrangement being for the benefit of both parties, his children or members of his family may also go upon such premises to carry him his dinner or to help him.—Powers v. Harlow, 53 Mich. 507.

¶ 29. A tenant gave his landlord a written license to occupy as much of the premises as should be reasonably necessary in putting up an elevator. Held, that in suing the landlord for exceeding his privileges, the tenant could not show that the space to be occupied by him was marked out upon the floor; the license controlled, and the necessary space was a question for the jury.—Ives v. Williams, 50 Mich. 100.

¶ 30. An unrevoked parol license to flow lands, given by a third person, who at the time had the right to flow, is a good defense to an action for flowing lands.—Millerd v. Reeves, 1 Mich. 107.

§ 12. Rights of licensor.

Duty and liability of licensor, see post § 13.
Expulsion of licensee by landlord, see Landlord and Tenant § 180.
Power of summer resort association to sell concessions, see Associations § 7.

¶ 31. Permission to a grantor to remain upon the premises after his deed is a mere license, which, even while unrevoked, does not preclude the licensor from taking actual possession of the premises generally and putting his stock upon them. Any occupation by the grantor inconsistent with this general right in the grantee would be unwarranted.—Eaton v. Winnie, 20 Mich. 156.

§ 13. Duty and liability of licensor.

Liability for injuries to licensees in buildings, see Buildings §§ 4-6.

Liabilities of tenants towards licensee for injury on leased premises, see Landlord and Tenant §§ 183, 184.

Duty of landlord towards licensee and liability for injury on leased premises, see Landlord and Tenant §§ 177-181.

¶ 32. During the lifetime of a license to use realty the licensor cannot make the use thereof more dangerous, without being answerable for resulting injuries.—Groesbeck v. Shelden, 185 Mich. 583.

¶ 33. A license to come upon one's premises, especially if in the licensor's interest, imposes upon him the duty to warn those who come of any danger in coming of which he knows or ought to know and they do not. —Powers v. Harlow, 53 Mich. 507.

¶ 34. An owner, who cuts down timber previously sold to another without giving him notice of revocation of his license to remove, is guilty of conversion.—Wood v. Elliott, 51 Mich. 320.

Duty and liability to persons on premises seeking employment, see note, 6 N. C. C. A. 935-943.

Liability of owner of premises for injury to person on premises for purpose of transacting business, see note, 7 N. C. C. A. 375-383.

Liability of storekeeper for injury to customer in store, see note, 7 N. C. C. A. 436-445.

Duty of owner or occupant of premises to warn third persons of dangers incidental to operations thereon, see note, 7 N. C. C. A. 701-705.

Liability of owner of private property for injury to bare licensees, see note, 8 N. C. C. A. 426-438.

Liability of owners of domestic animals for injuries to licensees, see note, 8 N. C. C. A. 953-959.

§ 14. Rights of licensee.

Right of licensee to assign or transfer, see post § 15.

Necessary implications arising from license, see ante § 9.

Manner of pleading license as defense in trespass, see Trespass, II.

Right to enter premises to remove chattels peaceably, see also Assault ¶ 64.

Implied license of attorney to enter office on client's business, see also Assault ¶ 61.

License to open road, right to cut and remove trees, see also Highways ¶ 602.

Entry of licensee to sow unauthorized crop, see also Agriculture ¶ 3.

Right of passengers to be in station, see Carriers § 133.

Right of mortgagee to enter premises to take possession of mortgaged chattels, mutual right to be on premises, see also Chattel Mortgages ¶ 292.

¶ 35. A license until revoked will protect the licensee so far as he has acted under it. —Wetherbee v. Green, 22 Mich. 311.

¶ 36. A license, like an estoppel, is limited to the fair understanding on which the parties are at liberty to act; it does not give the licensee a general authority to do what he pleases.—Ortmann v. Sovereign, 42 Mich. 1.

¶ 37. A license creates an estoppel against complaining of acts done under it before revocation, or from preventing the enjoyment of the results of what was thus done.— Greeley v. Stilson, 27 Mich. 153.

¶ 38. When the timber is cut under an oral sale of stumpage on cedar land, the title to it passes to the licensee because the right thereto has become a chattel interest. —Spalding v. Archibald, 52 Mich. 365.

¶ 39. The license implied from an oral agreement for the sale of timber or from the parol extension of time for removal under such an agreement protects the licensee in regard to all trees cut seasonably and before revocation.—Greeley v. Stilson, 27 Mich. 153; Haskell v. Ayres, 35 Mich. 89; Wetmore v. Neuberger, 44 Mich. 362; Sovereign v. Ortmann, 47 Mich. 181; Spalding v. Archibald, 52 Mich. 365.

¶ 40. Under a contract pursuant to which a railroad builds a sidetrack for the convenience of a mill owner, the railroad reserving the right to use it for other purposes as long as not interfering with its use by the millowner, the railroad has the right to continue such use as long as the sidetrack remains on the premises.—Pontiac, Oxford & N. R. Co. v. Reed, 130 Mich. 661.

§ 15. ——Right of licensee to assign or transfer.

See also ante ¶¶ 1, 2.

¶ 41. An oral permission by one tenant in common of land to cut timber therefrom is not assignable.—Ward v. Rapp, 79 Mich. 469.

§ 16. Liabilities of licensee.

Liability of licensee to licensor for putting diseased sheep on premises, see Animals ¶ 109.

¶ 42. One who, being allowed to remain on land under a mere license, keeps animals upon it that have an infectious disease, in consequence of which the animals of the owner afterwards brought upon the land in ignorance of the danger become infected and damaged, will be liable to an action for such consequent injury.—Eaton v. Winnie, 20 Mich. 156.

¶ 43. Trespass quare clausum will lie against the president of an agricultural asso-

ciation for entering with the buyer and tearing down a barn which he has without authority sold to a third person, even though as president he has a license to enter upon the premises whenever his official duties warrant it.—Kent County Agricultural Society v. Ide, 128 Mich. 423.

§ 17. Duration of license.

Rights after termination, see post § 26.
Effect of time limits for removal of reserved timber, see Deeds § 74.

¶ 44. Where standing timber is sold to be cut and removed by a certain date the license to enter and remove continues until that date.—Utley v. Wilcox Lumber Co., 59 Mich. 263.

¶ 45. The grantee in a quitclaim deed of the timber upon certain land, with the right to enter, and to cut and remove the timber "at any time thereafter," is entitled to a reasonable time after notice to remove.—St. James v. Erskine, 155 Mich. 606.

¶ 46. Under the rule that a gratuitous license must be acted on within a reasonable time where no time is fixed, the question of what constituted an unreasonable delay in acting upon a gratuitous license to remove timber, was properly left to the jury.—Snyder v. East Bay Lumber Co., 135 Mich. 31.

§ 18. Right and authority of licensor to revoke.

License coupled with interest, see post § 19.
Right to revoke license given railroad to enter on land and build its road, see Railroads, III.

¶ 47. An oral license for the erection of a structure on the land of another is revocable at the will of the licensor.—Bell v. Reed, 199 Mich. 35.

¶ 48. A parol license—whatever right it may give to remove erections under it—is revocable at any time.—Druse v. Wheeler, 22 Mich. 439.

¶ 49. A license to use property for an express purpose, but not operative until a certain contract shall have been performed, is a revocable contract.—Druse v. Wheeler, 26 Mich. 189; Druse v. Wheeler, 22 Mich. 439.

¶ 50. Theaters, circuses, race tracks, private parks, and the like in the absence of statute are private enterprises, and license to enter them may be refused by the owners, or when once granted, may be revoked.—Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545.

¶ 51. Where the grantee of land knows that the timber on it has been previously sold to another with the right to take his own time to remove it, he cannot terminate the other's right to occupy the land with his timber without giving him notice to remove it within a reasonable time.—Wood v. Elliott, 51 Mich. 320.

¶ 52. An oral license to go upon lands to ditch is revocable by parol, and an oral agreement to give a written license if a neighbor will do likewise cannot operate as a license where, after the neighbor had done as requested, the party making such agreement declined to abide by it and forbade the digging of the ditch.—Hitchens v. Shaller, 32 Mich. 496.

¶ 53. Where a petitioner for a village street across his land orally stated to the authorities that he claimed no damages, it was merely a license that would be binding only when they proceeded to take the land, and might be previously revoked by a written notice.—Turner v. Village of Stanton, 42 Mich. 506.

¶ 54. Complainant filed a bill to enjoin defendants from cutting certain standing timber. Said bill alleged the making by the owner of said timber land of a bill of sale to complainant, which recited that said owner thereby sold to complainant all the timber on said land. The bill also alleged that defendants, heirs of said owner, before complainant started to cut said timber, entered into a contract with other persons to cut and remove same. Complainant alleged that he had been in possession of the lands ever since said writing was delivered to him, but in his prayer asked for no relief on account of such possession. Held, said writing was merely a bill of sale of the timber with a license to enter upon the lands and remove same; that such license might be revoked at any time before the timber was severed; and that therefore the demurrer to complainant's bill should be sustained.—Curran v. Gordon, 169 Mich. 250.

§ 19. ——License coupled with interest.

¶ 55. A license coupled with an interest is not revocable while the interest continues; as where a license from a landlord to cross his land is necessary to the tenant's enjoyment of the premises for which he pays rent, and is therefore for the benefit of both.—Powers v. Harlow, 53 Mich. 507.

¶ 56. A contract right to cut timber under a license coupled with an interest under a time limit is not revocable, where the owner's reserved right of forfeiture for delay has been once waived.—Newberry v. Chicago Lumbering Co., 154 Mich. 84.

§ 20. What constitutes revocation.

Assignment or conveyance of licensor's interest, see post § 21.
Death of one of parties, see post § 22.
Misconduct or unlawful acts of licensee, see post § 23.
Estoppel to claim revocation, see post § 24.
Forfeiture of license, see post § 25.
Rights after revocation, see post § 26.

¶ 57. A license to use a road over one's premises is revoked by closing the road.—Fowler v. Hyland, 48 Mich. 179.

¶ 58. The license to enter another's private office implied by the opening of such office to the public for the transaction of business with the owner is revoked at once as to a person who is ordered to leave; and one who has been forbidden to enter is a trespasser when he goes in.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 59. An oral permission by one tenant in common of land to cut timber therefrom is a mere naked, personal license which is revoked by the licensor's forbidding the licensee to cut timber.—Ward v. Rapp, 79 Mich. 469.

¶ 60. Where the vendor in a land contract has given oral permission to the vendee to take possession, such permission is revoked by the vendor's return to him of a partial payment on failing to get his wife to unite with him in the sale.—Gault v. Stormont, 51 Mich. 636.

¶ 61. Where the owner of certain lands, after contracting for their sale, had given oral license to the other party, who were trustees of a church, to erect sheds thereon, but had afterwards forbidden such erection "until the contract should be carried out," and the other party privately determined not to fulfil the contract, such prohibition operated as an absolute revocation of the license. It was held that the use of the sheds for fifteen months afterwards without interference did not tend to show a new license or the withdrawal of the revocation.—Druse v. Wheeler, 26 Mich. 189.

¶ 62. A revocation of a license to the trustees of a church made to and in the presence of one of the trustees had the same effect as if made to all.—Druse v. Wheeler, 26 Mich. 189.

¶¶ 63, 64. Where the heirs of the grantor of a license to cut timber after the death of said grantor made a new agreement with a third person for the cutting of said timber inconsistent with said license, the latter is thereby revoked.—Curran v. Gordon, 169 Mich. 250.

§ 21. ——Assignment or conveyance of licensor's interest.

¶ 65. Where the vendor of land assigns his contract to one who knows nothing of an oral agreement between the vendor and vendee whereby the latter may remove timber in violation of the contract's terms, the agreement is revoked.—Stickney v. Parmenter, 35 Mich. 237.

¶ 66. A bill of sale to a third person of standing timber with license to cut and remove it is no more than a license, and will not revoke a former license before notice to a first licensee.—White v. King, 87 Mich. 107.

¶ 67. The consent of a riparian owner to the building of a bridge on his premises is revoked by his conveying the property.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 68. An oral permission by one tenant in common of land to cut timber therefrom is naked, personal license which is revoked by the licensor's quitclaiming to his cotenant.—Ward v. Rapp, 79 Mich. 469.

¶ 69. A license, given by one tenant in common, with his cotenant's consent, to a third person to cut timber, is not necessarily revoked by a conveyance of the licensor's interest.—Wetherbee v. Green, 22 Mich. 311.

¶ 70. Where adjoining owners of lots had created a driveway between their two lots for mutual convenience and deeds to one of the lots had been made without any grant or reservation of a highway being made therein, and the husband of the owner of one of the lots became the owner of the other, the wife having joined in the conveyance, the conveyance operated as a revocation of the license to use the driveway as to a later purchaser from the wife of her lot.—Wilkinson v. Hutzel, 142 Mich. 674.

§ 22. ——Death of one of parties.

¶ 71. An oral permission by the owner of land to cut timber thereon is revoked by the death of the licensor.—Estelle v. Peacock, 48 Mich. 469.

¶ 72. A mere license to cut timber is revoked by the death of the grantor thereof occurring before the grantee has severed said timber.—Curran v. Gordon, 169 Mich. 250.

¶ 73. A license to two or more is in general revoked by the death of one of the licensees. Whether such would be the rule under the peculiar facts of this case, quære.—Rust v. Conrad, 47 Mich. 449.

§ 23. ——Misconduct or unlawful acts of licensee.

¶ 74. The license impliedly given to enter another's place of business is revoked the moment the person so entering interferes unlawfully with the proprietor's rights or property.—Webber v. Barry, 66 Mich. 127.

§ 24. ——Estoppel to claim revocation.

General principles of estoppel, see Estoppel.
Loss of right to revoke license granted railroad to construct its road over licensor's land because of his knowledge of permanent nature of construction, see Railroads, III.

¶ 75. The owner of lands may be estopped from revoking a parol license where his con-

duct has rendered the revocation inequitable. —Maxwell v. Bay City Bridge Co., 41 Mich. 453; Day v. Walden, 46 Mich. 575.

¶ 76. Where a licensee to use land has made costly improvements in reliance on the license, it seems that he should have adequate protection against revocation.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

§ 25. Forfeiture of license.

Rights after termination, see post § 26.

¶ 77. A licensee to cut timber forfeited his rights by a failure to perform the conditions of the license. Held, equity would not relieve him from the forfeiture when the ground offered by him was that he forgot the time fixed for performance of the conditions and it was inconvenient for him to perform them.—Scott v. Sullivan, 159 Mich. 297.

¶ 78. An instrument gave a right to a licensee to cut and remove timber for a term of fifteen years, all uncut timber at the end of the period to remain the property of the licensor. The licensee agreed to pay a portion of the taxes. Time was made of the essence, and the failure to pay the taxes was expressly stated to be an abandonment of the license. Held, the payment of the taxes was a condition precedent to the licensee's right to cut the timber, and an omission so to do for three years constituted a surrender of his rights.—Scott v. Sullivan, 159 Mich. 297.

§ 26. Rights after termination.

¶ 79. Revocation of a license to appropriate part of a street to private use does not immediately make the licensee a wrongdoer. —Everett v. City of Marquette, 53 Mich. 450.

¶ 80. Where wooden sheds had been erected on another's land after the revocation of the license to erect them, fifteen months were held to have exceeded any reasonable or necessary time for their removal. —Druse v. Wheeler, 22 Mich. 439; Druse v. Wheeler, 26 Mich. 189.

¶ 81. A resumption of possession and fencing of land occupied under a license contract permitting erection of sheds is lawful after reasonable time to remove the sheds.— Druse v. Wheeler, 26 Mich. 189; Druse v. Wheeler, 22 Mich. 439.

LICENSING AGREEMENTS.

Cross-References.

Licensing Agreements—
For use of patents or inventions, see Patents.

LIENS.

TREATS of common law or statutory rights to hold or have property as security for debt.

Analysis.

§ 1. In general; nature, kinds and qualities.
§ 2. Creation by agreement or implication.
§ 3. Equitable liens.
§ 4. Statutory liens.
§ 5. ——Labor liens.
§ 6. How created, obtained or lost.
§ 7. ——Loss of possession.
§ 8. Reinstatement of liens.
§ 9. Rights under lien; assignability.
§ 10. Remedies and procedure to enforce liens.
§ 11. Conflicting liens; priorities.

Prevention of liens on building as consideration for parol promise to pay materialmen, see Frauds, Statute of § 24.
Indemnity against loss from breach of building contract as including loss from perfecting liens, see Indemnity § 2.

§ 1. In general; nature, kinds and qualities.

Contract or implied liens, see post § 2.
Equitable liens, see post § 3.
Statutory liens, see post §§ 4, 5.
How created, obtained or lost, see post §§ 6, 7.
Reinstatement of liens, see post § 8.
Rights of parties to lien and assignability of liens, see post § 9.
Remedies and enforcement, see post § 10.
Conflicts and priorities, see post § 11.
As vested rights under constitution, see Constitutional Law § 248.
Liens as against claim that goods have become fixtures, see Fixtures, IV.
Recognition of liens created or existing under foreign laws, see Conflict of Laws § 4.
Many liens pertaining to specific debts and proceedings are treated in specific topics. See cross-references which follow.

Agents' liens against principals, see Agency § 103.
Brokers' and factors' liens, see Brokers § 15.
Attorneys' liens, see Attorneys, II, E.
Lien to work out equity of improver of another's land in good faith, see also Accession and Confusion ¶ 25.
Stable keeper's lien for keeping and care of animal, see Animals § 24.
Liens of attachments in general, see Attachment, VIII.
Bailee's lien, see Bailments § 3.
Lien on deposit for debt of depositor, see Banking § 20.
Lien of bank on proceeds of collections made by it, see Banking § 35.
Bank lien on stock for debt of stockholder, see Banking §§ 69, 71.
Liens under National Bankruptcy Act, see Bankruptcy.
Carrier's lien for freight and charges, see Carriers § 75.
Corporation's lien on stock for debts of holders, see Corporations §§ 313-315.
Corporate creditors' lien on corporate assets, see Corporations § 219.
Lien on fund for costs allowed, see Costs § 148.
Lien to secure alimony, see Divorce § 182.
Labor liens on logs or forest products, see Forestry, III.
Labor claims against railroads and liens for same, see Railroads, VI.
Service of garnishment as creating lien, see Garnishment § 103.
Liens on husband's realty to enforce separate maintenance decree, see Husband and Wife § 193.
Liens in property hypothecated as security for indemnity, see Indemnity § 11.
Innkeepers' and boarding and lodging house keepers' liens, see Inns §§ 6, 7.
Liens of joint adventurers, on common property, see Joint Adventures, ¶ 20.
Lien of judgment or decree, see Judgments § 121.
Liens and securities of landlord, see Landlord and Tenant, IV, H.
Mechanics', materialmen's, and laborers' liens under Mechanics' Lien Law, see Mechanics' Liens.
Mortgages and liens thereof, see Mortgages; Chattel Mortgages.
Equitable mortgages, see Mortgages, II, C.
Pledgee's liens, see Pledges.
Railroad mortgages and liens, see Railroads, VI.
Seller's lien on chattels sold, see Sales, VIII, B.
Sales with reservation of title, see Sales, XII.
Liens for cost of official surveys, see Surveyors.
Tax and assessment liens, see Taxes, IX.; Local Improvements, VI, G.
Vendors' and purchasers' liens, see Vendors and Purchasers, IX, XI.
Wharfinger's and warehousemen's liens, see Warehousing; Wharves.
Liens under Workmen's Compensation Law, see Workmen's Compensation Law.

¶ 1. A lien is a tie, hold or security upon goods or other things, which a man has in his custody, till he is paid what is due him. —Fitch v. Newberry 1 D. 1.

¶ 2. In its largest sense the word lien embraces every case in which property is charged with the payment of any debt or duty.—Bidwell v. Whitaker, 1 Mich. 469.

¶ 3. The right to a lien is usually based upon something in the nature of a contract to furnish materials or to perform services for another.—Gamble v. Gates, 97 Mich. 465.

¶ 4. A common-law lien implies that the party by whom it is claimed is either in the actual or constructive possession of the thing; and his right to detain the thing continues until his claim is satisfied; but maritime liens exist independently of possession. —Wight v. Maxwell, 4 Mich. 45. Writ of error dism'd 18 How. 511, 15 L. ed. 506.

¶ 5. Common law liens involve possession of the chattel actual or constructive, and the creditor has no right to sell the chattel for the purpose of obtaining compensation.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

§ 2. Creation by agreement or implication.
Facts sufficient to raise equitable liens, see post § 3.
Waiver or loss by implication, see post § 6, ¶ 51 et seq.
Reservation of life use as creating lien, see Deeds ¶ 248.
Right to lien by possession as affected by local usage, see Customs ¶ 24.

¶ 6. There must be contract, express or implied, to support a common-law lien, and, unless by express provision of statute it never arises where no contract relations exist.—Shaw v. Bradley, 59 Mich. 199.

¶ 7. Charges cannot be imposed on real estate by oral agreements unless there are distinct and positive provisions enabling it to be done.—Hammond v. Wells, 45 Mich. 11.

¶ 8. By signing a note or a bond one creates no lien on his property, legal or equitable.—West v. Laraway, 28 Mich. 464.

¶ 9. A contract of sale by one partner to another of his share and interest in the store and business, together with the goods and all accounts due the firm, the vendor to "have a lien on said goods," etc., was construed to give security on the whole interest in the goods, etc., on hand at the time, and not merely on an undivided half.—Northrup v. McGill, 27 Mich. 234.

¶ 10. A contract not to avoid a valid lien differs from a promise to pay a third person a debt that is entirely unsecured; such a promise is binding only as between the parties to the agreement.—Hunt v. Strew, 39 Mich. 368.

¶ 11. Whether one who sells merchandise to another on credit can establish a lien upon the proceeds of sales made by the debtor by stipulating that they shall be held in trust for him, quære.—Adriance v. Rutherford, 57 Mich. 170.

¶ 12. Where subscriptions of money to induce a person to erect a mill express no provision for a lien, none can be implied.—Ayres v. Dutton, 87 Mich. 528.

¶ 13. No lien upon papers or moneys placed in their hands for use in purchasing land exists in favor of real estate brokers.—Robinson v. Stewart, 97 Mich. 454.

¶ 14. Where a defendant claims that he bought and paid for property, that it was deeded to him, and that he owned it and spent money improving his own property, he cannot, upon failure to sustain such claim, change about and claim a lien under an implied contract as for an expenditure made on property belonging to another.—Dehn v. Dehn, 170 Mich. 407.

§ 3. Equitable liens.

Disregard in equity of discharge of lien by mistake, see post ¶ 55.
Equitable mortgages, see Mortgages, II, C.
Equitable lien resulting from payment under contract void under statute of frauds, see Frauds, Statute of § 139.
Decreeing lien to work out accounting, see Accounting Suits § 14.

¶ 15. A court of equity cannot create a lien, and can only declare one where the testimony equitably establishes an implied contract, as liens can only be made by agreement, express or implied, or by some fixed rule of law.—Dehn v. Dehn, 170 Mich. 407.

¶ 16. An equitable lien may arise in the absence of an express contract, under circumstances from which a contract is necessarily implied.—Dehn v. Dehn, 170 Mich. 407.

¶ 17. Equity cannot create a lien on real estate to secure a debt not contracted on its credit, and not charged upon it by agreement.—Bennett v. Nichols, 12 Mich. 22; Perkins v. Perkins, 16 Mich. 162.

¶ 18. Courts of equity do not create liens upon lands to secure a party for a breach of contract, whether under seal or not, when there is no agreement for a lien between the parties.—Richards v. Lewis L. Arms Shingle & Lumber Co., 74 Mich. 57.

¶ 19. An equitable lien upon real estate requires (1) a written contract identifying the property as security for the debt; or (2) such relations between the parties as will make it right and just to declare the lien; as, for example, in the case of a joint owner or bona fide purchaser making improvements in good faith, or in the case of partners' liens.—Kelly v. Kelly, 54 Mich. 30.

¶ 20. The doctrine of equitable lien is to prevent fraud and do justice, and should never be applied where the establishment of an equitable lien would not be carrying out the intent of the parties.—Kelly v. Kelly, 54 Mich. 30.

¶ 21. Equity cannot, unless allowed by statute, create a lien upon real estate to secure a personal debt, not contracted on its credit, and not charged on it by agreement.—Bennett v. Nichols, 12 Mich. 22; Perkins v. Perkins, 16 Mich. 162.

¶ 22. An equitable lien may arise where a party, innocently and in good faith, under a mistake as to the condition of the title to realty, renders services or makes improvements that are permanently beneficial to another.—Dehn v. Dehn, 170 Mich. 407.

¶ 23. A lien may be decreed on land and improvements for money advanced to parents of a deceased owner for the purpose of aiding the parents in making the improvements, where there are letters showing the intention that the lender should be secured thereon.—Osgood v. Osgood, 78 Mich. 290.

¶ 24. Subscribers to stock in a hotel to be erected and maintained by defendant under an agreement that each shareholder should have "an ownership" in the building and should be paid interest are entitled, though stock was never actually issued, to a lien on the completed building according to the amounts paid; and payment of interest could be enforced by foreclosure.—Near v. Donnelly, 80 Mich. 130.

¶ 25. Subscribers of money to aid in the erection of a flouring-mill, which is thereafter, in good faith, operated for more than two years at a loss, cannot, in the absence of express stipulation for a lien and for a continuance of the business, have a lien declared in their favor upon the property and prevent the sale and removal of the machinery.—Ayres v. Dutton, 87 Mich. 528.

¶ 26. Subscribers of stock for the erection of a mill who have not paid up are in no position to ask that defendant who had erected the mill be enjoined from removing the milling machinery and to declare an equitable lien on such.—Ayres v. Dutton, 87 Mich. 528.

¶ 27. Where sons, while living in the family, contribute not only sufficient to cover their own care and keep, but for the support of the parents and for the betterment of the property which is the family home,

such contributions are impliedly gratuitous, in the absence of any agreement or understanding to the contrary, and create no lien. —Dehn v. Dehn, 170 Mich. 407.

¶ 28. Defendant, with his brothers, lived with his parents on premises purchased with money derived from the family inheritance and from family earnings, which premises were deeded to the father. Defendant, while making his home with his parents, expended money for taxes, insurance and improvements. Expenditures for repairs and improvements were also made by other sons and by the parents. Held, defendant was not entitled to a lien upon the premises for the money thus expended by him.—Dehn v. Dehn, 170 Mich. 407.

¶ 29. Upon suit by the guardian to set aside a deed made by an incompetent in consideration of support for life, it cannot be said that the equities are in favor of the defendant and that an equitable lien should be declared in his favor because he furnished the support for years, where her services to the defendant were of some value, the defendant also received some cash from her and had the use of the land in question during the time the support was furnished.—Domling v. Domling, 128 Mich. 588.

¶ 30. On bill for an accounting and for a lien on certain property on the ground that money furnished defendant for a specific purpose was not accounted for, and was used in constructing buildings on which a lien is claimed, held, that the testimony does not support plaintiff's theory.—L. Starks Co. v. Bigler, 175 Mich. 468.

¶ 31. On a bill to subject certain property of defendant to an equitable lien claimed by complainant, it was shown that defendant upon selling certain lands owned by him placed a deed thereto in complainant's hands as an escrow; that thereafter defendant secured a loan from complainant for the purchase of other lands, and thereupon induced the vendee in the first transaction to pay the purchase price directly to him instead of to complainant. It was held that complainant was not entitled to a lien upon the property subsequently acquired, since while defendant's conduct was dishonest and fraudulent he had violated no trust and permitted no fraud at the time the purchase of the lands was made.—Churchill v. Howe, 180 Mich. 150.

¶ 32. An equitable lien upon assets that are subject to the payment of debts in the hands of the administrator arises in favor of creditors, which may be enforced in a court of equity, after distribution by the probate court, to reach assets misapplied by the administrator.—Pierce v. Holzer, 65 Mich. 263.

¶ 33. The finder of lost goods who has been at trouble and expense about them has no lien upon the goods for compensation, unless they were lost at sea; then he has a lien for salvage.—Fitch v. Newberry, 1 D. 1.

¶ 34. A finder of lost property has no lien upon it as finder after he knows to whom it belongs; but he has a lien upon it for whatever reward may be offered for its recovery. —Wood v. Pierson, 45 Mich. 313.

¶ 35. A trespasser who cuts another's trees acquires no lien upon the logs for the expense of cutting and transporting them.—Gates v. Rifle Boom Co., 70 Mich. 309.

¶ 36. One who has discharged a lien on goods by advancing money therefor at the request of the owner has a right to the possession of the goods till reimbursed.—Edwards v. Frank, 40 Mich. 616.

¶ 37. Land conveyed to a fiduciary agent by a party who was in a position rendering him an easy subject for imposition was in equity subjected to a lien for any balance that might be found due on final accounting for its full value.—Rath v. Vanderlyn, 44 Mich. 597.

§ 4. Statutory liens.

Tax, local assessment, and drain assessment liens, see Taxes, IX; Local Improvements, VI, G; Drains § 60 et seq.
Due process of law in lien statutes, see Constitutional Law § 149.
Whether chattel mortgage is an assignment for creditors warranting proceedings in favor of labor claimants, see also Assignments for Creditors §§ 2, 12.
Statutes providing for liens on personal property, see Comp. L. 1915, chap. 245.

¶ 38. Statutory liens often exist although the creditor has not possession of the property and the matter of possession does not deprive statutory liens of the legal attributes of common-law liens to which they are analogous.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

¶ 39. An automobile repairman is not entitled to a lien on an automobile for the purchase price of an extra tire furnished to be carried on the car under Comp. L. 1897, § 10747, but is entitled to a common-law lien against the tire itself for the price thereof.—Gardner v. Le Fevre, 180 Mich. 219.

§ 5. ——Labor liens.

Assignability of liens, see post § 9.
Remedies and procedure to enforce lien, see post § 10.
Labor claims and liens under the log lien law, see Forestry, III.
Labor liens against corporations, see Corporations § 227; Railroads, VI.
Recourse to stockholders for labor debt of corporation, see Corporations §§ 331-337.

¶ 40. How. St. § 8408, giving laborers for mining corporations in the Upper Peninsula

a lien for the amount due them for such labor upon all of the real and personal property of the corporation there situate, applies to the personal labor performed by an overseer and custodian of the mines and property of the corporation while in charge of its works and property and is not restricted to any particular class of laborers or kind of labor performed; the statute being liberally construed.—McLaren v. Byrnes, 80 Mich. 275.

¶ 41. An employee engaged by the owner of charcoal kilns contiguous to railroad tracks, to fire the kilns, fight fires and do other work at a fixed compensation, had no such possession of the charcoal as gave him a lien thereon for his wages and a consequent right to maintain trover against a railroad company which removed the coal after notice of such employee's claim.—Van Lesler v. Ann Arbor R. Co., 133 Mich. 664.

§ 6. How created, obtained or lost.

Creation by agreement or implication, see ante § 2.
Basis for lien, see also ante ¶ 3.
Loss of lien by loss of possession, see post § 7.
Election to claim ownership as bar to claim of lien, see also ante ¶ 14.
Effect of filing creditors' bill to create lien, see Creditors' Suits § 31.
Acceptance of time paper as waiver of log lien, see also Forestry § 11.
Effect of excessive retention on right to log lien, see Forestry ¶ 38.
Waiver of reservation in mining lease of lien on ore for royalties, see also Mines ¶ 40.
Estoppel of bank by officer's statement to assert lien on stock for debt of the holder, see Banking § 58.
Liens avoided by subsequent bankruptcy of debtor, see Bankruptcy §§ 8, 9.
Extinction of liens by merger, see Mortgages, VII, D; Real Property.
Requisites and sufficiency of payment, see Payment.

¶ 42. Liens can only be created by agreement, or by some fixed rule of law, and it is not one of the functions of courts to create them.—Frost v. Atwood, 73 Mich. 67.

¶ 43. Courts cannot create liens, but can only declare and enforce them.—Lyster's Appeal, 54 Mich. 325.

¶ 44. The burden of showing relinquishment of a lien once established is upon the owner of the estate charged.—Kirkwood v. Hoxie, 95 Mich. 62.

¶ 45. A lien once waived cannot afterwards be revived.—Blakeley v. Moshier, 94 Mich. 299.

¶ 46. Whether a lien may not continue, if so agreed, where other collaterals are taken, quære.—Ortmann v. Plummer, 52 Mich. 76.

¶ 47. For a case where a party, under an agreement to pay for lands by taking up encumbrances upon it, was held to have satisfied an encumbrance by buying it in, see Michigan Ins. Co. v. Kibbee, 6 Mich. 410.

¶ 48. A lien for redemption from foreclosure can only be satisfied by a payment or voluntary discharge.—Powers v. Golden Lumber Co., 43 Mich. 468.

¶ 49. One who seeks to break a lien on the ground that the demand is excessive should tender what he himself considers reasonable.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 50. A lien once waived is permanently lost.—Au Sable River Boom Co. v. Sanborn, 36 Mich. 358.

¶ 51. All liens created by implication may be waived by implication.—McMaster v. Merrick, 41 Mich. 505.

¶ 52. A lien is waived if the parties entitled to it acquiesce in the action of third persons taking possession of the property on execution without notifying them of their own adverse claims.—McMaster v. Merrick, 41 Mich. 505.

¶ 53. A lien is waived by implication if privileged and unprivileged claims are commingled in the same dealings so that the lien is not kept ascertainable without restating and charging the accounts.—McMaster v. Merrick, 41 Mich. 505.

¶ 54. A lien is not lost by merely restating the account and deducting certain items.—Comstock v. McCracken, 53 Mich. 123.

¶ 55. Equity contemplates a lien discharged by mistake as still in existence.—French v. De Bow, 38 Mich. 708.

§ 7. ——Loss of possession.

In case of maritime liens, see also ante ¶ 4.
Loss of possession as releasing lien for log labor or services, see Forestry § 12.

¶ 56. An unconditional surrender of possession or conduct showing a design to discharge a possessory lien, or plainly inconsistent with it, usually puts an end to it.—De Witt v. Prescott, 51 Mich. 298.

¶ 57. The holder of a possessory lien may allow the owner of the property to take it into his possession and remove it without prejudice to the lien, if so agreed.—De Witt v. Prescott, 51 Mich. 298.

¶ 58. A possessory lien on property cannot be destroyed by a removal of such property, without the lienor's consent, from his lienor's possession.—De Witt v. Prescott, 51 Mich. 298.

¶ 59. No common-law lien upon personal property manufactured attaches where the manufacturer parts with the possession in the first instance after the manufacture.—Smith v. Greenop, 60 Mich. 61.

§ 8. Reinstatement of liens.

Revivability of lien, see also ante ¶¶ 45, 50.

¶ 60. A constable's lien upon the chattels of a corporation for his services in foreclosing a mortgage thereon is destroyed by his surrendering the property to the purchaser at the foreclosure sale; and no allowance therefor should be made to him in a subsequent proceeding for the appointment of a receiver for the corporation.—Citizens' Sav. Bank v. Kock, 117 Mich. 118.

¶ 61. It seems that a complainant seeking to reinstate a lien which he has discharged by mistake on lands of which he has since been in possession might be required to account for rents and profits if the pleadings raise the question.—French v. De Bow, 38 Mich. 708.

§ 9. Rights under lien; assignability.

Rights of purchaser subject to unenforceable lien, see post ¶ 74.

Rights of lienor bailing goods as against owner's directions as to their disposal, see Bailments § 31.

Taking one's own chattel from lienor's possession as larceny, see Larceny ¶ 14.

Rights affected by partnership, see Partnership, IV.

Lienors of insured property as proper or necessary parties to action on policy, see Insurance § 280.

Subrogation to rights of lien parties, see Subrogation; Mortgages, VIII.

Provisions of wills respecting properties subject to liens or creative of liens, see Wills, VI.

¶ 62. One who holds property under claim of a lien is under no obligation to take it to a certain point, at the owner's request, merely to enable the owner to replevy it.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 63. Claims against railroad companies for labor, etc., under the statute (How. St. §§ 3423-3425) are assignable, and may be sued by the assignee.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538; Dudley v. Toledo, A. A. & N. M. R. Co., 65 Mich. 655.

¶ 64. A lien on personalty for work performed thereon is assignable under Comp. L. 1897, § 10054.—Gardner v. Le Fevre, 180 Mich. 219.

§ 10. Remedies and procedure to enforce liens.

Evidence of equity to a lien, see ante § 3.

Burden of showing relinquishment, see ante ¶ 44.

Accounting to distribute proceeds between concurrent liens, see post § 11.

Jurisdiction of action on lien on foreign property, see Courts § 45.

Venue of suit to enforce lien on land, see Venue, I.

Amount of lien to be enforced as test for jurisdiction in equity, see Equity § 17.

Land or property value as test for equity jurisdiction to protect against asserted lien, see Equity § 17.

Existence of lien as basis for equitable jurisdiction though legal remedy to collect debt is also available, see Equity ¶ 121.

Jurisdiction of justice of the peace to enforce liens, see also Justices of the Peace § 18.

Mode of service to enforce statutory lien for labor performed for foreign corporation, see Process, II, B.

Multifariousness of bill to enforce distinct liens, see Equity § 75.

Right to enforce lien on exempt property, see Exemptions § 46.

Right of holder of lien to interplead claimants of surplus moneys, see Interpleader ¶ 4.

Computation of time for bar of suit to enforce lien of decree payable in instalments, see Limitations ¶ 294.

Remedies appropriate to particular kinds of liens, see topics treating of the specific liens, e. g., Mortgages; Foreclosure of Mortgages; Chattel Mortgages; Mechanics' Liens; Pledges; Vendors and Purchasers, XI; Forestry, III (log lien attachments).

Proceedings under Water Craft Act to enforce liens on boats, see Shipping, IV.

Attachment under the Log Lien Law, see generally Attachment.

Right of lien claimant to maintain trover, see Conversion § 20.

Decreeing lien for money paid as mode of relief from fraud, see also Fraud ¶ 753.

Foreclosure or enforcement of corporations' liens on their stock, see Corporations § 315.

Adjustment and working out of liens in partition, see Partition, III.

Working out liens or other rights incident to quieting title, see Quieting Title, III.

Working out liens as incident to rescission suits, see Rescission, VI.

Enforcement of lien as incident to specific performance, see Specific Performance, IV.

Presumption on error that no lien existed where none is found, see also Appeal ¶ 1412.

Decree establishing a lien on assets in hands of assignee for creditors, as bar or estoppel, see Former Adjudication § 67.

¶ 65. Equity will not interfere to impound property or tie up interests after an execution sale thereof, in order to establish a lien thereon under attachment proceedings that have not even reached a judgment.—Rollins v. Van Baalen, 56 Mich. 610.

¶ 66. In many lien cases resort to a court of equity, is not necessary or permissible, as

courts of law can deal with them cheaply and expeditiously.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

¶ 67. Equity has not jurisdiction to enforce payment by foreclosure in all cases of statutory liens.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

¶ 68. Where liens on property are accompanied by a personal responsibility the creditor has a right to rely on both.—Stebbins v. Walker, 46 Mich. 5.

¶ 69. The facts that a vendee of shinglelogs, the title to which, as also to the shingles manufactured therefrom, is retained by the vendor until certain notes given for the purchase-price are paid, has sold the shingles in violation of the contract and in fraud of the vendor, and that the purchasers threaten to remove the shingles out of the jurisdiction of the court, it not being claimed that they are pecuniarily irresponsible, do not create an equity entitling the vendor to maintain a bill in equity to enforce his alleged lien on the shingles, and for an accounting with said purchasers for shingles sold.—Brown v. Ring, 77 Mich. 159.

¶ 70. How. St. §§ 8402-8404, provide for the enforcement of liens for labor performed for mining corporations in the Upper Peninsula by the commencement of a suit by summons, and in case of a failure to obtain personal service the plaintiff may proceed in all respects, as near as may be, as in suits commenced by attachment where personal service is not obtained upon the defendant.—McLaren v. Byrnes, 80 Mich. 275.

¶ 71. Equity having jurisdiction for other purposes may order sales of property for the satisfaction of liens in order to do complete justice between the parties.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

¶ 72. A common-law lien resting in possession is not enforceable in equity.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

¶ 73. Although a creditor corporation having a legal security by statute analogous to a common-law lien cannot sell the property, there is no impediment to the recovery of a judgment and a sale of the property, as well as any other property of the debtor, on execution.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

§ 11. Conflicting liens; priorities.

Priorities in claims to land dependent on knowledge or notice of lien, see Notice and Record of Title.

Priority between domestic and foreign liens as affected by comity in recognizing foreign law, see Conflict of Laws ¶ 12.

Validity of assignments involving preferences and priorities or protecting existing liens, see Assignments for Creditors § 10.

Priorities of creditors of assignor, see Assignments for Creditors § 23.

Priority of lien of bankruptcy decree and creditors thereunder, see Bankruptcy § 8.

Priorities among creditors of insolvent bank, see Banking §§ 81-87.

Rank and preferences among corporate creditors, see Corporations § 221.

Lien of chattel mortgage and priority towards other liens or claims, see Chattel Mortgages, III.

Priorities on creditors' bill, see Creditors' Suits §§ 31, 32.

Rating and rank of liens on land mortgage foreclosure, see Foreclosure § 123.

Right of lienor for freight against seller rescinding sale after shipment, see Carriers ¶ 198.

Rights between execution purchasers and lienors, see Executions § 71.

When drain assessment becomes a lien on the land, see Drains § 60.

When local assessment or tax becomes a lien, see Local Improvements, VI, G; Taxes, IX.

Provision for preference of labor claims against insolvent debtors or estates, see Comp. L. 1915, § 14622.

¶ 74. One who buys at an auction subject to liens must take the transfer subject to such liens, notwithstanding they are not such as could have been legally enforced against the title sold.—Eames v. Eames, 16 Mich. 348.

¶ 75. All persons are bound to take notice that unpaid laborers for a mining corporation in the Upper Peninsula have a lien for their labor upon all of the real and personal property of the corporation in that portion of the state, which accrues and attaches as the labor is performed, and which has priority over a subsequent attachment though no notice of lien is filed.—McLaren v. Byrnes, 80 Mich. 275.

¶ 76. Where there are two concurrent liens against property, the court should order an accounting and distribute the proceeds of the property in accordance with the rights of the parties so ascertained.—M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co., 132 Mich. 285.

¶ 77. A judgment lien for mining labor under Comp. L. 1897, § 10755, and a lien under section 5472 for labor and materials furnished a foreign mining and smelting corporation, are concurrent or simultaneous.—M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co., 132 Mich. 285.

¶ 78. A vendor's lien has priority over the claims of assignees in bankruptcy or insolvency or general assignees for the benefit of creditors.—Lyon v. Clark, 132 Mich. 521.

¶ 79. How. St. § 8749m, allowing a preference for claims for labor, applies to services rendered by a clerk in a dry goods store,

to services by a salesman and manager in marking goods, placing them on the shelves, getting the stock ready, sweeping out the store, and other general work.—Lawton v. Richardson, 118 Mich. 669.

¶ 80. Labor liens for mine labor were given priority over mortgages prior in point of time, on property of a mining corporation in the Upper Peninsula under How. St. § 8408, providing for such liens to "take precedence of all other" debts, liens, or mortgages; and this language is not restricted by the further provision that the lien shall be enforced in the same manner and under the same "limitations and conditions" as are provided for other liens.—Atlantic Dynamite Co. v. Ropes Gold & Silver Co., 119 Mich. 260.

¶ 81. The rule that a surviving partner had the right to give a mortgage on the partnership property to secure the payment of a debt which should be paid out of the partnership assets, applies as between a mortgage given by a surviving partner individually and also as such partner and an execution levy made after the giving of the mortgage; and the mortgage was held to be the prior lien.—Peoples Nat. Bank of Jackson v. Wilcox, 136 Mich. 567.

¶ 82. The lis pendens for costs filed by complainant in partition with the filing of his bill, under Comp. L. 1897, § 8980, operates to make his lien upon the interest of the defendants in the lands involved in the partition suit superior to the lien of the solicitor of defendants under a mortgage upon such interest, given by them after the commencement of the suit to secure the payment of such solicitor's fee; even though the sheriff by his notice levied upon and sold only the interest of defendants in execution for such costs.—Barbour v. Patterson, 145 Mich. 459.

¶ 83. One having a claim for mining royalties under a lease which provides for a lien on the ore to enforce such claim may obtain a personal decree against the lessee in a court of equity in a suit to enforce the lien, where the bill alleges property upon which the complainant had a lien within the jurisdiction and the answer is silent upon the subject of the removal from the state of the property or sale of it, but on the contrary admits an indebtedness of a part of the amount claimed and offers to pay it and no intimation of sale and removal is made until the presentation of the defense on the hearing.—Hewitt Iron Mining Co. v. Dessau Co., 129 Mich. 590.

¶ 84. On a bill to enforce a lien on stock assigned by a former city clerk as security for the payment of any deficit, if such there should be found in his accounts with such city, the stock was rightly ordered returned to him and such assignment canceled according to his cross-action for accounting, where the evidence shows that at the time of such assignment, he had in fact overpaid such city; and such credit balance was rightly ordered paid to him by such city.—First State Sav. Bank of Three Rivers v. McMurtrie, 145 Mich. 700.

LIFE; LIVES.

Cross-References.

Life or Lives—
- Words used in limiting or conditioning estates, see Wills, VI; Deeds, III.
- Estates for life, see Life Estates.
- Term for which power of alienation may be suspended, see Perpetuities.
- Presumptions as to survivorship or continuance of life, see Death and Survivorship.
- Expectancy of life (mortality tables), see Damages §§ 329, 330; Death by Wrongful Act § 26.

Life Contracts—
- Employment contracts for life, see Master and Servant, II.
- Measure of damages for breach, see Damages § 81.
- Agreement to employ for life as consideration for release of claim, see Contracts § 115.

Life Insurance—
- See Insurance; Fraternal Associations.

Lives in Being—
- See Perpetuities.

LIFE ESTATES, REMAINDERS AND REVERSIONS.

TREATS of the law of life estates and future estates in real or personal property and of the rights and liabilities of the owners relatively as between themselves and as to third persons. The law of joint and common tenancies and of partition is treated in Tenants in Common and Partition, and the validity of suspensions of the power to alienate in the future is treated in Perpetuities. Deeds, trusts and wills creative of estates are treated in Deeds, Trusts and Wills, VI, respectively.

Analysis.

I. Nature and characteristics of estates.

§ 1. In general; creation and nature of life estates.
§ 2. Remainders and reversions.

§ 3. ——Alienation or incumbrance before death of life tenant.
§ 4. Merger of estates.
§ 5. Presumptions and evidence of estates.

II. Mutual and relative rights and liabilities.

§ 6. Rights pertaining to life estates.
§ 7. ——Sale or mortgage by life tenant.
§ 8. ——Improvements by life tenant.
§ 9. ——Limitations upon use of estate.
§ 10. ——Effect of levy upon or sale of remainder or reversion.
§ 11. Liabilities as between life tenant and remainderman or reversioner.
§ 12. ——Obligation to pay taxes.
§ 13. ——Duty to make repairs.
§ 14. Payment of incumbrance by life tenant.
§ 15. Rights incident to remainders and reversions.
§ 16. Acquisition of adverse title.
§ 17. ——Right of parties to buy in tax titles.
§ 18. Remedies to determine relative rights and liabilities.

III. Rights and liabilities towards strangers.

§ 19. In general; persons dealing with life tenant.
§ 20. Persons holding under life tenant at his death.
§ 21. Right and title of purchaser of life estate.
§ 22. Rights of foreclosure purchaser.
§ 23. ——Redemption rights of remainderman or reversioner.
§ 24. Purchaser of reversion or remainder.
§ 25. Proceedings for sale of lands subject to life estate.
§ 26. Actions and remedies by and against strangers.

IV. In personal property.

§ 27. In general; possession and enjoyment.
§ 28. Corpus and income.
§ 29. Sale and conversion to money and reinvestment.
§ 30. Waste and remedies against it.

I. NATURE AND CHARACTERISTICS OF ESTATES.

§ 1. In general; creation and nature of life estates.

Remainders and reversions, see post §§ 2, 3.
Merger of estates, see post § 4.
Presumptions and evidence of estates, see post § 5.
Mutual and relative rights and liabilities incident to life estates, see post II.
In personal property, see post IV.
Course of descent of expectant estates, see Descent § 18.
Life estate as entirety, see Husband and Wife § 24.
Termination of life estates for support by breach of condition, see also Deeds ¶ 135.
Life estate enjoyed by dowress after assignment, see Dower § 62.
Whether life estates subject to dower, see Dower § 8.
General provisions as to estates, see Comp. L. 1915, §§ 11519-11564.
Statutory limitation of successive estates for life, see Comp. L. 1915, § 11535.
Accumulation of rents and profts for future estate, see Comp. L. 1915, §§ 11555-11557.
When estates measured by life of third person to be estates of freehold, see Comp. L. 1915, § 11524.
Estates for life as estate of freehold, see Comp. L. 1915, § 11523.

¶ 1. An owner in fee of land, and his wife, owning an inchoate right of dower therein, may convey the title in fee or impose any limitations they see fit. They may, therefore, reserve a life estate to themselves and survivor.—Engel v. Ladewig, 153 Mich. 8.

§ 2. Remainders and reversions.

Alienation or incumbrance before death of life tenant, see post § 3.

Mutual and relative rights and liabilities incident to remainders and reversions, see post II.
Rights pertaining to life estates in personal property, see post IV.
Rights of remainderman in personalty, see post ¶ 78.
Reverter of dedicated premises on abandonment or disuse, see Dedication § 38.
Words of reservation of life estate in deed, see Deeds § 69.
Reverter for nonuse as agreed, see Deeds § 87.
Forfeiture and re-entry for breach of condition, see also Deeds §§ 88-91.
Construction of deeds as to vesting of future estates, see Deeds § 40.
Construction of deeds as to intent to pass reversions and remainders, see Deeds § 31.
Rights remaining in servient owner, see Easements § 23.
Statutory definition of remainder, see Comp. L. 1915, § 11529.
Statutory definition of reversion, see Comp. L. 1915, § 11530.
Statutory provisions relating to remainders, see Comp. L. 1915, §§ 11536-11539, 11542, 11545-11547.
Statutory requisites of contingent remainder on term of years, see Comp. L. 1915, § 11538.
Contingent remainders in fee, see Comp. L. 1915, § 11534.
Reversions as estates in expectancy, see Comp. L. 1915, § 11527.

¶ 2. A remainder over to minor children named, in the event of a devisee's dying without issue, is valid as a contingent limitation upon a fee, and will vest in possession on the death of the first taker without issue living at the time of such death.—Goodell v. Hibbard, 32 Mich. 47.

¶ 3. A remainder in fee may be created in favor of an unborn child.—See v. Derr, 57 Mich. 369.

¶ 4. The estate of a remainder-man is a vested one, subject only to the possibility of being defeated by his death previous to that of the life tenant.—Ensign v. Dunn, 181 Mich. 456.

¶ 5. Under Comp. L. 1897, § 8814, a remainder after a life estate cannot be defeated by the act of the life tenant.—Jeffers v. Sydnam, 129 Mich. 440.

¶ 6. Where a woman acquiesced for many years in a probate decree pursuant to the terms of her father's void will, awarding her a life estate in realty with remainder to her unborn children, held that the legal title vested in her children at their birth, and that the mother's grantee did not acquire title to the fee.—James E. Scripps Corporation v. Parkinson, 186 Mich. 663.

(5 Mich. Dig. 45)

§ 3. ——Alienation or incumbrance before death of life tenant.

Alienation or incumbrance by life tenant, see post § 7.
Levy upon or sale of remainder or reversion, see post § 10.
Mortgage of reversionary interest as affecting right to rent, see Landlord and Tenant § 57.
Merger of estates in general, see Real Property.
Alienation of expectant estates, see Comp. L. 1915, § 11553.

¶ 7. A remainderman may, before the death of the life tenant, convey his interest, under How. St., § 5551, declaring expectant estates to be descendible, devisable, and alienable in the same manner as estates in possession.—Defreese v. Lake, 109 Mich. 415.

§ 4. Merger of estates.

¶ 8. Where a life estate becomes vested in or is transferred to the owner of the fee without any intervening estate it is merged in the fee.—Ryder v. Flanders, 30 Mich. 336.

¶ 9. The conveyance of the estate of remaindermen and of a life tenant to the same person, subject to a lease given by the life tenant for a term of years does not effect a merger of the two estates which will, in equity, bind the purchaser, on the death of the life tenant before the end of its term, to the terms of the lease, where the latter had no intention of leasing anything beyond the life estate.—Hartz v. Hilsendegen, 182 Mich. 129. Followed in Mintz v. Hartz, 182 Mich. 140.

¶ 10. Where the grantor conveys a moiety in land to each of two grantees for life with remainder to the survivor in fee neither can by conveyance create a tenancy in common so as to cut off the contingent remainder.—Finch v. Haynes, 144 Mich. 352.

§ 5. Presumptions and evidence of estates.

¶ 11. The evidence held sufficient to show that a lost conveyance created a life estate with remainder over to the grantee's son.—Edwards v. Mudge, 186 Mich. 71.

¶ 12. The fact that a lost conveyance created a life estate with remainder over to the grantee's son, held established by the evidence.—Edwards v. Mudge, 186 Mich. 71.

II. MUTUAL AND RELATIVE RIGHTS AND LIABILITIES.

§ 6. Rights pertaining to life estates.

Sale or mortgage by life tenant, see post § 7.
Improvements by life tenants, see post § 8.
Limitations upon use of estate, see post § 9.
Effect of levy upon or sale of remainder or reversion, see post § 10.
Liabilities as between life tenant and remainderman or reversioner, see post §§ 11-13.

Payment of incumbrance by life tenant, see post § 14.
Rights incident to remainders and reversions, see post § 15.
Acquisition of adverse title, see post §§ 16, 17.
Remedies to determine relative rights and liabilities, see post § 18.
Rights towards third persons, see post III.
Rights pertaining to life estates in personal property, see post IV.
Rights of life tenants to homestead exemption, see Homesteads § 7.
Right of widow to income from life estate during period she receives allowance, see Estates of Decedents ¶ 354.
Payment of insurance money to reversioner, see Insurance § 258.
Persons entitled to notice of proceedings to vacate highways, see Highways § 131.
Construction of wills creative of life estates, see Wills, VI.

¶ 13. The devisee of a life estate is entitled to possession, rents, issues and profits.—Pitcher v. Douglas, 37 Mich. 339.

¶ 14. The right of a life tenant to the proceeds of sales of timber follows the right to cut timber.—Poole v. Union Trust Co., 191 Mich. 162.

¶ 15. Where, before the commencement of the life estate, the land has been cultivated for the produce of salable timber, the tenant may continue the cultivation for his own profit.—Poole v. Union Trust Co., 191 Mich. 162.

§ 7. ——Sale or mortgage by life tenant.

Sale or mortgage of remainder or reversion before death of life tenant, see ante § 3.
Deed from life tenant as color of title, see Adverse Possession § 32.
Necessity of right of entry in remainderman before adverse possession runs, see Adverse Possession § 8.
Estoppel to question that warranty deed carried life lease of premises, see Estoppel ¶ 19.
General law of sales of realty, see Vendor and Purchaser.
Effect of deed by life tenant, see Comp. L. 1915, § 11690.

¶ 16. A widow entitled to a life estate in certain realty, under the will of her husband, agreed to convey her interest to the heirs for $1,500, and certain personal property, provided the heirs should sell the realty within a year and pay her the money. She died before the year was up, and the land was sold within the year. Held, her administrator was entitled to recover by bill the $1,500 out of the money received for the land, in the hands of her husband's administrator.—Ferris v. Poucher, 152 Mich. 251.

¶ 17. The owner of a life estate in land and the remaindermen joined in a conveyance taking a single mortgage back for the unpaid purchase price. Held, that the life tenant was entitled to the interest on the debt until the mortgage was discharged or until her death, notwithstanding a subsequent conveyance and assignment by the remaindermen of their interest in the land and in the debt secured.—Horton v. Howard, 95 Mich. 134.

§ 8. ——Improvements by life tenant.

Right of purchaser from life tenant to remove improvements, see post ¶ 60.
Improvements by life tenant as fixtures or movables, see Fixtures § 13.

¶ 18. Improvements made by a life tenant during his tenancy are presumed to be for his own benefit and are as a rule not a charge against the estate or the remainderman.—Stroh v. O'Hearn, 176 Mich. 164.

§ 9. ——Limitations upon use of estate.

What is prohibited as waste, see Waste.

¶ 19. Where timber lands which were purchased by a testatrix for investment and resale are valuable chiefly for the timber thereon, the trustees of an estate may not sell the timber and pay the proceeds to the life tenant, since such a course would materially injure the fee.—Poole v. Union Trust Co., 191 Mich. 162.

¶ 20. A widow who has a life interest in an entire estate with power to use so much as she shall need does not have power to remit the interest on a mortgage accruing during her life; she is under obligation to account for both principal and interest.—In re Mallary's Estate, 127 Mich. 119.

§ 10. ——Effect of levy upon or sale of remainder or reversion.

Voluntary alienation or incumbrance before death of life tenant, see ante § 3.

¶ 21. The right of the owner of a life interest to control and possess the property during his life is not affected by a levy upon and sale of the remainderman's interest.—Storrs v. Storrs, 58 Mich. 55.

§ 11. Liabilities as between life tenant and remainderman or reversioner.

Obligation to pay taxes, see post § 12.
Duty to make repairs, see post § 13.
Liabilities toward third persons, see post III.
Forfeiture of estate for breach of condition, see Deeds § 88 et seq.

¶ 22. Life tenants must pay the interest on mortgages and debts which are a lien upon the fee of the property.—Stroh v. O'Hearn, 176 Mich. 164.

¶ 23. As between the owners of the fee and of a life estate in the same encumbered property, the life estate is to keep down the

interest and the fee is to be charged with the principal. Interest due at the death of the ancestor, as between the tenants for life and in fee, will be treated as principal.—Campbell v. Campbell, 21 Mich. 438.

¶ 24. The interest of a widow in her husband's realty being only a life interest it is her duty as between herself and the owners of the fee to pay the interest upon the encumbrance upon the estate.—Bowen v. Brogan, 119 Mich. 218.

¶ 25. As between a tenant for life in possession and the remainderman, the duty to pay the principal of an encumbrance rests upon the remainderman, the tenant being holden for interest only; and the obligation of the tenant is not extended where the life estate is in expectancy.—Damm v. Damm, 109 Mich. 619.

¶ 26. A grantor of property encumbered by a mortgage, who reserves a life estate therein in himself, is bound, as between himself and the grantee, to pay the interest on the mortgage during the existence of the life estate.—Welbon v. Welbon, 109 Mich. 356.

¶ 27. A life tenant in expectancy is bound to contribute to a remainderman who pays an encumbrance upon their estates, to which the estate of the tenant in possession is not subject, an amount equal to his proportionate share, according to his expectancy, of the interest which would accrue during the expectancy of life of the tenant in possession, and the entire interest which would accrue during his expectancy of life after the commencement of his life estate in possession, less such sum as may be proper on account of immediate payment.—Damm v. Damm, 109 Mich. 619.

¶ 28. It is the duty of a life tenant to pay the interest on encumbrances existing at the time the tenancy was created, and, in case the premises are redeemed, to contribute to the payment of the principal according to the value of his interest in the land. A dowress, therefore, who purchases and seeks to foreclose a mortgage covering lands admeasured to her as dower, the amount of which mortgage was deducted from the value of the land in making the apportionment, should be charged with the present value of an annuity for the remainder of her life equal to the annual interest on the mortgage debt, to be computed, however, at the legal rate of interest, irrespective of that stipulated in the mortgage.—Hodges v. Phinney, 106 Mich. 537.

§ 12. ——Obligation to pay taxes.

¶ 29. It is the duty of a life tenant to pay taxes upon a life estate during his tenancy.—Smith v. Blindbury, 66 Mich. 319; Myers v. Myers, 186 Mich. 215.

¶ 30. Life tenants must pay taxes which are a lien upon the fee of the property.—Stroh v. O'Hearn, 176 Mich. 164.

¶ 31. The duty of a life tenant to pay taxes is not released because a reversioner, who occupies jointly with him, mortgages the reversion agreeing with the mortgagee to pay the taxes.—Jenks v. Horton, 96 Mich. 13.

§ 13. ——Duty to make repairs.

Waste in general, see Waste.
Conveyance of timber land by life tenant as waste, see Waste.

¶ 32. It is the duty of a life tenant to make repairs to prevent waste.—Smith v. Blindbury, 66 Mich. 319.

¶ 33. The life tenant is bound to keep the premises in repair, and is not permitted to commit waste.—Curtis v. Fowler, 66 Mich. 696.

§ 14. Payment of incumbrance by life tenant.

¶ 34. Although a life tenant is under no obligation to pay off the principal of an encumbrance, even to prevent a foreclosure sale, yet if he does so, he is entitled to call upon the remainderman for contribution and has a lien on the property for the amount due, and the amount for which the remainderman is liable is the amount paid less the amount of interest which would have been payable by the life tenant.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 35. While a life tenant cannot claim a lien for payments on an encumbrance made voluntarily with no purpose to bind the remainderman, yet payments made in ignorance of the real state of facts cannot be said to be voluntary.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 36. Evidence held sufficient to show that a life tenant, in using her own money to apply on a mortgage on property, believed that she was the owner of the premises.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 37. It is the duty of the remainderman to pay the principal of incumbrances against the property which is held by a life tenant but if the life tenant pays it he cannot acquire an adverse title against the remainderman but he is entitled to contribution from such remainderman and has a lien upon the property for the amount so paid less interest on the principal.—Stroh v. O'Hearn, 176 Mich. 164.

§ 15. Rights incident to remainders and reversions.

Nature of remainders and reversions in general, see ante § 2.
Rights of remainderman in personalty, see post ¶ 78.
Reversionary right of bankrupt in bankrupt estate, see Bankruptcy § 23.

Reversion of highways and streets to abutters on vacation or discontinuance, see Highways § 138.
Improvements by remainderman as fixtures or movables, see Fixtures § 13.
Validity of parol surrender of remainder interest, see Frauds, Statute of, § 51.
Effect of parol agreement by remainderman in common not to claim a share of testator's realty, see Frauds, Statute of ¶ 178.
Construction of wills creative of remainders and reversions, see Wills, VI.
Invalidity as to reversioner and remainderman of recoveries against life tenant, see Jud. Act, chap. XXXIII, § 3, Comp. L. 1915, § 13360.

¶ 38. Permanent improvements made on realty by life tenants inure to the remainderman's benefit.—Curtis v. Fowler, 66 Mich. 696.

¶ 39. Remaindermen are not bound by representations of the life tenant's attorney that in making a lease of the life estate he was acting for them, when in fact he represented the life tenant only.—Hartz v. Hilsendegen, 182 Mich. 129. Followed in Mintz v. Hartz, 182 Mich. 140.

¶ 40. Where a remainderman who has agreed to pay the owner reserving a life estate a monthly sum for the latter's lifetime, enters into possession and makes improvements, he will be presumed to have made the improvements for his own benefit. —Herpel v. Herpel, 162 Mich. 606.

¶ 41. A widow had a life estate in the west half of a building. The reversioner also owned the east half of the building. Held, that the reversioner would not be enjoined from removing a stairway that had been used in common by the two halves, and closing the communication, the stairway not being a way of necessity or a permanent appurtenance, and the proposed change tending to increase the value of the estate as a whole, and the benefit to the reversioner being greater than the injury to the life tenant; such a tenant must make the property available to his profit at his own expense.—Scott v. Palms, 48 Mich. 505.

§ 16. Acquisition of adverse title.

Right of parties to buy in tax titles, see post § 17.
Right of purchaser of life estate to purchase hostile claims and dispute title of life tenant, see also post ¶¶ 58, 59.
Remedies for protection of estate in personalty from waste, see post § 30.

¶ 42. Where, through an agreement fraudulent as to the remainderman, a third person forecloses a mortgage on property subject to a life estate, purchases at foreclosure, and conveys to the life tenant, the remainderman is entitled to redeem.—Engel v. Ladewig, 153 Mich. 8.

¶ 43. Where the life tenant has acquired a title through foreclosure of a mortgage in fraud of the rights of the remainderman, the remainderman is entitled to redeem upon paying the amount of the mortgage less such sum, calculated at its present worth, as would equal the amount of interest which the life tenant would have been required to pay during her expectancy of life.—Engel v. Ladewig, 153 Mich. 8.

¶ 44. Land held by a life tenant, the father of complainants, was covered by a mortgage, the interest on which the father failed to pay. Foreclosure was had, the mortgagee buying in. Later, the mortgagee reconveyed the fee to the father, and took from him a mortgage covering the original debt, interest, and costs. The father then conveyed to his son, the defendant, who knew all the facts. In a bill by other minor children, the remaindermen, to have the deeds set aside, held, the life tenant occupied toward them a fiduciary relation and owed a duty to pay the interest on the mortgage; and the defendant not being an innocent purchaser the deeds to him should be set aside.—McCall v. McCall, 159 Mich. 144.

¶ 45. A life tenant, the father of complainants, minor children, who were remaindermen, permitted a mortgage to be foreclosed, and later, in violation of his fiduciary duty to the remaindermen obtained title in fee to the land. He then conveyed the same to a son, the defendant, with whom the father lived on the land, and who took care of the father during his last illness. In a decree setting aside the deed to the defendant, held, the defendant was not in equity entitled to compensation for taking care of the father, or for money spent in taxes and improvements on the land, since he had had the use of the same and had removed valuable buildings from it.—McCall v. McCall, 159 Mich. 144.

¶ 46. The interest of a widow in her husband's realty being only a life interest, it is her duty, as between herself and the owners of the fee, to pay the interest upon the encumbrance, and therefore a widow who neglected such duty and permitted a mortgage to be foreclosed, could not, by acquiring the property through the foreclosure sale, cut off the title of the remaindermen.—Bowen v. Brogan, 119 Mich. 218.

¶ 47. Land held by a life tenant, the father of complainants, was covered by a mortgage, the interest on which the life tenant failed to pay. Foreclosure was had, the mortgagee buying in. Later, the mortgagee reconveyed the fee to the father, and took from him a mortgage covering the original debt, interest, and costs. The father then conveyed to his son, the defendant, who knew all the facts. Complainants, minor children, who were the remaindermen, brought a bill shortly after the father's death to have the deeds set aside. There was evidence that the father

led complainants all along to believe he was acting for their protection. Held, that since complainants acted as soon after their father's death as the defendant informed them of his intent to claim absolute title, they were not guilty of laches.—McCall v. McCall, 159 Mich. 144.

¶ 48. Where a will created a life estate which was accepted and imposed upon the life tenant the duty of paying the interest upon the mortgage debt on the land, but he failed to do so and allowed the property to be sold under a foreclosure sale, and failing to redeem, he was afterwards compelled to take a contract of purchase from the purchaser at the foreclosure sale, this inured to the benefit of the remaindermen who secured all the equitable rights under his contract of purchase.—Lewis v. Wright, 148 Mich. 290.

¶ 49. Under the rule that a life tenant in possession does not hold adversely to the remaindermen, the grantees of such a tenant who acquired title at the foreclosure sale under a mortgage which she had permitted to be foreclosed through neglect of her duty to pay interest, did not acquire title by adverse possession.—Bowen v. Brogan, 119 Mich. 218.

§ 17. ——Right of parties to buy in tax titles.

¶ 50. A purchaser of a life estate cannot neglect to pay taxes and acquire a tax title as against the remaindermen.—Jeffers v. Sydnam, 129 Mich. 440.

¶ 51. A married woman who is in possession with her husband, of land in which the latter has a life estate, cannot acquire a tax title which she can assert adversely to the life tenant or the remainderman.—Myers v. Myers, 186 Mich. 215.

§ 18. Remedies to determine relative rights and liabilities.

Presumptions and evidence of estates, see ante § 5.
Actions and remedies by and against strangers, see post § 26.
Limitation of action by remainderman to recover portion of fund derived from sale of fee by life tenant, see Limitations ¶ 46.

¶ 52. Where a remainderman goes into possession of the premises and the life tenant brings a bill for relief, the chancery court must have sufficient evidence before it of the rental value of the premises before decreeing that the remainderman shall pay a fixed sum per year for the occupation of the land.—Herpel v. Herpel, 162 Mich. 606.

III. RIGHTS AND LIABILITIES TOWARDS STRANGERS.

§ 19. In general; persons dealing with life tenant.

Persons holding under life tenant at his death, see post § 20.
Right and title of purchaser of life estate, see post § 21.
Rights of foreclosure purchaser, see post §§ 22, 23.
Purchaser of reversion or remainder, see post § 24.
Proceedings for sale of lands subject to life estate, see post § 25.
Actions and remedies by and against strangers, see post § 26.
Rights pertaining to life estates in personal property, see post IV.
Whether life tenant "freeholder" is qualified to sign application for drain, see Drains ¶ 58.
Effect of conveyance of life tenant purporting to convey a greater estate than that possessed, see Comp. L. 1915, § 11690.
Power of life tenant to make leases, see Comp. L. 1915, §§ 11606-11608.
Statutory prohibition against arbitration of interests in life estates or estates in fee, see Jud. Act, chap. XLV, § 2; Comp. L. 1915, § 13647.

¶ 53. One who contracts with a life tenant for the purchase of the timber standing on the land, and pays the purchase price, with the full knowledge and acquiescence of the remainderman, will be protected, in so far as his acts in cutting and removing the timber without objection by the remainderman are involved, upon the theory that the silence of the remainderman amounted to a parol assent in the nature of a license, revocable at his pleasure.—Huyck v. Bailey, 100 Mich. 223.

§ 20. Persons holding under life tenant at his death.

Right and title of purchaser of life estate, see post § 21.
Rights of foreclosure purchaser, see post § 22.

¶ 54. The death of a life tenant terminates the lease of the premises existing between him and his lessee, and the latter becomes a tenant by sufferance of the reversioner.—Harrington v. Sheldon, 196 Mich. 388.

¶ 55. The death of a life tenant during the continuance of a lease of his estate for a term of years extinguishes the rights of the lessee the lease not being binding on the remainderman.—Hartz v. Hilsendegen, 182 Mich. 129. Followed in Mintz v. Hartz, 182 Mich. 140.

¶ 56. A lease for a term of years by a life tenant of his estate is not, after his death, binding on the remaindermen on the ground of ratification, in the absence of evidence tending to show an intention on their part to recognize the lease as affecting their estate; or that the life tenant acted for them, or attempted to bind them in writing.—Hartz v. Hilsendegen, 182 Mich. 129. Followed in Mintz v. Hartz, 182 Mich. 140.

¶ 57. The lease of his estate by a life tenant for a term of years is not binding on

the remaindermen by way of estoppel after the former's death, where the remaindermen did nothing to lead the lessee to believe that the life tenant had power to bind them. —Hartz v. Hilsendegen, 182 Mich. 129. Followed in Mintz v. Hartz, 182 Mich. 140.

§ 21. Right and title of purchaser of life estate.

¶ 58. A purchaser of a life estate cannot dispute the title of the life tenant through the purchase of hostile claims.—Hunt v. Rabitoay, 125 Mich. 137.

¶ 59. The purchaser of a life estate may purchase outstanding claims to set up against the title of the remaindermen upon the termination of the life tenancy.—Hunt v. Rabitoay, 125 Mich. 137.

¶ 60. A purchaser in possession of land under a deed conveying a life estate, who was also tenant in common with others of the remainder, could not, after his grantor's death, recover for improvements made by him upon the premises during his grantor's life.—Curtis v. Fowler, 66 Mich. 696.

¶ 61. As the deed of a tenant for life conveys the present freehold, rescission on the ground of a complete failure of consideration cannot be claimed by tenant's purchaser with warranty, who maintains that he bought the land believing that tenant's title was in fee. —Leal v. Terbush, 52 Mich. 100.

§ 22. Rights of foreclosure purchaser.

Redemption rights of remainderman or reversioner, see post § 23.

Title and rights of foreclosure purchasers in general, see Foreclosure, IV.

¶ 62. Where a will created a life estate which was accepted and there was a duty imposed that he pay the interest upon a mortgage debt on the property, but the property is permitted to be sold under foreclosure for nonpayment of interest, the purchaser obtains a good title; and where he afterwards sells to a stranger the remaindermen will have lost all their interest in the property.—Lewis v. Wright, 148 Mich. 290.

§ 23. ——Redemption rights of remainderman or reversioner.

¶ 63. Where a will created a life estate which was accepted and there was imposed the duty upon paying the interest upon a mortgage debt on the property, but instead of performing the duty owed to the remaindermen he allows the property to be sold under foreclosure, his remaindermen would succeed to every right he obtained in case he had redeemed within the statutory period.—Lewis v. Wright, 148 Mich. 290.

§ 24. Purchaser of reversion or remainder.

¶ 64. The purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against a life tenant.—Jenks v. Horton, 96 Mich. 13.

§ 25. Proceedings for sale of lands subject to life estate.

Proceedings in chancery court for sale of life estates with reversion or remainder, see Jud. Act, chap. XIX, §§ 62-70, Comp. L. 1915, §§ 12716-12724.

Chancery power to authorize sale of lands at instance of persons having life estate in them, whose interests would otherwise be jeopardized, see Jud. Act, chap. XIX, § 62 et seq.; Comp. L. 1915, § 12716 et seq.

¶ 65. A petition for the sale of lands subject to devised life estate, filed under Comp. L. 1897, § 9234 et seq., not being under oath, inasmuch as there was no clerk's certificate to the character of the notary, and verification having been made in a foreign state, was properly dismissed.—Metcalf v. Carr, 133 Mich. 123.

¶ 66. Under Comp. L. 1897, §§ 9234-9242 inclusive as amended by Pub. Acts 1901, No. 55, authorizing chancery courts to sell lands held under a life estate whenever it shall appear that the rights of interested parties will otherwise be jeopardized, and providing for substituted service by publication, the procedure is constitutional and valid where the urgency is shown, the heirs apparent are served and appear by guardians ad litem, but no service other than by publication is had on brothers and sisters of the life tenant who may possibly be entitled if the children of the life tenant die before he does. Persons not in esse will be bound by the decree and the substituted service by publication provides for those now in esse who may possibly become entitled to the remainder.—Garrison v. Hecker, 128 Mich. 539.

§ 26. Actions and remedies by and against strangers.

Presumptions and evidence of estates, see ante § 5.

Remedies to determine relative rights and liabilities, see ante § 18.

Person entitled to bring forcible entry or summary proceedings, see Forcible Entry §§ 14-16.

Injunction to prevent trespasses injuring the freehold, see Injunctions § 70 et seq.

Measure of damages for eviction or disturbance of life tenant, see Damages § 74.

Right of reversioner or remainderman to bring partition suit, see Jud. Act, chap. XXXI, § 3, Comp. L. 1915, § 13260.

Sale of life estate in partition proceedings, see Jud. Act, chap. XXXI, § 42, Comp. L. 1915, § 13299.

Right of reversioner or remainderman to sue after tenant for life makes default or surrender of property to stranger, see Jud. Act, chap. XXXIII, § 2, Comp. L. 1915, § 13359.

Right of reversioner or remainderman to defend suit against life tenant, see Jud. Act. chap. XXXIII, § 1, Comp. L. 1915, § 13358.

¶ 67. Ejectment was maintainable by remaindermen against parties in possession under a void mortgage foreclosure, though they and not the life tenant were bound to pay the mortgage debt, and the foreclosure occurred by the life tenant's neglect to pay the interest.—Bowen v. Brogan, 119 Mich. 218.

¶ 68. In ejectment by remaindermen against the grantees of a life tenant who improperly acquired title through the foreclosure of a mortgage based on her own default, such grantees could not defend on the ground that the action was not sustainable until such remaindermen had made payment of the principal amount due to the mortgagee.—Bowen v. Brogan, 119 Mich. 218.

¶ 69. Strangers in possession of land cannot resist the foreclosure of a mortgage executed by the life tenant on the ground that the mortgage violates a condition in the deed to the mortgagor prohibiting a conveyance of the land during his lifetime.—Hayward v. Kinney, 84 Mich. 591.

IV. IN PERSONAL PROPERTY.

§ 27. In general; possession and enjoyment.

Corpus and income, see post § 28.
Sale and conversion to money and reinvestment, see post § 29.
Waste and remedies against it, see post § 30.

¶ 70. Payments on deceased vendor's contract to sell land held good where made to his widow, to whom he left life estate in all his property, and where there was no administration.—Lamore v. Frisbie, 42 Mich. 186.

¶ 71. Replevin cannot be maintained by the administrator of the estate of a daughter who was entitled to the life possession of the property which belonged to her father, subject to the condition of caring for him during his lifetime; as upon the death of the daughter the father alone could assert, not only title to the property, but his right to the possession of it.—Salter v. Sutherland, 123 Mich. 225.

¶ 72. In a particular case it was held that, even on the supposition that a widow's right was limited by will to a life estate, she was entitled to possession of securities and could foreclose them, especially as the coexecutor acquiesced.—Proctor v. Robinson, 35 Mich. 284.

§ 28. Corpus and income.

¶ 73. Distributions of additional stock in the nature of a stock dividend belong to the corpus of a trust estate and do not constitute income payable to a life tenant when they represent a reduction of capital, or a change of its form, or an enhancement of the value of the capital assets from causes other than the accumulation of earnings.—Poole v. Union Trust Co., 191 Mich. 162.

¶ 74. An instrument made and delivered by a mother to her daughter, selling and agreeing to transfer to the daughter certain stocks and other property, upon the condition that the mother is to have the income during her life, and after her death the property and "all income arising therefrom" to belong to the daughter, is construed to reserve the income to the mother during her life to be used or disposed of as she shall see fit.—Bloodgood v. Terry, 134 Mich. 305.

¶ 75. Where a promissory note bearing annual interest provides that at the death of the payee it is to become the property of another designated person, and that no part of the principal is to be paid during the lifetime of the payee, and the note was secured by a mortgage containing similar recitals the payee does not thereby reserve to himself during his lifetime the interest earned by the principal, but merely reserved the annual interest, and the interest which accrued in the interval between the payment of the annual interest and his death belongs to the person designated in the note, and not to his estate.—Rogers v. Osborne, 146 Mich. 613.

§ 29. Sale and conversion to money and reinvestment.

¶ 76. The owner of a life estate in personal property has the power to make it available according to circumstances. If it consists of securities the estate is not an estate in each particular security, but in the aggregate; and an assignment of a security cannot be complained of unless it would tend to diminish the estate at the life tenant's death.—Sutphen v. Ellis, 35 Mich. 446.

¶ 77. A person holding a life estate in securities has authority to convert them into money when that is the proper proceeding for obtaining the income and protecting the property from loss; and even a sale of a particular security may be entirely admissible where the bulk of the estate is preserved intact; and all that can be required is that the estate shall be so managed as to preserve the aggregation from diminution.—Sutphen v. Ellis, 35 Mich. 446.

¶ 78. A possible remainderman in personalty, in event that the life tenant does not dispose thereof, cannot assert fraud with regard to a sale of such personalty.—Turnbull v. Johnson, 153 Mich. 228.

§ 30. Waste and remedies against it.

¶ 79. If in case of a life estate in personal property, the estate is wasted by the

life tenant, the party in whose behalf the limitation order is made has a remedy, but the personal representatives cannot interfere.—Sutphen v. Ellis, 35 Mich. 446.

LIGHT AND AIR to LIMITATIONS.

Cross-References.

Light and Air—
Obstruction of light or contamination of air as nuisance, see Nuisances.
Light House—
Condemnation of land for or by United States, see Eminent Domain § 4.
Lighting—
Franchises for public and private lighting, see Franchises; Electricity; Gas.
Gas and electric corporations, see Gas; Electricity.
Lighting Contracts—
Public contracts and provisions for lighting, see Municipal Corporations, III, XI; Public Contracts.
Lighting Fixtures—
See Fixtures; Landlord and Tenant, IV, E.
Lightning—
Liability under insurance policies, see Insurance.
Duty and care and negligence in use of electric wires respecting lightning, see Electricity; Master and Servant, III.
Lights and Warnings—
Duty and negligence in respect to lighting or safeguarding places of danger, see Buildings § 5; Landlord and Tenant, IV, D, VII; Carriers, IV, E; Master and Servant, III; Railroads, VIII; Street Railways, IV; Highways § 211 et seq.; Shipping, V.
Motor vehicle liabilities and regulations, see Highways, XIII, XIV.
Limitation of Liability—
In contract with carrier, see Carriers §§ 48, 57 et seq., 66-71, 98, 127, 247.
In contract of employment, see Master and Servant, III, A.
In contracts of telegraph companies, see Telegraphs.
Limitation or Condition—
Construction of words, see Wills, VI; Deeds, III.
Limitation Over—
See Wills, VI; Deeds, III; Real Property; Life Estates; Perpetuities.
Limitations—
See generally the topic describing the subject or the object of the limitation, e. g., constitutional limitations, see Constitutional Law; Commerce; charter and statutory limitations on corporate power, see Corporations, XI et seq.; agents' authority, see Agency, II; Corporations, XVII; municipal powers and limitations, see Municipal Corporations, III.
See also references, post, under "Limited."

LIMITATIONS OF ACTIONS.

TREATS of statutory restrictions on the time within civil actions and proceedings in the nature of actions may be brought. It excludes regulations and restrictions on the time and sequence of the particular steps in actions, as to which see the specific topics treating of the various actions and proceedings, and the statutes of nonclaim, which require the presentation of the claim within time limits in order to fix a right of action. As to statutes of nonclaim, see Estates of Decedents, VI, C; Highways, XII, H, 1; Municipal Corporations, XIV. For agreements limiting time to sue, see Contracts §§ 47, 48; Insurance § 272 et seq. The doctrines of prescription and adverse possession are treated in Adverse Possession and in Easements and Highways, II, A.

Analysis.

I. The statutes and their application in general.

§ 1. In general; policy and construction of the law.
§ 2. Application and operation of the statutes and amendments.
§ 3. Actions and proceedings to which statutes apply.
§ 4. Applicability to suits in equity.
§ 5. Foreign and domestic causes and statutes.
§ 6. Effect of the statutes and of bar thereunder.
§ 7. ——Bar of one cause or remedy leaving other available.

II. The periods and corresponding actions.

§ 8. In general; nature and form of the action.
§ 9. Real actions.

§ 10. ——Recovery of land held under void or defective judicial or involuntary sale.
§ 11. Suits to establish equitable interests in land or to foreclose.
§ 12. Actions for damages to land.
§ 13. Actions on judgments and transcript judgments.
§ 14. Contract actions in general.
§ 15. Actions on sealed contracts, bonds and undertakings.
§ 16. Actions for injuries to personalty.
§ 17. Actions for personal torts and injuries.
§ 18. Actions against sheriffs and other public officers.
§ 19. Mandamus actions.
§ 20. Accounting suits.
§ 21. Creditors' suits and suits in aid of execution.
§ 22. Establishment or enforcement of trusts.

III. Disabilities, exceptions and suspensions.

A. In General.

§ 23. Exceptions and exemptions in general.
§ 24. Causes arising after statute begins to run.
§ 25. Actions or claims against state or public.
§ 26. Actions by, or in name of, or on behalf of the state.
§ 27. Death and pendency of administration.
§ 28. Dissolution or expiration of corporation.
§ 29. Injunctions against suing or other suits affecting parties.
§ 30. Fraud, ignorance or concealment.
§ 31. Possession as tolling limitations against possessor's action.
§ 32. Tacking disabilities and suspensions.

B. Infancy, Coverture and Incompetency.

§ 33. Infancy of plaintiff.
§ 34. Coverture of plaintiff.
§ 35. Insanity of plaintiff.

C. Absence or Nonresidence or Imprisonment.

§ 36. Absence or nonresidence of defendant.
§ 37. ——Effect of assumption of domestic residence.
§ 38. ——Effect of personal service on nonresident.
§ 39. Nonresidence or absence of plaintiff.
§ 40. Imprisonment of party.

IV. Maturity and accrual of cause.

§ 41. Accrual or devolution of title or right to plaintiff.
§ 42. ——Plaintiff as successor in right to another.
§ 43. ——Infant as successor to representative.
§ 44. Appointment of administrator or representative to sue or defend.
§ 45. Right of entry; recovery of land.
§ 46. Actions to recover legacies or to enforce wills.
§ 47. Actions on judgments and decrees.
§ 48. Contracts in general; necessity of demand and tender.
§ 49. ——Necessity of liquidation or measurement.
§ 50. ——Effect of collateral agreements or rights.
§ 51. On open or running accounts.

§ 52. On accounts stated.
§ 53. Negotiable paper and liabilities thereon.
§ 54. Demand or sight paper.
§ 55. Demands due on specified contingency.
§ 56. Agreements and demands due on death of person.
§ 57. Implied contract rights.
§ 58. Work and labor over extended period.
§ 59. Breach of sale or warranty of chattel.
§ 60. Breach of contracts, under seal and covenants for title to land.
§ 61. Actions on fiduciary bonds.
§ 62. Actions on appeal, supersedeas and indemnity bonds.
§ 63. Demands against agents and bailees.
§ 64. Actions against liquidating partners.
§ 65. Misappropriation and waste of corporate assets and properties.
§ 66. Causes of action for tort.
§ 67. ——Conversion of personalty.
§ 68. ——Continuing trespasses and injuries.
§ 69. ——Waste.
§ 70. Statutory liabilities.
§ 71. Equities and equitable rights.
§ 72. Accounting suits.
§ 73. Default and foreclosure of mortgages.
§ 74. Express, implied and constructive trusts.

V. Commencement of action and computation of elapsed time.

§ 75. Necessity and sufficiency of commencement of action.
§ 76. Continuity or interruption of action.
§ 77. Amendments and changes after commencement.
§ 78. Set-offs and recoupments.
§ 79. Computation of time and deductions.

VI. Extension of time, revival of cause, and waiver and estoppel.

A. ACKNOWLEDGMENT AND NEW PROMISE, AND WAIVER.

§ 80. In general.
§ 81. Sufficiency of acknowledgment or new promise; necessity of writing.
§ 82. ——Certainty and freedom from conditions.
§ 83. New promise by one of several obligors.
§ 84. Consideration for new promise.
§ 85. Revival or extension as to tort causes.
§ 86. Waiver of the bar of the statute.
§ 87. Authority and disability of representatives or trustees to revive or waive.
§ 88. Agreements and estoppels.

B. PART PAYMENT.

§ 89. In general; effect as acknowledgment of debt.
§ 90. Payment accompanied by disavowal or denial.
§ 91. Indorsements of payments.
§ 92. Payments and indorsements on mortgage debts.
§ 93. Credit applied under illegal agreement.
§ 94. Payments applied without consent or intent of debtor.

§ 95. Payments made by, to or through agents of parties.
§ 96. Payment by codebtor or co-obligor.
§ 97. ——By surety or guarantor or secondary obligor.
§ 98. ——Assent or knowledge of co-obligors.

C. Abatement or Failure of Timely Action.

§ 99. In general; discontinuance, dismissal or reversal for defects.
§ 100. Death of party and vacancy in administration.
§ 101. Right to bring new action within year.
§ 102. Timeliness and sufficiency of new action.

VII. Pleading, urging and proving or avoiding the statutory bar.

§ 103. In general; necessity of plea or notice.
§ 104. Mode of pleading, demurrer or plea or answer.
§ 105. Sufficiency of pleas, answers and notices.
§ 106. Urging bar of claim pleaded as set-off.
§ 107. Pleading fraud or concealment to avoid bar.
§ 108. Issues and variances.
§ 109. Presumptions and burden of proving bar or avoidance.
§ 110. ——As to tolling or extension.
§ 111. Evidence as to bar or matters avoiding or suspending it.
§ 112. ——As to new promise or part payment.
§ 113. Questions of law and fact and instructions.
§ 114. ——As to new promise or part payment.
§ 115. Findings and decision.

Limitations in criminal prosecutions, see Indictment, II.
Limitations on actions for penalties, see Penalties.
Bar of particular rights by lapse of time or laches, see Equity, IV, and see specific topics treating of the right in question.
Titles and easements by adverse possession or prescription, see Adverse Possession; Easements; Highways, II, A; Waters, II-V.
Time limitations on rights, see specific topic treating of the right in question.
Time limitations on statutory proceedings other than common law actions and chancery suits, see specific topic treating of the particular proceeding, e. g., Eminent Domain; Local Improvements; Taxes.
Time for motions and other interlocutory proceedings in actions, see specific topics treating of the motion or proceeding, e. g., Directing Verdict; Pleading, IV; Trial, V, C.
Time in which appeal or error must be taken, see Appeal § 72.
Statutes limiting time for presentment of claims for allowance, see Estates of Decedents, § 170 et seq.; Highways § 266 et seq.; Municipal Corporations, XIV.
Public policy as to agreements limiting time to sue, see Contracts § 47.
Operation of stipulations in policies of insurance affecting time and right to sue, see Insurance § 272 et seq.
Validity of limitation by agreement in bond, see also Bonds ¶ 28.
Validity of provisions in indemnity bond limiting time for enforcing it, see also Indemnity ¶ 21.
Effect of lapse of time without question on representative's sale, see Estates of Decedents § 252.
Duration of lien on land by levy of execution, see Executions § 31.
Bar of execution purchaser's right by delay to sue to declare debtor's equities, see Executions § 101.
Limitations on enforcement of alimony by execution, see Divorce ¶ 678.
Presumptions as to payment from lapse of time, and nature of the presumption, see Payment, V.
Juror's prejudice against defense of statute of limitations as ground for challenge, see Jury ¶ 230.
Representation that note is good as fraudulent representation that defense of limitations does not exist, see also Fraud ¶ 17.
Sufficiency of plea in justice's court to set up statute of limitations, see also Justices of the Peace ¶ 473.

I. THE STATUTES AND THEIR APPLICATION IN GENERAL.

§ 1. In general; policy and construction of the law.

Implications as to exceptions and exemptions, see post § 23.

Validity of laws imposing limitations on persons in possession of land, see Constitutional Law §§ 146, 154, 289.

¶ 1. The statute of limitations is favorably regarded by the courts as one of repose as well as of presumption, and as affording security against stale claims; and it is not to be defeated by undue strictness of construction, but must be fairly construed to give effect to the legislative intent.—Ten Eyck v. Wing, 1 Mich. 40; Jewett v. Pettit, 4 Mich. 508; Jenny v. Perkins, 17 Mich. 28; People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 138; Palmer v. Palmer, 36 Mich. 487; Toll v. Wright, 37 Mich. 93; Proctor v. Bigelow, 38 Mich. 282.

¶ 2. Statutes of limitation, where land is involved, have regard specially to the laches of the owner, and they deny him a remedy for the recovery of his rights because he has failed to pursue them within a reasonable time.—Showers v. Robinson, 43 Mich. 502.

¶ 3. Statutes limiting the right to bring actions for the recovery of land are for the purpose of preventing litigation, quieting title, and securing peace among citizens. They are statutes of repose, and have come to be regarded with favor by courts and juries, rather than, as formerly, with disfavor.—Greene v. Anglemire, 77 Mich. 168.

¶ 4. The reason for statutes of limitation lies in the danger of losing testimony, and of finding difficulty in getting at precise facts.—Shadock v. Alpine Plank Road Co., 79 Mich. 7.

¶ 5. The chapter on the statute of limitations, Comp. L. 1897, chap. 268, How. St., 2nd Ed., chap. 384 (§§ 14135-14164), must be read as one act with its several parts and clauses mutually acting on each other as their sense requires.—Sproat v. Hall, 189 Mich. 28.

¶ 6. While the statute of limitations is to be construed according to its terms, it is not to be given a construction so technical as to deprive a party of a legal right which the terms of his contract plainly give him.—Busch v. Jones, 94 Mich. 223.

§ 2. Application and operation of the statutes and amendments.

To actions by, for, or against the state or the public, see post §§ 25, 26.
Effect of the statutes as a bar, matters barred, see post §§ 6, 7.
Effect of amendment of statute after action begun, see post § 77.
Noninterruption of statute by disabilities and devolutions after running commences, see post § 24.
Implied repeal of exceptions as to married women by enactment of acts enabling them to sue and be sued, see post § 34.
Classes of actions and periods corresponding thereto, see post II.
When cause of action deemed mature and running begun, see post IV.
When action deemed commenced or bar complete, see post V.
Validity of acts retrospectively affecting limitations, see Constitutional Law §§ 288, 289.
Application of due process clause, see Constitutional Law § 146.

¶ 7. A general statute of limitation must operate uniformly and hence will not be construed to retroact, when that would operate unequally.—Holmes v. Soule, 180 Mich. 526.

¶ 8. Statutes of limitation are construed to operate prospectively only unless their terms clearly indicate a different intent.—Harrison v. Metz, 17 Mich. 377.

¶ 9. Laws 1863, Act No. 227, amending the limitations of actions for the recovery of lands, does not apply to causes of action that accrued before Jan. 1, 1864, the date when said statute took effect. A right of action that accrued before that date would be controlled by the statute in force at the time.—Price v. Hopkin, 13 Mich. 318; Ludwig v. Stewart, 32 Mich. 27; Stambaugh v. Snoblin, 32 Mich. 296.

¶ 10. A right of action to recover the possession of real estate, accruing prior to the time when Rev. Stat. 1838 took effect, is governed by the statute of limitations theretofore existing.—Miller v. Davis, 106 Mich. 300.

¶ 11. Laws 1867, p. 39 (How. St. § 8736), limiting the time within which actions upon judgments can be brought, applies only to judgments rendered after the act took effect.—Harrison v. Metz, 17 Mich. 377.

¶ 12. Laws of 1869 (Act No. 89, How. St., § 8736), limiting actions upon judgments, provided ample time in which to sue, and hence applied to causes of action existing at the time of its passage.—Parsons v. Wayne Circuit Judge, 37 Mich. 287.

¶ 13. Where, by the law as it stood December 31, 1863, a person had sixteen years in which to bring suit for a parcel of land claimed by her, and Laws 1863, Act No. 227 (see How. St., § 8698), if applied to the case, would have the effect, the moment it became operative, to cut off all remedy, it was held not to apply to such a case.—Price v. Hopkin, 13 Mich. 318.

¶ 14. The proviso of Laws of 1879, Act No. 204 (How. St., § 8709), giving a fixed time within which to begin foreclosure proceedings is not to be construed as retroactive save in the cases it mentions.—McKisson v. Davenport, 88 Mich. 211.

¶ 15. Laws 1879, Act No. 204 (How. St., § 8709), provides for a reasonable time within which to begin foreclosure in all cases where the debt has been due and no interest paid thereon for fifteen years prior to the act's taking effect.—McKisson v. Davenport, 83 Mich. 211.

¶ 16. Except in cases coming within the proviso of How. St., § 8709, relating to cases where the mortgages have been due for fifteen years or more, or the last payment upon which was made fifteen years or more prior to the passage of that law, mortgages given before the act of 1879 took effect are controlled by the twenty-year limitation previously in force.—McIntire v. Conrad, 93 Mich. 526.

¶ 17. Laws 1871, Act No. 145 (How. St., § 8718), whereby the statute is made to run against Canadian as well as domestic creditors, held applicable to causes of action already existing.—Krone v. Krone, 37 Mich. 308.

¶ 18. Pub. Acts 1899, No. 155, limiting the time within which actions for personal injuries shall "hereafter" be brought has no application to a cause of action accrued prior to its passage.—Hathaway v. Washington Milling Co., 139 Mich. 708.

¶ 19. The provision of How. St., § 8706, that as to certain amendments to the statutes of limitations, the rights of parties are to be determined by the law in force when the right of action accrued, relates not to the subject of disabilities, but to the time when the statute became a law.—King v. Merritt, 67 Mich. 194.

¶ 20. Whether, by section 8 of the repealing act contained in R. S. 1838, relating to statutes of limitation, it was intended to continue in force the provisions of the acts of limitation repealed by that act, where the time had "begun to run," or whether the time prescribed in R. S. 1838 was intended as the period at the expiration of which the suits should be barred, quære.—McLean v. Barton, H. 279.

¶ 21. The act of May 15, 1820, limited the time for bringing ejectment, for causes of action thereafter accruing, to twenty years. An act of Nov. 15, 1829, limited the period to ten years, where the cause of action had then accrued. R. S. 1838 repealed these acts and substituted a new limitation of twenty years, with a proviso, however, that causes of action already accrued should not be affected, but be determined by the law under which the same accrued. In ejectment commenced in 1840 for a cause of action which accrued in 1822, it was held, in view of the various provisions of R. S. 1838 relating to the same subject, that the action was barred by the act of 1829.—Lastly v. Cramer, 2 D. 307.

¶ 22. Defendant went into actual possession of lands, under a tax title, in August, 1842, and by the act of Feb. 17, 1842 (Laws of 1842, p. 133), the time for bringing action of ejectment in such case was limited to ten years. This act was repealed by R. S. 1846, but it was held that R. S. 1846, chap. 139, § 9, continued it in force as to all rights of action which had accrued under it, and an action commenced more than ten years from the time defendant entered in possession was barred.—Perry v. Hepburne, 4 Mich. 165.

§ 3. Actions and proceedings to which statutes apply.

Effect of amendment of statute, applicability to existing causes, see ante § 2.
Form of action rather than cause as test for proper statute to apply, see post § 8.
Applicability in equity, see post § 4.
Applicability of limitations to actions by, for, or against the state or the public, see post §§ 25, 26.
Classes of actions and period applicable to each, see post II.
Maturity of cause of action and right to sue as putting statute in motion, see post IV.
Time limitations on rights and proceedings other than actions and suits at common law, see specific topic treating of the right or proceeding in question. See also cross-references at head of this topic following analysis.

¶ 23. The provisions of the general statute of limitations Comp. L. 1871, § 7157 (How. St., § 8722), apply to claims against estates.—Sperry v. Moore's Estate, 42 Mich. 353.

¶ 24. The bar of the statute must operate as broadly as the remedy was which it extinguishes, and it cuts off whatever redress it would have supported.—National Copper Co. v. Minnesota Min. Co., 57 Mich. 83.

§ 4. Applicability to suits in equity.

Proper period applicable to actions to recover equitable interests, see post § 11.
Accrual of right of suit and running of statute on equities, see post § 71 et seq.
In trust suits, see also post § 22.
Necessity of pleading limitation in equity, see also post § 103, ¶ 393.
Delay less or more than period of limitations as laches, see Equity § 49.

¶ 25. The statute of limitations will be applied in equity where it would bar a claim at law.—McClean v. Barton, H. 279; Webster v. Gray, 37 Mich. 37; Hatch v. Village of St. Joseph, 68 Mich. 220.

¶ 26. A court of equity usually applies a statute of limitation by analogy.—Young v. Young, 200 Mich. 236.

¶ 27. Courts of equity should generally apply the statute of limitations by analogy in any case where the remedy in equity is concurrent only or a substitute for an action

at law.—People ex rel. Attorney General v. Michigan Cent. Ry. Co., 145 Mich. 140.

¶ 28. The statute of limitations cannot be evaded by a suit in equity, where the law gives an action of assumpsit as an alternative remedy to a proceeding in rem.—People ex rel. Attorney General v. Michigan Cent. R. Co., 145 Mich. 140.

¶ 29. By analogy, where action for the recovery of lands held under sales by executors, administrators or guardians is barred by Comp. L. 1871, § 7137, How. St., § 8698, they cannot be reached in equity.—Smith v. Davidson, 40 Mich. 632.

¶ 30. The rule of limitation will be applied where a bare equity is sought to be enforced against an equity, and will not be confined to cases where it is sought to enforce an equity against a legal estate.—Campau v. Chene, 1 Mich. 400.

§ 5. Foreign and domestic causes and statutes.

Applicability of saving clause as to absence of debtor from state, where plaintiff is also absent, see post § 36.

Effect of nonresidence of plaintiff on running of the statute, see post § 35.

Effect of bar in foreign state or country on bar when sued in Michigan, see Conflict of Laws § 41.

Extraterritoriality of limitations, see Conflict of Laws § 41.

¶ 31. Limitations are governed by the law of the forum in a suit on a bond made in and secured on land in another state.—Home Life Ins. Co. v. Elwell, 111 Mich. 689.

Conflict of laws with respect to application of statute of limitations in action for injury to passenger on interstate train, see note, 10 N. C. C. A. 107-118.

§ 6. Effect of the statutes and of bar thereunder.

Favor or disfavor of courts towards defense of limitations, see ante § 1.

Remedy or form of action rather than cause of action as object of the statute, see post § 8.

Bar of debt as barring right to set aside conveyance in fraud of debt, see also post ¶ 169.

Possession as exempting possessor from suing, see post § 31.

Title by adverse possession, see Adverse Possession.

Easements by prescription, see Easements §§ 11-13.

Establishment of highway by prescription, see Highways § 10.

Limitation on penal action for unlawful peddling, applicability to prosecution, see Indictment ¶ 475.

Final judgment without remand where cause is barred, see Appeal § 509.

Bar as to part of joint defendants or defendants who should otherwise have been joined, see Jud. Act, chap. IX, § 22 et seq.; Comp. L. 1915, § 12332 et seq.

¶ 32. If one's title has become perfected under the statute of limitations so that it cannot be questioned in a suit brought against him, neither can it be in a suit brought by him.—Toll v. Wright, 37 Mich. 93.

¶ 33. Where, by reason of an adverse possession of lands for twenty years, the occupant has acquired a perfect right in the law to defend his possession, he has for all practical purposes a title, and may maintain suits upon it against parties afterwards found upon the land.—Bunce v. Bidwell, 43 Mich. 542.

¶ 34. The statute of limitations cannot bar the right to an easement unless there has been an enjoyment adverse to the easement for the statutory period. Mere nonuser will not extinguish it.—Day v. Walden, 46 Mich. 575.

§ 7. ——Bar of one cause or remedy leaving other available.

Differing times for commencement of running as to several contracts collateral to each other, see post § 50.

Original tort and continuing injuries therefrom, see post § 68.

Bar of action on debt as affecting right to foreclose, see Foreclosure § 12.

Exclusion from foreclosure decree of interest already barred by statute of limitations, see Foreclosure ¶ 394.

Bar of judgment as preventing execution on it, see Executions § 6.

Bar on claim against estate as bar to action on bond of representative given to secure claim, see Estates of Decedents ¶ 1216.

Right to sue for fraud in transfer of note after being defeated by plea of limitations, see also Former Adjudication ¶ 160.

¶ 35. A mortgage does not keep alive the personal obligation to pay the debt it secures.—Lashbrooks v. Hatheway, 52 Mich. 124.

II. THE PERIODS AND CORRESPONDING ACTIONS.

§ 8. In general; nature and form of the action.

Form of action as test, see also post ¶ 76.

Real actions and actions for damages to land, see post §§ 9-12.

Actions on judgments, see post § 13.

Actions ex contractu, see post §§ 14, 15.

Actions for injuries to personalty, see post § 16.

Actions for personal injuries, and personal torts, see post § 17.

Actions against sheriffs and public officers, see post § 18.

Mandamus actions, see post § 19.
Equitable suits and trusts, see post §§ 20-22.
Distinction between assumpsit on contracts and assumpsit on judgments, see post § 13.
Application of limitations in equity by analogy to law, see ante § 4.
Policy, construction, operation and effect of the statutes, see ante §§ 1-3.
Time when the various actions are deemed to have accrued, see post §§ 45-74.
Statutory terms of limitations of personal actions, see Jud. Act, chap. IX, § 13; Comp. L. 1915, § 12323.
Statutory time for action to enforce penal liability of managers or officers of partnership associations for omission to make annual reports, see Comp. L. 1915, § 7962.

¶ 36. The form of action and not the cause of action must determine whether an action is barred by the statute of limitations.—Stringer v. Stevens' Estate, 146 Mich. 181.

§ 9. Real actions.

Statutes shortening time to assail judicial or involuntary sales, see post § 10.
Rule applicable to accounting of rents and profits, see also post § 20.
Land in use by public, see post § 25.
Time for actions by the state to recover land, see post § 26.
Applicability of statute to existing causes, see ante § 2.
Suspension of statute while party is in possession, see post § 31.
Accrual of right of entry or action, see post § 45 et seq.
Computation of different periods, see post § 79.
Rights in real property by adverse possession or prescription, see Adverse Possession; Easements; Highways, II, A; Boundaries.
Time within which to contest establishment of public highway, see Highway ¶ 59.
General provisions of the statutes, see Jud. Act, chap. IX, § 1; Comp. L. 1915, § 12311.

¶ 37. A right of entry must be enforced within the period of limitations.—Cook v. Hopkins, 68 Mich. 514.

¶ 38. Statutes of limitation, however broad and comprehensive, do not bar actions for the recovery of dower unless expressly named or included by unavoidable implication; and they were not barred by the limitation act of November 5, 1829 (2 Ter. Laws, p. 748; Code 1833, p. 408).—May v. Rumney, 1 Mich. 1.

¶ 39. Under R. S. 1838 the right of possession of lands was barred if entry was not made within twenty years from its origin.—Van Vleet v. Blackwood, 39 Mich. 728.

¶ 40. The statute of limitations of 1829 barred recovery of lands after an adverse undisturbed holding of ten years.—Campau v. Dubois, 39 Mich. 274.

¶ 41. The statute places no limitation upon actions of ejectment as such.—Harrison v. Spencer, 90 Mich. 586.

¶ 42. Under Comp. L. 1871, § 7137, ejectment will not lie for land adjoining plaintiff's premises, but on the other side of a fence which for twenty years the adjoining owners and occupants have treated as the boundary between their lots.—Call v. O'Harrow, 51 Mich. 98.

¶ 43. Under our present statutes ejectment is the only action provided for the recovery of dower, and it is subject to the statute of limitations equally with ejectment for the recovery of lands in other cases.—Proctor v. Bigelow, 38 Mich. 282; King v. Merritt, 67 Mich. 194.

¶ 44. The recovery of dower is barred by the statutory limitation upon actions of ejectment.—King v. Merritt, 67 Mich. 194; Beebe v. Lyle, 73 Mich. 114.

¶ 45. A wife's right to dower in her husband's lands upon decree of divorce for extreme cruelty is based upon the statute rather than upon the decree since the dower is given by the statute, because of divorce, and action therefor may be brought within 15 years as limited by Comp. L. 1897, § 9714, subd. 3, for real actions.—Moross v. Moross, 132 Mich. 203.

¶ 46. The recovery of a fund by a remainderman under a second valid will from the life tenant thereunder, which fund was the proceeds of the sale of the interest of such life tenant as holder of the fee under the former will, is barred under Comp. L. 1915, § 12311, providing that no person shall bring or maintain any action for the recovery of lands obtained through a devise in a will which has been probated in the state for more than 15 years, during which period no suit in chancery has been brought to test the validity of such will, provided that in cases where such period has elapsed an action shall be barred after two years from the passage of the act, or in case such right has not accrued, then after two years from the accruing thereof, where the remainderman discovered the later will 20 years after the probate of the first will and within two years after the passage of the act, but did not institute suit until nearly three years after such discovery.—Young v. Young, 200 Mich. 236.

§ 10. ——Recovery of land held under void or defective judicial or involuntary sale.

Period for adverse possession under tax deed or judicial sale deed, see Adverse Possession § 34.
Statutory period within which objections to execution or judicial sales must be made or be barred, see Executions § 96; Estates of Decedents § 252.

Statutory time for bill by execution purchaser to declare equities of debtor and others in lands purchased, see Executions § 100.
Statutory limitations applicable specially to suits to assail or question tax deeds and titles, see Taxes, XII, C.
Statutory limit and provisions, see Jud. Act, chap. IX, § 1, ¶ 1; Comp. L. 1915, § 12311, ¶ 1.
Provision as to suit to recover land from holder under tax deed, see Jud. Act, chap. IX, § 1, ¶ 2; Comp. L. 1915, § 12311, ¶ 2.

¶ 47. A sale on execution on a judgment void for want of jurisdiction will not authorize the purchaser to claim the benefit of the statute, requiring action to be brought within five years where title is claimed under a deed made upon a sale by an officer under judgment of a court.—Millar v. Babcock, 29 Mich. 526; and see McVickar v. Filer, 31 Mich. 304.

¶ 48. An administrator's sale void for want of jurisdiction is not protected by Comp. L. 1871, § 7137; How. St. § 8698.—Toll v. Wright, 37 Mich. 93.

¶ 49. An administrator's deed executed under order of the probate court, in pursuance of a decree for specific performance, under provisions of sections 9472 and 9486, Comp. L. 1897, though not recorded, is within the protection of the statute of limitations (§ 9714, subd. 1, Comp. L. 1897), relating to titles based on judicial proceedings.—Chandler v. Clark, 151 Mich. 159.

¶ 50. How. St., § 8698, subd. 1, limiting to five years the bringing of actions against persons claiming under judicial sales, applies only when validity of title derived through the sale is challenged, and does not enable one who claims under a commissioner's deed on foreclosure to cut off a title adverse to the mortgagor's.—Donovan v. Ward, 100 Mich. 601.

¶ 51. Where a plaintiff sues in ejectment to recover premises taken from it and given to defendant fifteen years before by a commissioner's deed made pursuant to a decree of foreclosure it is barred from recovering by Comp. L. 1897, § 9714, which provides that no person shall recover land unless action is commenced within five years where defendant claims title under a sale pursuant to an order, judgment or decree of a court.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

¶ 52. Where a mortgagor has lain dormant for a period of nineteen years after the issuance of the commissioner's deed pursuant to a decree of foreclosure, he cannot resist, in an ejectment suit brought by him to recover the premises, the defense of the five-year statutory limitation, since the equities of the situation are not in his favor.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

¶ 53. Under the statute of limitations, Comp. L. 1897, § 9714, defendant in a suit to quiet title who conveyed the property more than five years before as administratrix of her husband's estate and guardian of her minor children, is barred of dower and cannot set up the defense that she did not convey her dower interest.—Hunt v. Stevens, 174 Mich. 501.

§ 11. Suits to establish equitable interests in land or to foreclose.

Accrual of right of action for legacy against land charged therewith, see post ¶ 178.
Suits to annul or to recover possession from holder under judicial sale, see ante § 10.
Limitation of mortgage foreclosures as applicable by analogy to tax liens, see Taxes, XI, A.
Statutory time for foreclosure suits, see Jud. Act, chap. IX, § 12; Comp. L. 1915, § 12322.

¶ 54. There is no statute of limitations barring an equitable interest in a share of a mining location, asserted by the shareholder's successors against the corporation succeeding to the property subject to his rights.—Kobogum v. Jackson Iron Co., 76 Mich. 498.

¶ 55. The statute of limitations as to the foreclosure of mortgage liens applies to a case where a testator has imposed a lien upon devised land for the payment of an annuity to his wife and, upon the death of the wife, her administrator is proceeding to foreclose his lien in equity.—Stringer v. Gamble, 155 Mich. 295.

§ 12. Actions for damages to land.

When right of action accrues, see post §§ 68, 69.

¶ 56. The statute of limitations precludes a recovery by an abutting lot owner against a railroad company which has laid its tracks in a city street, for damages accruing more than six years prior to the commencement of suit.—Hoffman v. Flint & P. M. R. Co., 114 Mich. 316.

¶ 57. Failure for fifteen years to assert a claim for damages arising from the construction of a steam railroad track in a public street, will bar an action by an abutting owner to recover either past or future damages.—Felton v. Wedthoff, 185 Mich. 72.

§ 13. Actions on judgments and transcript judgments.

Applicability of statutes to pre-existing judgments, see ante § 2.
Time when right of action is deemed to have accrued, see post § 47.

Exceptions and suspensions of running, see also post ¶ 117.
Suspension of running as to absent debtors, see post ¶¶ 152, 161.
Exclusion of day of entry in computing time, see post ¶ 292.
Duration of judgment and of right to have execution thereon, see Judgments § 121.
Statutory provisions, see Jud. Act, chap. IX, § 13, ¶ 1; Comp. L. 1915, § 12323, ¶ 1.

¶ 58. The judgment of a court of record is good for ten years.—Ward v. Citizens' Bank, 46 Mich. 332.

¶ 59. Assumpsit upon a judgment of a court of record may be brought at any time within ten years after the entry thereof (How. St. § 8736), though by section 8713, six years is the period for assumpsit on an ordinary contract.—Snyder v. Hitchcock, 94 Mich. 313.

¶ 60. A justice's judgment docketed on transcript in the circuit court is not barred in less than ten years.—Arnold v. Thompson, 19 Mich. 333; settling the question raised in Jerome v. Williams, 18 Mich. 521.

¶ 61. A judgment of a justice of the peace, regularly filed and docketed in the office of the clerk of the circuit court, is the judgment of a court of record and the 10 years' statute of limitation applies.—Cole v. Potter, 135 Mich. 326.

§ 14. Contract actions in general.

Period applicable to actions on specialties, see post § 15.
Distinction between assumpsit on bond and assumpsit on simple contract, see post § 15.
Assumpsit on judgments, see ante § 13.
Equitable assumpsit to enforce trust, see post § 22.
When right of action accrues, see post § 48 et seq.

¶ 62. A husband's promise to pay the wife for support of their child while he was living apart from her would be barred in six years.—Lapworth v. Leach, 79 Mich. 16.

§ 15. Actions on sealed contracts, bonds and undertakings.

When right of action accrues, see post §§ 60-62.
Action for accounting under sealed partnership articles, see post ¶ 84.
Provisions as to actions on bonds of executors, administrators, and guardians, see Jud. Act, chap. IX, § 13, ¶ 4; Comp. L. 1915. § 12323, ¶ 4.

¶ 63. An agreement in a sealed contract to pay for land bought is not barred in less than ten years.—Peters v. Canfield, 74 Mich. 498.

¶ 64. Under Comp. L. 1897, § 9734, an action on a personal obligation created by a mortgage on real estate is barred by the statute of limitations after ten years.—Clinton v. Clinton's Estate, 148 Mich. 496.

¶ 65. Where a husband and wife entered into a separation agreement under seal wherein certain property mortgaged by both should belong to her and there was a personal agreement on his part to pay the mortgage within two years, but provided further that if in the meantime she should make any payments of principal or interest she should be subrogated to the rights of the mortgagee or have a lien corresponding to the amount paid; if this agreement can be construed as a promise to repay her for payments she might afterward make, it is barred by the statute of limitations after ten years.—Clinton v. Clinton's Estate, 148 Mich. 496.

¶ 66. Debt on bond of administratrix, for failing to file an account in probate court, was not barred until ten years after the right of action accrues; the form, not the cause of action, fixing the bar in such case.—Avery v. Miller, 81 Mich. 85.

¶ 67. Under Comp. L. 1897, § 9734, How. St., 2nd Ed., § 14141, personal actions on an official bond must be commenced within ten years.—Township of Forest v. American Bonding Co. of Baltimore, 187 Mich. 657.

¶ 68. An action on a bond given on appeal in a summary proceeding is not governed by the two years' limitation prescribed by § 9753, Comp. L. 1897, How. St., 2nd Ed., § 14161, for actions on bonds on appeal from justice's court.—Hoffman v. Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

¶ 69. An action of assumpsit is barred after six years whether brought on a sealed or an unsealed contract.—Sigler v. Platt, 16 Mich. 206.

¶ 70. Comp. L. 1857, § 4550, How. St. § 7778, does not compel a resort to the action of assumpsit upon a sealed instrument; debt may be brought thereon, and is not barred until ten years.—Goodrich v. Leland, 18 Mich. 110.

¶ 71. Comp. L. 1871, § 6194, How. St. § 7778, permits assumpsit to be brought where covenant might be maintained, but Comp. L. 1871, § 7148, How. St. § 8713, bars any action in assumpsit after six years. Held, that it is the form, and not the cause of action, which fixes the bar, and the remedy elected is governed by the limitation appropriate to itself.—Christy v. Farlin, 49 Mich. 319.

¶ 72. Debt on sealed lease for rent may be brought any time within ten years; the period is governed by How. St. § 8719, and is not affected by sections 8713, 7778, which

fix a limitation for assumpsit and provide that assumpsit may lie on a specialty.—Stewart v. Sprague, 71 Mich. 50.

¶ 73. How. St. § 8713, providing that the six year limitation applies to "all actions for arrears of rent" has reference to rent accruing on parol leases; and does not limit the provision of section 8719, that "all personal actions on any contract not limited by the foregoing sections" shall be ten years. Hence debt on a sealed lease runs for ten years.—Stewart v. Sprague, 71 Mich. 50.

¶ 74. In an action founded upon and created by a will or other specialty the same statute of limitations does not apply as to one which although incident to a specialty yet rests upon an express or implied promise.—Stringer v. Stevens' Estate, 146 Mich. 181.

¶ 75. Under How. St. § 8713, providing that actions of debt on contracts under seal and of assumpsit must be brought within six years after the cause of action accrues, and section 8719, providing that all personal actions on any contract not limited by previous sections must be brought within ten years, and section 7778, providing that in all cases arising upon contracts when an action of covenant or debt may be maintained, an action of assumpsit may be brought and maintained, in the same manner, in all respects, as upon contracts without seal, and that no bond, deed of conveyance or other contract in writing signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party, where officers of a township intend that evidences of township indebtedness shall be sealed instruments and denominate them as bonds, an action of covenant may be maintained thereon, which action is not barred until the lapse of ten years before issue of summons.—Rondt v. Rogers Tp., 99 Fed. 202.

¶ 76. Under How. St. § 8713, providing that actions of debt on contracts not under seal and of assumpsit must be brought within six years after the cause of action accrues, and section 8719, providing that all personal actions on any contract not limited by previous sections must be brought within ten years, and section 7778, providing that in all cases arising upon contracts when an action of covenant or debt may be maintained, an action of assumpsit may be brought and maintained, in the same manner, in all respects, as upon contracts without seal, an action of assumpsit on a sealed instrument is barred in six years, while an action of covenant on the same cause of action is not barred for ten years, the form, and not the cause, of action fixing the bar.—Rondt v. Rogers Tp., 99 Fed. 202.

§ 16. Actions for injuries to personalty.

When right of action accrues, see post § 66 et seq.

Statutory term and provisions, see Jud. Act, chap. IX, § 13, ¶ 2; Comp. L. 1915, § 12323, ¶ 2.

¶ 77. The common-law action of trespass lies for injuries done to plaintiff's horse and carriage by defendant's not turning to the right on a highway as required by Comp. L. 1871, § 2002, How. St., § 1456; and it seems that the limitation of one year fixed by section 2003 (1457) would apply to this as well as to the public prosecution or the statutory action there provided for.—Daniels v. Clegg, 28 Mich. 32.

§ 17. Actions for personal torts and injuries.

For false imprisonment in insane asylum, see also post ¶ 167.

When right of action accrues, see post § 66.

Time and necessity for presentment of claim for injuries incurred on defective highways, see Highways § 266; Municipal Corporations, XIV.

Time within which actions against officers or municipalities for injuries from defective highways and streets must be brought, see Comp. L. 1915, § 4591.

¶ 78. Act No. 155, Pub. Acts 1899, provides that no action for personal injuries shall lie unless brought within three years. Held, an action for seduction under a promise of marriage comes within the statute.—May v. Wilson, 164 Mich. 26.

¶ 79. Pub. Acts 1899, Act No. 155, § 1, providing that no personal injury action should thereafter be brought, unless brought within 3 years from the occurrence, and section 2 providing for the repeal of all contravening acts, did not repeal the provision of the charter of the city of Kalamazoo requiring the bringing of actions for personal injuries arising from defective sidewalks, within four months from the happening of the accident.—Woodworth v. City of Kalamazoo, 135 Mich. 233.

§ 18. Actions against sheriffs and other public officers.

Actions against superintendents of the poor of one county to reimburse other county for outlay for poor, see Comp. L. 1915, § 5222.

Statutory provisions, see Jud. Act, chap. IX, § 13, ¶ 3; Comp. L. 1915, § 12323, ¶ 3.

¶ 80. Comp. L. 1897, § 9730, How. St., 2nd Ed., § 14137, providing a limit of three years for actions against sheriffs for misconduct or neglect of their deputies, is inapplicable in an action against a sheriff for damages for false imprisonment.—Alexander v. Thompson, 195 Fed. 31.

§ 19. Mandamus actions.

Laches or delay as reason for denying mandamus, see Mandamus, I.

¶ 81. There is no statute of limitation applicable to mandamus proceedings.—McDermott v. Alger, 186 Mich. 278.

¶ 82. Whether the statute of limitations applies to mandamus proceedings for collection of a liquidated liability, quære. Certainly the period is not less than ten years (How. St., § 8719).—County of Oceana v. Hart Township Sup'rs, 48 Mich. 319; and see Merrill v. Gladwin County Treasurer, 61 Mich. 95.

§ 20. Accounting suits.

Trust accountings, see post § 22.

¶ 83. One claiming to be a partner, and to have been excluded from participation in the business, is too late to come for an account after a delay of more than six years.—Jenny v. Perkins, 17 Mich. 28.

¶ 84. A member of a partnership, under sealed articles containing covenants, may apply for an accounting even after a delay of six years.—Near v. Lowe, 49 Mich. 482.

¶ 85. The equitable proceeding for an accounting between townships as to personal property and debts is barred in six years, like an action of assumpsit, unless there are special equities to prevent.—Township of Sheridan v. Township of Frost, 62 Mich. 136.

¶ 86. The rule of law whereby a liability for mesne profits is limited to the period of the statute of limitations does not necessarily apply to an accounting for rents and profits under a decree setting aside a deed, but as complainants are bound to do equity as a condition of relief, the accounting may cover the entire period during which the defendant has held the property.—Hack v. Norris, 46 Mich. 587.

¶¶ 87-89. An accounting for past rents and profits may be limited by a shorter period than the claim to the land itself.—Compo v. Jackson Iron Co., 49 Mich. 39.

§ 21. Creditors' suits and suits in aid of execution.

Suit to reach railroad aid bonds returned to issuing township, see post ¶ 93.

Time within which execution creditor must sue to declare equities in land levied on as fraudulently conveyed or as subject to levy, see Executions § 101.

¶ 90. Subsequent to the entering of judgment and taking out of execution, but before the execution was levied, the defendant to a combined bill in aid of execution and creditor's bill sold the land upon which the execution was issued by land contract. More than one year elapsed between the levies and the filing of the bill. Held, the bill might be treated as a creditor's bill so as to make the one-year statute of limitations inapplicable, and so as to enable complainants to seize the interest of defendant in the land.—Rohrabacher v. Walsh, 170 Mich. 59.

§ 22. Establishment or enforcement of trusts.

When right of action accrues and statute runs, see post § 74.

Suspension of running by fraudulent concealment of cause of action, see post § 30.

Actions on bonds of personal representatives for default as such, see ante § 15.

Applicability of limitations to accounting suit against fiduciary, see Accounting Suits ¶ 12.

¶ 91. In cases of an implied trust to be raised by evidence, equity follows the courts of law in applying the statute of limitations.—Beaubien v. Beaubien, 23 How. (64 U. S.) 190, 16 L. ed. 484.

¶ 92. An equitable action of assumpsit, if it lies at all, will be outlawed by the same lapse of time as bars an action at law, particularly if it rests on a merely constructive trust, and the defendant has always denied the equity and relied on an adverse claim.—German American Seminary v. Kiefer, 43 Mich. 105.

¶ 93. The contention by a judgment creditor, seeking by bill in the nature of a creditor's bill, to subject to the satisfaction of a judgment against a railroad company, township railroad aid construction bonds issued under the act of March 22, 1869, deposited with the state treasurer, and returned to the township because of the failure of the company to obtain the certificate of compliance with the provisions of the act from the governor, that the bonds were invested by the statute with the character of trust property while in the hands of the state treasurer and therefore could be followed into the hands of the township and that that right was not subject to the limitation presented for a conversion is untenable since the bonds were never perfected instruments, and it is immaterial that the treasurer returned the bonds canceled a few weeks prior to minimum period of three years prescribed by the statute.—Young v. Township of Clarendon, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

III. DISABILITIES, EXCEPTIONS AND SUSPENSIONS.

A. IN GENERAL.

Extensions of time after running has commenced and revival of cause after bar is complete, see post VI.

Interruption or suspension of running of laches, see Equity § 52.

§ 23. Exceptions and exemptions in general.

Exceptions in statutes as to existing causes of action and special provisions as to time for suing on those, see ante § 2.

Applicability of statutes to pre-existing causes of action, see ante § 2.

Exceptions respecting the state or the public, see post §§ 25, 26.

Effect of death and vacancy in administration, see post § 27.
Effect of extinction of corporate party, see post § 28.
Effect of injunction against suing, see post § 29.
Effect of fraud, concealment or ignorance, see post § 30.
Inapplicability of limitations to party while in possession, see post § 31.
Tacking one cause of suspension to another, see post § 32.
Exceptions and suspensions in favor of infants, insane persons, and married women, see post §§ 33-35.
Exceptions and suspensions because of absence, nonresidence, or imprisonment, see post §§ 36-40.
Implied exceptions, see also post ¶ 117.
Deduction of suspensions in computing time elapsed, see post § 79.
Exclusion of time while debtor was in military service, see Comp. L. 1915, § 928.
State of war as time to be excluded in reckoning time, see Jud. Act, chap. IX, § 16; Comp. L. 1915, § 12326.

¶ 94. Where there is no express exception to the statute the court can create none.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 95. If there is no saving in a statute as to absentees, feme coverts, or residents beyond seas, the court will make none.—Beaubien v. Beaubien, 23 How. (64 U. S.) 190, 16 L. ed. 484.

§ 24. Causes arising after statute begins to run.

Bar of infant on cause accruing to his representative or guardian, see also post § 43.

¶ 96. After the statute has commenced to run, no subsequent disability or devolution of the estate will arrest it.—Ten Eyck v. Wing, 1 Mich. 40; De Mill v. Moffat, 49 Mich. 125; King v. Merritt, 67 Mich. 194; Dodson v. McKelvey, 93 Mich. 268.

¶ 97. Where the statute of limitations has begun to run against a decedent's estate, no subsequent disability of a distributee can check its operation.—Daniells v. Daniells, 92 Mich. 208.

¶ 98. Plaintiffs in ejectment, claiming as heirs, cannot defeat the plea of adverse possession for the period of the statute of limitations by relying upon a disability which arose before the transmission of the estate from their ancestor and after the statute of limitations began to run.—De Mill v. Moffat, 49 Mich. 125.

¶ 99. An assignment for the benefit of creditors does not prevent the running of the statute of limitations.—Parsons v. Clark, 59 Mich. 414.

¶ 100. Issuing execution on a judgment does not arrest the running of the statute of limitations.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 101. Whether the running of the statute of limitations in the matter of mortgage foreclosure can be interrupted for any cause other than payment, quære.—Rodgers v. Robson, 147 Mich. 656.

§ 25. Actions or claims against state or public.

Ejectment against federal officers in possession of land, see also post ¶ 177.
Adverse possession against the public, see Adverse Possession §§ 2, 3, 5.
Waiver of statute by state by recognizing claim, see also Bounties ¶ 15.

¶ 102. The state may plead the statute of limitations to the same extent as an individual.—McRae v. Auditor General, 146 Mich. 594.

¶ 103. The claim of a private person against the state is subject to the same statute of limitations that the same claim against another private person would be.—McRae v. Auditor General, 146 Mich. 594.

¶ 104. The statute of limitations cannot, it seems, bar a soldier's vested right to bounty; and it is waived by the proviso to Laws 1881, Act No. 173.—Smith v. Aplin, Auditor-General, 80 Mich. 205; apparently overruling Blanchard v. Church, 47 Mich. 644.

¶ 105. The occupation of land by a city for market purposes is not a public easement, but a proprietary occupation, and private adverse rights will be barred by the same lapse of time as if the occupation was by a private person.—Cooper v. City of Detroit, 42 Mich. 584.

§ 26. Actions by, or in name of, or on behalf of the state.

Mandamus actions, see also ante § 19.
Limitations and exceptions applicable to tax titles and deeds, see Taxes, XI, A, XII.
Time to charge back or recover tax moneys on adjustment of accounts between state and its subdivisions, see Taxes, X, B.
Period applicable to suits by the state or on behalf of the state to recover lands, see Jud. Act, chap. IX, § 11; Comp. L. 1915, § 12321.
Exception in statute as to limitations of actions by municipalities to recover public grounds, see Jud. Act, chap. IX, § 1, ¶ 3; Comp. L. 1915, § 12311, § 3.
Provisions for application to personal actions by or for state of same limitations as in ordinary cases, see Jud. Act, chap. IX, § 28; Comp. L. 1915, § 12338.

¶ 106. Statutes of limitation will not operate against the state without express words declaring such to be the purpose of the act.—Crane v. Reeder, 21 Mich. 24.

¶ 107. As against the state as the trustee of an express trust, the statute of limitations will not run.—State v. Venice of America Land Co., 160 Mich. 680.

¶ 108. A claim by the state against the estate of one admitted to the asylum as an indigent insane person, for expenses incurred in his care, support, or maintenance, is subject to the operation of the statute of limitations.—State v. Dunbar's Estate, 99 Mich. 99.

§ 27. Death and pendency of administration.

Death after running of time commences, see ante § 24.

Accrual of right of action to representative as such, see post § 44.

Allowance of year to bring new action on abatement by death of party, see post § 100.

Death occurring during year within which to bring new action after failure of timely action, see post ¶ 380.

Computation of period and time of suspended right to sue, see post ¶ 295.

Limitation on time for presentment of claims against estate, see Estates of Decedents, VI, C, 2.

Extension of time for presentment of claims against estate by death of party or vacancy in administration, see Estates of Decedents §§ 176-177.

Provisions for extension for time of real actions in case of death of person entitled to sue, but under disability of infancy, insanity, or imprisonment, see Jud. Act, chap. IX, § 6; Comp. L. 1915, § 12316.

Provision for absolute bar of claims not presented within ten years after death of debtor, see Comp. L. 1915, § 14620.

Provisions for extension of two years after appointment of personal representative of person dying before period is complete or within thirty days thereafter, see Jud. Act, chap. IX, § 18; Comp. L. 1915, § 12328.

¶ 109. The debtor's death suspends the running of the statute of limitations for two years after the granting of letters testamentary or of administration but not longer.—First Nat. Bank v. Sherman's Estate, 117 Mich. 602.

¶ 110. Under Comp. L. 1897, § 9737, providing that an action may be brought against the administrator or executor at any time within two years after his appointment, an action will lie against the administrator of the maker of a promissory note, although there has been 12 years' delay in his appointment.—Baker v. Halleck's Estate, 128 Mich. 180.

¶ 111. A claim against the estate of a deceased person for money and effects of claimant, which it is alleged deceased took charge of, is saved by Comp. L. 1897, sec. 9737, How. 2nd Ed., § 14144, relating to the time within which actions may be brought by or against the representatives of deceased persons where the claimant dies and the general statute of limitations expires during the two years after administration is granted on claimant's estate and under such section action on such claim may be brought at any time within two years after administration is granted.—In re Sellman's Estate, 175 Mich. 700.

¶ 112. The running of the statute of limitations provided for by Pub. Acts 1899, No. 155 for actions to recover for personal injuries is not suspended because of the provisions of Comp. L. 1897, § 9737, because the act makes no exceptions in favor of causes of action which survive.—Colling v. McGregor, 144 Mich. 651.

¶ 113. Comp. L. 1897, § 9737, does not bar a ward's suit against a guardian's estate for pension moneys received in 1873, he dying in 1876, and the ward having first had knowledge of her rights in 1897, whereupon claim and negotiations were begun and an administrator of the guardian appointed for the first time in 1899, followed by suit. [Official reporter states that suit was brought in 1900, but the opinion does not show this fact. —Editor.]—Murphy v. Cady, 145 Mich. 33.

¶ 114. An action for the conversion of shares of stock of a corporation, which would have been barred if brought by the corporation, was likewise barred where brought in the name of the administratrix of the estate of a deceased stockholder, 13 years after the action was barred; where even if such stockholder had brought such action in his own name, it would have been one in behalf of the corporation, and the recovery would have been for the benefit of the corporation and all its stockholders.—Bates v. Boyce's Estate, 135 Mich. 540.

§ 28. Dissolution or expiration of corporation.

Statutory continuance of corporation to sue or be sued for stated period after expiration, see Corporations §§ 259, 260.

Effect of receivership or dissolution proceedings to disable corporation to sue or defend and to cast it on receiver, see Corporations § 244.

¶ 115. Suits against a corporation whose charter has expired must be commenced within three years after expiration.—Montgomery v. Merrill, 18 Mich. 338.

¶ 116. A corporation formed under a general incorporation law can begin suits in its own name at any time within three years after the end of its period, and continue them to a close, unless superseded by trustees or receivers; and this though such general law is repealed.—Bewick v. Alpena Harbor Improvement Co., 89 Mich. 700.

§ 29. Injunctions against suing or other suits affecting parties.

Provisions for excluding time during which chancery suit by debtor was pending, see Jud. Act, chap. IX, § 29; Comp. L. 1915, § 12339.

¶ 117. Where the statute (Laws 1833, p. 571) prescribed that actions of debt or scire facias on judgments should be commenced within eight years next after the rendition of such judgments, with a saving in the cases of arrest and reversal of judgments, of judgments on plea in abatement and upon demurrer, it was held that the saving clause could not be extended so as to include a case where plaintiff had been delayed by an injunction issued out of chancery after the statute had commenced to run.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 118. The defendant in a bill to foreclose a purchase-money mortgage by him given filed a cross-bill relying on frauds in the sale and on breaches of covenant. In a subsequent action by him on the covenants, held, that the chancery proceedings did not prevent the running of the statute of limitations. How. St., § 8738, suspending the statute during pendency of any case in chancery "commenced by any debtor," does not make an equitable suit suspend the statute except where instituted or prosecuted on behalf of the person who wishes to plead the statute. —Sweet v. Haldane, 68 Mich. 639.

¶ 119. Plaintiff in an ejectment suit cannot escape the defense of the five-year statute of limitations on the ground that the defendants, being bound by an injunction, could not set up the statute as a shield against their own acts, where the injunction issued in a suit to which plaintiff was not a party and which bore no relation to the issues in controversy in the ejectment suit. —West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

§ 30. Fraud, ignorance or concealment.

Effect of assumption of domestic residence by debtor unknown to plaintiff, see post § 37.

Want of knowledge of breach of trust as preventing accrual of action therefor, see post § 74.

Pleading the fraud and concealment in avoidance of bar, see post § 107.

Evidence as to fraud and concealment, see post § 111.

Want of knowledge or notice as excusing delay in equity, see Equity §§ 55, 56.

Breach of trust in purchase for taxes as preventing running of limitations against owner, see also Taxes, XII, C.

Statutory provisions for two-year period after discovery of cause of action fraudulently concealed, see Jud. Act, chap. IX, § 20; Comp. L. 1915, § 12330.

¶ 120. The statute of limitations does not run against a cause of action fraudulently concealed, before the fraud is discovered.—Tompkins v. Hollister, 60 Mich. 470.

¶ 121. Pub. Acts 1915, No. 314, chap. IX, § 20, providing that where a cause of action is fraudulently concealed an action may be brought within two years after discovery of the fraud, was intended not to curtail, but, when applicable, to enlarge, the six-year limit provided by § 13, and applies in an action at law only when it will in fact enlarge it, and consequently an action at law is barred in six years from the commission of the act complained of, unless the fraudulent concealment section can be invoked to extend the time, and even then, unless brought within two years from date of discovery of the cause of action.—Ramsey v. Child, Hulswit & Co., 198 Mich. 658.

¶ 122. Pub. Acts 1915, No. 314, chap. IX, § 20, providing that when a cause of action is fraudulently concealed from the knowledge of the party entitled thereto, the action may be commenced at any time within two years after discovery of the fraud, applies both at law and in equity, even though the cause of action is based on original fraud.—Ramsey v. Child, Hulswit & Co., 198 Mich. 658.

¶ 123. The fraudulent concealment of a cause of action which, under How. St., § 8724, prevents the running of the statute of limitations may be a concealment of law as well as of fact.—Tompkins v. Hollister, 60 Mich. 470.

¶ 124. The "fraudulent concealment" which will take a claim out of the statute of limitations must be that of the person sought to be charged and not that of his clerk without the employer's fault.—Stevenson v. Robinson, 39 Mich. 160.

¶ 125. The payee in a certificate of deposit was induced, when non compos mentis, to transfer the certificate to a third party, who drew the money thereon. The payee died a week thereafter, without having regained her normal mental condition, and an administrator of her estate was at once appointed. A few days after the expiration of six years from the receipt by the transferee of the money, the administrator, from whom the transferee had fraudulently concealed the facts relating to the transfer, filed a bill to compel the payment to the estate of the money and interest thereon. Held, that the suit was within How. St., §§ 8718, 8724, and was not barred by the statute of limitations.—Stebbins v. Patterson, 108 Mich. 537.

¶ 126. Where a guardian has received pension money for the benefit of his ward and has appropriated it to his own use, concealing the fact of its receipt during his lifetime, and it remaining unknown during settlement of his estate, the statute does not

begin to run against the ward's right to an accounting until his discovery of the fraud. How. St., § 8724 so provides.—Allen v. Conklin, 112 Mich. 74.

¶ 127. Under Comp. L. 1897, § 9739, a cause of action is not barred by the statute of limitations, if the defendant fraudulently concealed the existence of the claim or unless the plaintiff knew, or should have known, of the claim.—Wolkins v. Knight, 134 Mich. 347.

¶ 128. When the basis of an action is some wrong other than a fraud, the fraudulent concealment of the cause of action which will work a postponement of the statute of limitations must be a concealment by affirmative acts or misrepresentations, unless the parties stand in a fiduciary relation.—Dowse v. Gaynor, 155 Mich. 38.

¶ 129. Comp. L. 1897, § 9739 suspending the statute of limitations in cases of fraudulent concealment was not designated to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and one must be held chargeable with knowledge of the facts, which, in the exercise of reasonable diligence, it ought to have discovered.—First Nat. Bank of Ovid v. Steel, 146 Mich. 308.

¶ 130. Section 9739, Comp. L. 1897, providing that the running of the statute of limitations shall be suspended where defendant has fraudulently concealed the cause of action from plaintiff's knowledge, was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known; and the plaintiff is chargeable with knowledge of facts which he ought, in the exercise of reasonable diligence, to have discovered.—Dowse v. Gaynor, 155 Mich. 38.

¶ 131. How. St., § 8724, which allows suit within two years after the discovery of a cause of action which has been fraudulently concealed from the knowledge of the party suing, does not apply where plaintiff was put upon inquiry by a statement that the bonds were "good," but on coupons being dishonored, was told they were "poor" and defendant did not seek to prevent him from obtaining information.—Purdon v. Seligman, 78 Mich. 132.

¶ 132. There can be no "fraudulent concealment," within the meaning of the statute of limitations, of matters that are of record and of which plaintiff must be presumed to have knowledge.—Robert v. Morrin's Estate, 27 Mich. 306; Mecosta County Sup'rs v. Vincent, 65 Mich. 503.

¶ 133. Where one who sues to recover moneys which he claims he was induced to invest in stock by the false representations of the company's officers as to dividends having been paid, has had ample opportunity to examine the books, it cannot be said there was such a concealment of fraud as excuses delay for seventeen years in bringing suit.—McEacheran v. Western Transp. & Coal Co., 97 Mich. 479.

¶ 134. Under Comp. L. 1897, § 9739, which provides that a cause of action shall not be barred by the statute of limitations if the person liable, fraudulently conceals it from the plaintiff's knowledge, an administratrix is not charged with knowledge of her husband's failure to collect in full for a crop of apples sold, where the husband kept no books and the defendant purchaser informed her that he had paid the husband in full.—Wolkins v. Knight, 134 Mich. 347.

¶ 135. It was sufficient to have put the plaintiff on inquiry so as to prevent the application of the statute suspending the statute of limitations in cases of fraudulent representations and concealment where it appeared that ten days after it had discounted notes of a corporation and accepted as collateral stock thereof, the corporation having been represented as solvent, it executed mortgages in favor of its creditors upon all of its assets, and two days later a receiver was appointed, and on foreclosure there was not realized enough to pay the debts, the plaintiff having notice of these latter proceedings.—First Nat. Bank of Ovid v. Steel, 146 Mich. 308.

¶ 136. Where a purchaser of bonds from a bond house does not receive interest on her coupons at the time they are due and is afterwards informed that the enterprises are in serious financial straits, and the organization of bondholders' protective associations is urged, and the associations are perfected and she otherwise receives information which should have put her on inquiry, there is no fraudulent concealment of a cause of action of fraud in the sale of the bonds so as to make available the provisions of Pub. Acts 1915, Act No. 314, chap. IX, § 20, relating to the commencement of an action, the cause of which is fraudulently concealed, at any time within two years after the discovery of the fraud, since the statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by the facts known.—Ramsey v. Child, Hulswit & Co., 198 Mich. 658.

¶ 137. The fact that the relation of trust and confidence exists between an officer of a bond house and a purchaser of bonds cannot impair the legal effect of notice of fraud in the sale which should have put her on inquiry so as to render available the provisions of Pub. Acts 1915, No. 314, chap. IX, § 20, relating to the commencement of an action of fraud at any time within two years after discovery of the cause of action.—Ramsey v. Child, Hulswit & Co., 198 Mich. 658.

¶ 138. Where the owner of sheep intrusts them to the care of another under an arrangement whereby they are to be let out to

a certain person to double in four years, and, upon the return of double the number of sheep at the expiration of the term, such agent then converts and appropriates them to his own use, concealing the fact from the owner, and deceives the owner into believing that he has let out the increased flock for a similar period and on similar terms the statute of limitations does not begin to run until the owner learns of the conversion, and it is immaterial that the second time the agent let some of his own sheep, instead of all of those of such owner, if the owner was kept in ignorance of such fact and was deceived into believing that they were all hers.—Miller v. Young, 196 Mich. 276.

¶ 139. An action by a private person as for continuing injury in keeping a railway track in the street near his premises is subject to the six-year limitation, if defendant relies on permission given longer ago, and plaintiff seeks to show by such evidence as remains that his permission was obtained by fraud.—Krueger v. Grand Rapids & I. R. Co., 51 Mich. 142.

¶ 140. A man and his wife entered into a land contract with defendant, by the terms of which they conveyed to him certain property, and gave their note for $1,000, and in consideration thereof defendant promised to convey to them certain lots, at the same time executing a mortgage back to the man and wife upon part of the property conveyed to him to secure performance of the contract on his part. Upon the man's death, defendant persuaded the widow to release the mortgage she held, assuring her that he would convey to her the lots contracted for, which he never did, since a mortgage on such lots had been previously foreclosed, the woman having been served with subpoena in the foreclosure proceedings. In a suit by her eight years later, against defendant for fraud and deceit, the defense of the statute of limitations is set up as a defense. The evidence shows that at the time when plaintiff was served with the subpoena, and for six or seven years thereafter, plaintiff suffered severely from nervous prostration, and further that she relied on defendant as a trustworthy man and friend, and her faith in him was never shaken until he flatly refused to convey the land to her, and that she was ignorant of the import of the foreclosure proceedings. Held, that since defendant knew that plaintiff was ignorant of the fact that the foreclosure proceedings concerned her, and obtained the discharge of the mortgage because of such ignorance, he cannot now make the very ignorance which enabled him to perpetrate the fraud the basis of his defense.—Comfort v. Robinson, 155 Mich. 143.

§ 31. Possession as tolling limitations against possessor's action.

Effect of quiescence by possessor as estoppel on him to plead statute when sued, see post ¶ 387.

Possession of land as tolling limitations in favor of possessor, see also Equity ¶ 193.

Exemption of possessor to sue to annul void tax title, see Taxes, XII, C.

¶ 141. A defendant in possession is not estopped from taking advantage of the statute of limitations by any neglect to speed the cause.—Dubois v. Campau, 87 Mich. 248.

§ 32. Tacking disabilities and suspensions.

Death occurring during year allowed for bringing new action, see post ¶ 380.

Provisions as to extension in case of death of person under disability and against any further extensions, see Jud. Act, chap. IX, § 7; Comp. L. 1915, § 12317.

¶ 142. Under Comp. L. 1897, § 9728, How. 2nd Ed., § 14135, the period of the running of the statute of limitations on a promissory note under a foreign statute may not be tacked to the period of the running of the statute of limitations of Michigan.—Millar v. Hilton, 189 Mich. 635.

B. INFANCY, COVERTURE AND INCOMPETENCY.

§ 33. Infancy of plaintiff.

Rule as to tacking several disabilities one on another, see ante § 32.

Time when running on guardian's bond begins, see post ¶ 284.

Effect of appointment of next friend and of commencement and discontinuance of action by him, see post ¶ 284.

Burden of proving time and duration of infancy, see post § 110.

Bar of infant's claim against estate by delay in presentment, see Estates of Decedents § 174.

Application to infants of limitation of time within which to present claim or demand against municipal corporations, see Municipal Corporations, XIV.

Provision for extension of time for real actions, see Jud. Act, chap. IX, § 5; Comp. L. 1915, § 12315.

Statutory provision for extension of time for personal actions in case of infancy, see Jud. Act, chap. IX, § 15; Comp. L. 1915, § 12325.

¶ 143. Where a statute of limitations contains no saving clause exempting infants from its operation they are put on the same footing with adults as to the time within which actions must be brought.—Davidson v. City of Muskegon, 111 Mich. 454.

¶ 144. How. St., § 8718, which bars an action on the case unless commenced within six years after the cause of action accrues, does not commence to run as against an infant until he attains his majority.—Keating v. Michigan Cent. R. Co., 94 Mich. 219.

¶ 145. An infant's right of action for seduction is not barred by the statute of limitations until after she has reached her

majority, if the circumstances are such that she has to bring suit in her own name and not by another (How. St., § 7779).—Watson v. Watson, 53 Mich. 168.

§ 34. Coverture of plaintiff.

[Note. For the precedents on the right of married women to sue or be sued as sole parties under the various statutes, see Husband and Wife, VI.]

¶ 146. As married women are relieved by the act of 1855 (How. St., § 6295) from all disabilities of bringing suit, the statute of limitations runs against them as if they were unmarried.—Douglass v. Douglass, 72 Mich. 86.

¶ 147. The Married Women's Act of 1855 (How. St., § 6295), removing the disability of coverture and permitting a wife to bring suit for her sole property, impliedly repealed the exception created in her favor by R. S. 1846 (Comp. L. 1857, § 5354).—King v. Merritt, 67 Mich. 194; Curbay v. Bellemer, 70 Mich. 106.

¶ 148. The exception of married women from the operation of the statute of limitations (Rev. St. 1846) repealed by the Married Women's Act of 1855 was not continued in force by the amendment of 1863 to the statute of limitations (Comp. L. 1857, § 5354; How. St., § 8702), which was not intended to do more than to introduce the clause relating to the suspension of the running of the statute "unless within one of the British provinces of North America."—Curbay v. Bellemer, 70 Mich. 106.

¶ 149. Whether the statute of limitations runs against a wife in favor of her husband, quære.—Wilcox v. Wilcox, 139 Mich. 365.

§ 35. Insanity of plaintiff.

Confinement in insane asylum as "imprisonment" of inmate, see post ¶ 167.

Burden of proof and presumptions as to lawfulness of detention in asylum, see post § 109.

Insanity or incompetency of party to sue or defend, see Insane Persons § 35; Incompetents.

Provision for extension of time for real actions, see Jud. Act, chap. IX, § 5; Comp. L. 1915, § 12315.

Statutory extension of time for personal actions, see Jud. Act, chap. IX, § 15; Comp. L. 1915, § 12325.

C. ABSENCE OR NONRESIDENCE OR IMPRISONMENT.

§ 36. Absence or nonresidence of defendant.

Effect of assumption of residence by nonresident debtor, see post § 37.

Effect of personal service on nonresident, see post § 38.

Absence or nonresidence of plaintiff, see post § 39.

Burden of showing nonresidence, see post § 110.

Burden of showing sufficient residence within state, see post ¶ 420.

Residence as court or jury question, see post § 118.

Sufficiency of finding of absence, see post ¶ 455.

What constitutes legal domicile or residence, see Domicile.

Provisions for suspension of running during absence of defendant from state, see Jud. Act, chap. IX, § 17; Comp. L. 1915, § 12327.

¶ 150. The purpose of How. St., § 8721, providing for the suspension of the running of the statute of limitations by reason of defendant's absence from and residence out of the state after cause of action accrued, is to secure to the plaintiff the same time, and only the same time, in which to commence his action against an absent or nonresident defendant, that he would have if the defendant were an actual resident of the state.—Gray v. Jones, 80 Mich. 504.

¶ 151. The statute of limitations adopted by the governor and judges, May 15, 1820, continued in force as adopted until repealed in 1838; and its provisions ran against the claims of persons who were, at the time the cause of action accrued, out of this state, but not without the United States, and who had not, from the time of the accruing of said cause of action, come within the state.—Hulburt v. Merriam, 3 Mich. 144; Pease v. Peck, 18 How. (59 U. S.) 595, 15 L. ed. 518, affirming 5 McLean 486, Fed. Cas. No. 10894.

¶ 152. The provision (R. S. 1846, chap. 140, § 9) for a deduction from the period of limitation of the time the debtor is absent from and resides out of the state applies to every cause of action mentioned in the chapter, which includes debtors by judgment recovered in courts of record as well as those recovered in courts not of record, and Sess. L. 1869, p. 155, amendatory of section 24, was not intended to operate independently of the other provisions of the same chapter.—Conrad v. Nall, 24 Mich. 275.

¶ 153. The term "persons beyond seas," in the statute of 1820 (code of 1833, p. 569), meant persons out of the state.—Hulburt v. Merriam, 3 Mich. 144; Pease v. Peck, 18 How. (59 U. S.) 595, 15 L. ed. 518, affirming 5 McLean 486, Fed. Cas. No. 10894.

¶ 154. Residence out of the state, in order to take a case out of the statute of limitations, must be something more than a mere place of abode; it must be the party's domicile, which can only be in one place, and it must have the incidents, which may vary under different circumstances, but which determine the place of his home which he has adopted with the intention of remaining there, and to which, when he is absent, he

intends to return.—Campbell v. White, 22 Mich. 178.

¶ 155. Neither absence from the state nor residence out of it will alone suspend the running of the statute of limitations within the meaning of Comp. L. 1857, § 5369, How. St., § 8721; both must exist to take the case out of the statute. Where the absence has not been continuous, the different occasions when a debtor has been within the state—if his presence was sufficiently notorious, or lasted long enough, to fairly enable the creditor, by exercising reasonable diligence, to subject him to service of process—may be reckoned together, and the statute will run during the period thus computed, it being the legislative intent that the operation of the exception should be concurrent with the existence of the obstacle which prevents a service upon the debtor.—Campbell v. White, 22 Mich. 178.

¶ 156. Under How. St., § 9507, deducting from the period of limitation the time "during which the party charged was not usually and publicly a resident within the state," not mere absence from the state is referred to, but such absence as destroys residence.—People v. McCausey, 65 Mich. 72.

¶ 157. Under Comp. L. 1857, § 5366, a cause of action which accrued in Canada upon a promissory note in favor of a Canadian resident who had never been within the United States was not barred by the defendant's residing more than ten years in Michigan; the disability of absence from the United States applied to such a case and prevented the limitation from running.—Erskine v. Messicar, 27 Mich. 84.

¶ 158. The statute of limitations does not run on a promissory note during the time the defendant maker resides out of the state of his own free will and accord.—Hoffman v. Estate of Pope, 74 Mich. 235.

¶ 159. Under Comp. L. 1897, § 9736, providing that the period of absence from the state of a party against whom an action shall have accrued, shall not be taken as any part of the time limited for the commencement of the action, the saving clause applies to the period in which a husband and wife, who were respectively maker and payee of a note, were both absent from the state.—Blackburn v. Blackburn's Estate, 124 Mich. 190.

¶ 160. The statute of limitations will be construed as applying to a cause of action which accrues without the state between nonresidents; and so applied includes the saving clause where the debtor is absent from state.—Belden v. Blackman, 118 Mich. 448.

¶ 161. Comp. L. 1897, § 9736, providing that the time of the absence of a debtor shall not be taken as any part of the limitation against an action, applies to the 10-year limitation provided by section 9731 against judgments.—Newlove v. Pennock, 123 Mich. 260.

¶ 162. How. St., § 8721, which excepts from the period limited for the commencement of personal actions the time during which the debtor shall, after the cause of action has accrued, be absent from and reside out of the state, is applicable to the ten-year limitation imposed upon the right of complainant in foreclosure to take out an execution for a deficiency arising upon a sale of the mortgaged premises.—Shelden v. Barlow, 108 Mich. 375.

¶ 163. The proceeding for execution for deficiency on foreclosure, being essentially a new one, substituted service of the application upon the person liable for such deficiency cannot be given extra-territorial effect, and a neglect to resort to that method of service during the period of his absence from the state does not constitute such laches as will bar a proceeding taken on personal service.—Shelden v. Barlow, 108 Mich. 375.

§ 37. ——Effect of assumption of domestic residence.

Removal of debtor to Michigan without knowledge of foreign resident plaintiff, see also post ¶ 166.

¶ 164. The fact that the obligor in a bond executed in another state removes to Michigan and subjects himself to suit without the knowledge of the obligee does not operate to suspend the running of the statute in the former's favor until such time as the latter ascertains his whereabouts.—Home Life Ins. Co. v. Elwell, 111 Mich. 689.

§ 38. ——Effect of personal service on nonresident.

Inefficacy of service in foreign state, see Process, II, A.

¶ 165. Where suit has been commenced by personal service upon defendant, the fact that such defendant is a nonresident does not affect the running or suspension of the statute of limitations as provided for in How. St., § 8721; and while such suit is pending no new suit can be commenced for the same cause of action, nor afterwards, if the limitation of time has elapsed during the pendency of the suit.—Gray v. Jones, 80 Mich. 504.

§ 39. Nonresidence or absence of plaintiff.

¶ 166. No provision of the statute of limitations relieves a foreign plaintiff from the force of the statute because he is ignorant that the defendant has removed to this state; it is only when defendant is absent from the state that the statute is arrested.—Dowse v. Gaynor, 155 Mich. 38.

§ 40. Imprisonment of party.

Provision for extension of time for real actions, see Jud. Act, chap. IX, § 5; Comp. L. 1915, § 12315.

Statutory extension of time for personal actions, see Jud. Act, chap. IX, § 15; Comp. L. 1915, § 12325.

¶ 167. An insane asylum within the state is not the "state prison," within Comp. L. 1897, § 9733, How. St., 2nd Ed., § 14140, providing that if any person entitled to bring an action for false imprisonment shall, at the time when the cause of action accrues, be within the age of twenty-one years, insane or imprisoned in the state prison, such action may be brought within the statutory time after the disability is removed.—Alexander v. Thompson, 195 Fed. 31.

IV. MATURITY AND ACCRUAL OF CAUSE.

When damage accrues or is determinable, time for measurement, see Damages, II, III.

§ 41. Accrual or devolution of title or right to plaintiff.

[Note. The question when the right of action accrues and is complete and suable is primarily a question of substantive law depending on the elements of the cause and the maturity and existence of them. Topics dealing with the particular causes of action may therefore be consulted as supplementary to this one.]

Accrual and maturity of various rights of action, see post §§ 45-74.

Accrual to predecessor or person represented by plaintiff, see post § 42.

Accrual to infant plaintiff's predecessor or representative, see post § 43.

Accrual of right to sue on one promise which is collateral to another promise, see post § 50.

Commencement of action as time when set-off may be made, see post § 78.

Suspension of running because of infancy or other disability to sue at time of accrual, see ante §§ 33-35.

Suspension of running because of obstacle to suit or lack of parties at time of accrual, see ante §§ 25-30, 36-40.

Disability to sue or want of party as extending time, see ante III.

Presumptions, burden of proof, and evidence as to time of accrual and maturity of cause, see post § 109 et seq.

Accrual of right to sue as instituting adverse possession, see Adverse Possession, § 8.

¶ 168. Since 1846 a conveyance by an excluded owner of lands held adversely would carry what title he had, and his grantee, like himself, could sue within the statutory period of limitation.—Campau v. Dubois, 39 Mich. 274.

§ 42. ——Plaintiff as successor in right to another.

Suit by administrator of stockholder brought in right of corporation, see also ante ¶ 114.

Receiver of corporation suing for misappropriated assets, see post ¶ 248.

Reckoning of period from accrual to ancestor or predecessor, see Jud. Act, chap. IX, § 2; Comp. L. 1915, § 12312.

Reckoning of time from accrual to one who succeeds another in title, see Jud. Act, chap. IX, § 3; Comp. L. 1915, § 12313.

¶ 169. The statute bars assumpsit by an administrator to recover, for the benefit of a sole creditor of the estate whose claims matured six years before the debtor's death, for property fraudulently conveyed by debtor to defendant.—Bresnahan v. Nugent, 92 Mich. 76; Morse, C. J., concurring specially, urged that as to notes on which another was liable and a necessary party, the bar was not complete because of the death of such party within the six years, until time for administration and suit.

¶ 170. Where a member of a mutual-benefit society died while residing in Michigan, leaving three beneficiaries, one a resident of Ohio, another of Michigan, and the third of Germany, the last of whom dwelt in Germany until her death, ten years after the member's decease, it was held, that as to the right of the two survivors, who inherited the share of the third, to recover such share from the society, the statute of limitations did not begin to run until after the death of the nonresident beneficiary.—Wolf v. District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23.

§ 43. ——Infant as successor to representative.

Limitation on action for seduction of infant where suable by another for her, see also ante ¶ 145.

¶ 171. Where nearly fifteen years have elapsed since the right accrued to a guardian to receive the proceeds realized from the sale of real estate by the administrator of the estate of the ward's father, before the ward became of full age, an action by the ward to recover the money from the estate of the deceased guardian is barred by the statute of limitations.—Dodson v. McKelvey, 93 Mich. 263.

¶ 172. An infant's right of action for seduction is not barred until six years after her majority, if no one sued for her during minority (How. St., § 8713).—Watson v. Watson, 53 Mich. 168.

§ 44. Appointment of administrator or representative to sue or defend.

Provision for two-year extension from and after appointment of personal representative, see Jud. Act, chap. IX, § 18; Comp. L. 1915, § 12328.

¶ 173. Until an administrator is appointed, the statute of limitations will not begin to run for the conversion of an intestate's personalty.—Parks v. Norris, 101 Mich. 71.

¶ 174. Under How. St., chap. 282, § 12, in relation to the voluntary dissolution of corporations and the appointment of receivers therefor, providing that, if there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver "shall immediately proceed and recover the same," the statute of limitations begins to run as against such right of action immediately upon the dissolution of the corporation and the appointment of a receiver. —Webber v. Hovey, 108 Mich. 49.

§ 45. Right of entry; recovery of land.

Period applicable to real actions, see ante § 9.
Foreclosure of mortgages, see post § 78.
Enforcement of trusts, see post § 74.
Right of entry or action under conveyance of lands held adversely, see ante ¶ 168.
Rights of forfeiture for breach of condition, see Deeds § 88 et seq.; Life Estates, II.
What amounts to disseisin or adverse possession giving right to sue, see Adverse Possession.
Rights of life tenants and remaindermen towards third persons, see Life Estates, III.
Rights to possession under contracts for purchase of lands, see Vendors and Purchasers, VIII.
Burden of proof of time of ouster, see post § 109.
Provisions of statute as to time when accrual shall be deemed to have occurred, see Jud. Act, chap. IX, § 3; Comp. L. 1915, § 12313.
What deemed to be a possession consequent on entry, see Jud. Act, chap. IX, § 8; Comp. L. 1915, § 12318.

¶ 175. A land contract provided for seven annual payments, the first to fall due in 1857. It gave the vendee possession, a breach of condition to work forfeiture. The vendee failed to pay the instalment due in 1860, and left the premises, and in the same year parties who had been occupying under him attorned to an adverse claimant. Held, that under How. St. § 8700, subd. 4, the vendor's right of entry accrued in 1860, or, at the latest, in 1863, and that a suit begun by him in 1884 was barred.—Cook v. Hopkins, 68 Mich. 514.

¶ 176. Land was conveyed to a village upon the condition subsequent that the same should be cleared and ornamented for a public walk or promenade within ten years, title to revert on breach, etc. Held, that under How. St. § 8700, providing that when any one claims under a title arising from forfeiture or breach of condition his right should be deemed to have accrued when the forfeiture was incurred or the condition was broken, proceedings begun more than twenty-five years after said rights had so accrued were barred.—Hatch v. St. Joseph Common Council, 68 Mich. 220.

¶ 177. Ejectment will not lie at the instance of a landowner against government engineers who have been in actual, continued, notorious and hostile possession of the land for over twenty years, where the executive and legislative branches of the federal government uniformly repudiated his claim and denied its justice, and he has failed to bring his action within the period prescribed by the statute of limitations.—Heiss v. Adams, 149 Mich. 645.

§ 46. Actions to recover legacies or to enforce wills.

Actions to enforce trusts, see also post § 74.
Agreements to provide or make payment by will, see also post ¶ 215.

¶ 178. A legatee's right to follow devised land for the payment of his legacy is not barred by the statute of limitations though six years have elapsed, where there has been no settlement by the executor, and where the will does not contemplate the closing of the estate in six years.—In re Moores' Appeal, 84 Mich. 474.

§ 47. Actions on judgments and decrees.

Suspension of running as to absent debtors, see ante ¶¶ 152, 161.
Exclusion of day of entry in computing time, see post ¶ 292.
Computation of time to enforce lien of instalment decree, see post ¶ 294.
Statute and period applicable to judgments, see ante § 13.

¶ 179. On a decree which is a continuing obligation for the payment of money yearly the statute does not run as against an entirety, but runs against each installment as if falls due.—Field v. Loveridge, 114 Mich. 220.

§ 48. Contracts in general; necessity of demand and tender.

[Note. The existence of a cause of action for breach or nonperformance of contract often depends on a tender of payment or performance by plaintiff and a demand by him on the other party to fix a breach or default. For cases on what constitutes such a cause of action, see Contracts, VII; Sales, V, VII; Vendors and Purchasers, VI.]

Actions on accounts open or stated, see post §§ 51, 52.
Actions on bills and notes and contracts for payment of money, see post §§ 53-56.
Actions on implied contracts, see post § 57.
Actions for work and labor over extended period, see post § 58.
Actions on contracts of sale of chattels, see post § 59.
Actions on sealed contracts, covenants, and bonds, see post §§ 60-62.

Actions against agents, bailees, and partners, see post §§ 63, 64.
Liquidation or measurement to mature right of action, see post § 49.
Necessity of demand on agent or bailee, see post § 63.
Repudiation of trust or equitable right as starting running, see post §§ 71, 74.
Different contracts collateral to each other giving rise to causes of action at different times, see post § 50.
Statute and period applicable to contract actions, see ante §§ 13, 14.

¶ 180. A cause of action accrues to set the statute of limitations in motion, at least where no delay is contemplated, as soon as the creditor, by his own act and in spite of the debtor, can make his demand payable.—Palmer v. Palmer, 36 Mich. 487.

¶ 181. Where a demand is a necessary preliminary to an action, it is barred unless made within the period of the statute of limitations, and the right of action falls with it.—Palmer v. Palmer, 36 Mich. 487.

¶ 182. Where logs of like quality are to be returned on demand, the demand should be made within a reasonable time, and will be presumed to have been made, in the absence of testimony as to its date, at the expiration of six years from the time the logs were received, at which time the statute of limitations will commence to run against the claim.—Smith v. Smith's Estate, 91 Mich. 7.

¶ 183. The statute of limitations begins to run on a vendor's agreement to repurchase shares of corporate stock sold at any time on thirty days' notice, thirty days after notice by the vendee of an election to enforce such option, and not from the actual tender of the certificate.—Weaver v. Collins, 182 Mich. 255.

¶ 184. Plaintiff from time to time let defendant have sums of money, with the understanding that defendant was at plaintiff's request to repay the same, a reasonable time being allowed defendant to get the money together. A writing recited the several sums and the total and stated that interest was not yet paid. Held, the transactions amounted to loans in sequence payable on demand, so that lacking any demand, recovery was barred by the running of the statute of limitations seven years after the last loan.—Volli v. Wirth, 164 Mich. 21.

§ 49. ——Necessity of liquidation or measurement.

¶ 185. Where, under a contract to cut and haul timber, it is agreed that the quantity of logs cut shall be determined by measuring at the time of shipment the lumber sawed therefrom, the statute of limitations does not begin to run as to over-payments upon the contract until such measurement.—Busch v. Jones, 94 Mich. 228.

§ 50. ——Effect of collateral agreements or rights.

Trust to apply proceeds collateral to note, see also post ¶ 278.

¶ 186. If B. borrows from A. to lend to C., the running of the statute of limitations on C.'s debt to B. is not postponed to the date of the enforcement of B.'s liability to A.—Howard v. First Presbyterian Church & Society of Pontiac, 51 Mich. 125.

¶ 187. Where the maker of notes agreed to send to the payee at a designated place certain goods, the payee "to pay the freight on the same and indorse $50 on the notes," the indorsement was to be made when the goods were received; and the statute of limitations began to run on the notes at that time; moreover, the goods having been accepted and the indorsement made, the time of the indorsement was not affected by the fact that the goods sent varied from those described in the contract.—Sutton v. Lamb, 72 Mich. 340.

¶ 188. Where a husband in a separation agreement conveyed to his wife certain property as a home reserving to himself a life estate in certain events, and there was a mortgage on the premises which he agreed he would pay within two years, but if in the meantime the wife should make any payments of principal or interest she should be subrogated to the right of the mortgagee or have a lien corresponding to the amount paid as security and to assure the final payment of the principal and interest in full "by the party of the first part" (the husband), there was created a personal liability to pay the mortgage, which matured at the expiration of two years.—Clinton v. Clinton's Estate, 148 Mich. 496.

¶ 189. A suit brought on a written guaranty, which included notes in settlement of accounts, is not barred when suit is brought more than six years after date of an account, but within six years after maturity of the note.—American Steel & Wire Co. v. Richardson, 191 Mich. 549.

§ 51. On open or running accounts.

Running of time on account stated, see post § 52.
Action on guaranty of notes given in settlement of account, see also ante ¶ 189.
Continuous rendition of services, see post § 58.
Evidence as to character of account, see also post ¶ 428.
Court and jury questions as to character of account, see post § 118.
Necessity and propriety of instructions, see post § 118.
Instruction on effect of payment to continue account, see post ¶ 458.
Accrual of action for several balances reported against public officer, see also Account Stated ¶ 32.

Statutory provisions, see Jud. Act, chap. IX, § 14; Comp. L. 1915, § 12324.

¶ 190. On a running account the time of limitations only begins when there is a special occasion for making a new departure.—Tripp v. Curtenius, 36 Mich. 494.

¶ 191. There is no account current or mutual account within the statute unless there are accounts on both sides. A credit given by one to the other without the concurrence of the other is not sufficient.—Kimball v. Kimball, 16 Mich. 211.

¶ 192. A "mutual and open account current" means a course of dealing where each party furnishes credit to the other on the reliance that upon settlement the accounts will be allowed, so that one will reduce the balance due on the other.—In re Hiscock's Estate, 79 Mich. 536.

¶ 193. A payment made upon the same day with the last of a series of charges will render the whole account open and mutual, so as to take previous charges out of the statute of limitations.—Hollywood v. Reed, 55 Mich. 308.

¶ 194. Payments upon an account are sufficient to render it such an open and mutual account as to prevent the statute of limitations from barring the remedy thereon.—Payne v. Walker, 26 Mich. 60.

¶ 195. If an attorney's services are minuted in his register and other proper memorandum books, it is sufficient for the purpose of an account current; there is no requirement that the books upon which entries are made shall be of any particular kind, or the entries of any particular form, and the fact that the amount of the charges was not entered is immaterial.—Payne v. Walker, 26 Mich. 60.

¶ 196. Where, for mutual convenience, credit is given in the course of a running account for an article that has been returned without being paid for, the transaction is complete in itself and gives neither party a right to make it a matter of account within the statute of limitations. But if cash had been paid for it, which the vendor was allowed to retain, it is a proper item on the credit side, and sufficient to convert the account into a mutual one.—White v. Campbell, 25 Mich. 463.

¶ 197. Items of credit to defendant, entered on plaintiff's books for goods or money "returned," have no tendency to prove the existence of a mutual and open account between the plaintiff and defendant, within the meaning of Comp. L. 1857, § 5361, How. St. § 8717. Such entries denote merely that the transactions to which they relate are stricken out of the account entirely.—Campbell v. White, 22 Mich. 178.

¶ 198. One who defends against a claim originating in 1869, with items of set-off arising in 1865, 1868 and 1869, cannot show as an additional offset that the plaintiff boarded with him in 1858 and before, in the absence of any showing that there were mutual accounts between them in the meantime; the claim for such board is barred by the statute of limitations and the case cannot be treated as one of mutual accounts renewed after a suspension for a period.—Mandigo v. Mandigo, 26 Mich. 349.

¶ 199. A claimant against an estate sought to free an open account from the bar of the statute of limitations by showing that within the statutory period the decedent had orally admitted that the price of a bull bought from a firm of which he was a member was properly credited to him individually; also that by his oral consent an order drawn by the claimant on another firm of which he was a member was carried to his individual credit. But there was testimony that no one had accounted for the price of the bull, and there was nothing to show decedent's right to apply the price of it as a set-off to any account held by the claimant against him, and the defense also claimed that decedent had not assumed to apply to his benefit the credit arising from the payment of the order. The jury found against the claimant. Held, that the account was not released from the bar of the statute.—Sperry v. Moore's Estate, 42 Mich. 353.

¶ 200. Testimony by a third party that he had heard a decedent orally admit having bought certain property and become a debtor therefor at some previous time not specified, but which the witness inferred was comparatively recent, did not avail to release from the bar of the statute of limitations a claim against his estate upon an open account.—Sperry v. Moore's Estate, 42 Mich. 353.

¶ 201. A claim against a decedent's estate based on an account, the last item of which was made more than nine years before his death, on which claim the only credit items are a small credit for wood eight years after the last debit, and two unexplained credits of cash made more than six years before the death, is not such a "mutual and open account current" as to be excepted under How. St. § 8717, from the operation of the statute of limitations.—In re Hiscock's Estate, 79 Mich. 536.

¶ 202. While it may be sufficient to constitute a mutual account to show that the account is credited with items in good faith, it cannot be held that there are mutual accounts where one party has always denied liability and credit is given with full knowledge that it is contrary to his intention.—Bay City Iron Co. v. Emery, 128 Mich. 506.

¶ 203. Where defendant, who has purchased several carloads of lumber from plaintiff sends him a check with a statement and letter explaining that the check is in full settlement of the balance due, and plaintiff returns the check, claiming a larger amount due, the statement and check are not such an acknowledgment of a continuing contract as will prevent the bar of the statute of limitations.—Hebinger v. Ross, 175 Mich. 241.

§ 52. On accounts stated.

Running of time on open accounts, see ante § 51.

Evidence as to statement of account, see post ¶ 428.

What constitutes statement of an account, see Account Stated, §§ 1-3.

¶ 204. Limitation runs from the time an account was orally settled, since an account stated need not be in writing.—Sperry v. Moore's Estate, 42 Mich. 353; Watkins v. Ford, 69 Mich. 357.

¶ 205. Where a defendant relies on the statute of limitations on the ground that the claim has been by his assent converted into an account stated, he must show that such assent was expressed by some unequivocal word or act; it is not sufficient that after the exhibition of the account to him he remained passive.—White v. Campbell, 25 Mich. 463; Payne v. Walker, 26 Mich. 60.

¶ 206. An account stated may be worked out without any written undertaking or acknowledgment, and may be proved by unsigned writings; but it cannot overcome the bar of the statute of limitations unless it is supported by evidence of some writing signed by the party to be charged.—Sperry v. Moore's Estate, 42 Mich. 353.

§ 53. Negotiable paper and liabilities thereon.

On demand or sight paper, see post § 54.

On paper due on specified contingency, see post § 55.

On paper due at death of person, see post § 56.

On guaranty of note in settlement of account, see ante ¶ 189.

Accrual of right to sue on notes payable in goods where goods were not as represented, see ante ¶ 187.

Suspension of running because of nonresidence, see ante § 36.

Existence and maturity of cause of action on bills and notes, see Negotiable Instruments.

¶ 206a. The drawer of a check payable ninety days after date has the whole of the day of its maturity to make payment, and an action cannot be commenced on that day; therefore the statute of limitations does not begin to run until the day after maturity.—Jocque v. McRae, 142 Mich. 370.

¶ 207. The statute of limitations is inapplicable in an action on a note, where such note is dated April 21, 1897, is drawn without interest, and no payments are due thereon until 1903, when a sum sufficient to cover payments due for six years is paid, and in 1909 the payment due in such year is paid and an action is commenced on such note within the statutory period after the first unpaid payment falls due in 1910.—Reese v. Dyer, 199 Mich. 204.

¶ 208. The date of delivery of an antedated note payable one day after date determines the time at which the statute of limitations begins to run.—Webber v. Webber, 146 Mich. 31.

§ 54. Demand or sight paper.

Court or jury question as to time for repayment, see post ¶ 443.

¶ 209. Upon certificates of deposit, and obligations payable on demand, when not excepted by Comp. L. 1871, § 7151, How. St., the time runs from the date thereof.—Tripp v. Curtenius, 36 Mich. 494.

¶ 210. The statute runs from delivery of a note payable on demand; and in the case of a note payable thirty days after demand it runs from the expiration of thirty days after delivery.—Palmer v. Palmer, 36 Mich. 487.

¶ 211. Where six years have elapsed since the issue of township orders for work and labor performed, and payment was refused nearly that long ago, they cannot be enforced.—Owen v. Lincoln Township Board, 41 Mich. 415.

¶ 212. On a note payable on demand after date, but antedated, the statute of limitations does not begin to run until delivery of the note.—Webber v. Webber, 146 Mich. 31.

§ 55. Demands due on specified contingency.

Time from which statute of limitations runs against action to collect insurance assessment, see also Insurance § 90, ¶¶ 374, 375.

¶ 213. The statute of limitations does not begin to run on a deposit note given by a member of a mutual fire insurance company whereby he agrees to pay a sum certain, or any part thereof, when required, and which by its terms is part of the absolute funds of the company, until an assessment is made.—Wardle v. Hudson, 96 Mich. 432.

¶ 214. An action by the receiver of a mutual fire insurance company against a member thereof to recover an assessment made by order of court to liquidate the company's liability is barred six years after the assessment falls due.—Wardle v. Hudson, 96 Mich. 432.

§ 56. Agreements and demands due on death of person.

Time from which statute of limitations runs on contracts which are to be paid out of estate after death, see also Estates of Decedents ¶ 655.

¶ 215. Where an agreement to provide for one by will is binding on an estate the statute of limitations does not begin to run until after the death of the person executing it, and under Comp. L. 1871, § 7157, How. St., § 8722 the period of limitation, in case of the death of the party liable, is extended thirty days beyond the six years otherwise allowed. —Sword v. Keith, 31 Mich. 247.

¶ 216. Where personal services are performed under an agreement to pay therefor out of her estate the statute of limitations does not commence to run until the death of the promisor.—In re McNamara's Estate, 148 Mich. 346.

§ 57. Implied contract rights.

Work and labor over extended period, see post § 58.

Right to recover overpayments, necessity of measurement of goods, see ante ¶ 185.

Existence of implied contracts, see Implied Contracts.

¶ 217. An administrator's claim for moneys paid by him to redeem lands for the estate dates from the payment, and the statute begins to run at that time.—Goodrich v. Leland, 18 Mich. 110.

¶ 218. Action on an implied assumpsit to pay for services performed by plaintiff while living in a relation's house is barred by a lapse of six years after performance ceased. —In re Robinson's Claim v. McAfee's Estate, 59 Mich. 375.

¶ 219. Under contracts for cutting timber and sawing it into lumber it was held that a cause of action for overpayments made on saw-bills did not arise, so as to set the statute of limitations in motion, prior to the furnishing of a certain statement of the lumber by which the amount was known.—Busch v. Wilcox, 106 Mich. 514.

¶ 220. Where a contract for the sale and cutting of timber provided that the amount of logs cut should be determined by the saw-bills, and where by the contract for sawing a specified part of the price per thousand was to be paid upon monthly estimates and the rest as the lumber was shipped, unless the owner should decide to leave lumber on the dock until the following spring, in which case final payment was to be made when the job was finished, measurements to be made by a competent person agreed upon by the parties, and to be conclusive, the sawing was finished September 23, and no measurement was made of the lumber left upon the dock, but November 1 an estimate of it was furnished and payment was made accordingly. When, subsequently, the lumber was shipped, it was found to overrun the previous estimate, and the excess was paid for. Held, that a cause of action for overpayments claimed to have been made for the logs did not arise in any event before the statement rendered November 1, so as to set the statute of limitations in motion against the claim.—Busch v. Wilcox, 106 Mich. 514.

¶ 221. Where a mortgagee's attorney illegally includes an attorney's fee in the amount for which mortgaged premises are sold to the mortgagee on statutory foreclosure, and where the owner of the equity of redemption redeems by giving his note to the attorney, who remits to the mortgagee the amount of the note less the attorney's fee, which he retains in payment for his services, and then sells the note to a purchaser whose recovery in suit upon the note is confined to the amount due less the attorney's fee and interest thereon, one who succeeds to the attorney's estate and pays to the note's purchaser the amount thus deducted therefrom can recover the amount so paid upon the mortgagee's estate, and the statute of limitations does not commence to run against the claim until the making of such payment.—Owen v. Baxter's Estate, 97 Mich. 539.

¶ 222. Where territory is detached from one township and organized into another, the statute of limitations does not begin to run against the right of the old township to enforce the proportionate liability of the new upon bonds issued by the former township prior to the division, which are valid in the hands of bona fide holders only, until the liability of the old township thereon has been established by judgment.—Township of Grant v. Reno, 107 Mich. 409.

§ 58. Work and labor over extended period.

Running of statute on implied contracts for services, see ante § 57.

¶ 223. Where a person goes into the service of another upon an indefinite promise of payment, and no price and no period is fixed, the bargain and service are alike continuous, and the statute of limitations does not begin to run against the claim until the service is concluded; the right of action at the close of the service is an entire right and applies to the entire service, and the employee is entitled to claim for the whole amount of all unpaid wages for all the service rendered under the agreement.—Carter v. Carter, 36 Mich. 207.

¶ 224. A claim against an estate for labor and services extending over a period of ten years, with no evidence of an open mutual account, is barred by the statute of limitations at the end of six years from the termination of such services.—Rodgers v. Lamb's Estate, 137 Mich. 241.

¶ 225. A contract for cutting logs and sawing them into lumber and shingles had been in force for several years. There had been payments ostensibly according to quantity and agreeable to the contract, and there was evidence also that the parties in the last year of cutting figured up their account for the whole period. Held, in an action for the balance due on the contract in view of jury findings of an entire contract, that the statute of limitations did not begin to run until the last item of the account for that year.—Burch v. Woodworth, 68 Mich. 519.

§ 59. Breach of sale or warranty of chattels.

Time when sale or warranty is deemed to have been broken, see Sales, IV-VII.

¶ 226. Where a contract for the sale of machinery contemplates that it shall be tested and put in running order, a cause of action does not arise upon the warranty therein until a reasonable time has been allowed for the necessary tests; and the time taken by the parties in trying to make the machinery fulfil the conditions of the contract is a proper criterion as to what is reasonable.—Felt v. Reynolds Rotary Fruit Evaporating Co., 52 Mich. 602.

§ 60. Breach of contracts under seal and covenants for title to land.

On fiduciary and statutory bonds and undertakings, see post §§ 61, 62.

Effect of agreement to arrest running of statute against covenant of warranty, see post ¶ 333.

Rights of action on bonds, see Bonds; Indemnity, III.

Time of breach and accrual of right of action on covenants of seisin and against incumbrances, see also Covenants for Title, III.

When right of action for breach of covenant of warranty accrues, see also Covenants for Title § 19.

Rights of action on contracts for purchase of land, see Vendors and Purchasers, VIII et seq.

¶ 227. The statute of limitations runs against an action on the covenants of a deed from the date of the deed, where the covenants are broken as soon as the deed is given; as where the grantor has no title.—Matteson v. Vaughn, 38 Mich. 373; Vaughn v. Matteson, 39 Mich. 758.

¶ 228. Assumpsit on a covenant of seisin is barred within six years from the time the covenant was made if the grantor had no title.—Sherwood v. Landon, 57 Mich. 219.

¶ 229. A right of action in assumpsit upon a covenant against encumbrances is barred in six years.—Guerin v. Smith, 62 Mich. 369.

¶ 230. The statute of limitations against an action for breach of warranty in a deed of lands in Wisconsin, based on the existence of certain tax liens on the land pursuant to which the land was subsequently sold, begins to run from the date upon which the tax deed is recorded, since, under the laws of Wisconsin, the recording of a tax deed gives the grantees therein constructive possession and amounts to an eviction.—Bray v. Fletcher, 132 Mich. 272.

§ 61. Actions on fiduciary bonds.

Statute and period applicable to actions on bonds, see ante § 15.

Existence and maturity of liability on bonds of personal representatives and guardians, see Estates of Decedents, XIV; Guardianship, VII.

Time within which action may be brought against sureties as determined by time of guardian's discharge, see Guardianship ¶ 90.

¶ 231. Where the probate court has neglected to decree payment of debts and distribution of assets four years and a half after issuing letters of administration in accordance with How. St., §§ 5925, 5926, the right of action on the administrator's bond begins to run at that time, and in due course is barred by the statute of limitations.—Biddle v. Wendell, 37 Mich. 452.

¶ 232. Against an action on an administrator's bond for refusal to pay claims as ordered by the probate court, the statute of limitations does not begin to run until the expiration of the time limited in the order.—Avery v. Miller, 81 Mich. 85.

¶ 233. Under Comp. L., § 4840 (How. St., § 6332), actions against the sureties on a guardian's bond are barred four years after he ceases, from any cause, to be guardian (saving personal disabilities to sue), and not four years from any other period or transaction.—Tate v. Stevenson, 55 Mich. 320.

¶ 234. How. St., § 6332, limiting the liability of sureties upon guardians' bonds to actions commenced within four years from the discharge of the guardian, has no application to conditional orders for such discharge; and if at the time of the discharge the ward is an infant, the four years begin to run with his majority.—Landon v. Comet, 62 Mich. 80.

§ 62. Actions on appeal, supersedeas and indemnity bonds.

¶ 235. A right of action accrues on a supersedeas bond upon the rendition of judgment of affirmance in the supreme court, or, at the latest, at the earliest date when costs may be taxed.—Busch v. Wilcox, 106 Mich. 514.

§ 63. Demands against agents and bailees.

See also post ¶ 276.

Bailment as a trust, see also post ¶ 270.

Trust suits and what constitute trusts within limitation laws, see post § 74.

Burden of proving time and continuance of bailment, see post ¶ 424.

¶ 236. The relation between a principal and his agent whose duty it is to collect money due the principal and remit it to him, is not such trust relation as will suspend the running of the statute of limitations.—Jewell v. Jewell's Estate, 139 Mich. 578.

¶ 237. The statute of limitations does not begin to run against a claim for money in the hands of an agent until a demand is made by the principal or his representatives. —Ewers v. White's Estate, 114 Mich. 266.

¶ 238. As against a receipt of notes for collection, the statute does not begin to run until an accounting has been called for.—Kimball v. Kimball, 16 Mich. 211.

¶ 239. Receipt for money and personal property to be accounted for. Held that, as to the personal property, the statute did not begin to run until after demand, but the money was to be considered due immediately. Kimball v. Kimball, 16 Mich. 211.

¶ 240. Receipt for money to be paid on a demand held by another. Suit brought thereon fourteen years after its date. Held, that the receiptor was bound to pay over the money within a reasonable time, and in the absence of all explanation the reasonable time must be deemed to have elapsed more than six years before suit, and therefore the action was barred.—Kimball v. Kimball, 16 Mich. 211.

¶ 241. A right of action accrues to a principal against his agent who collects his money and whose duty it is to remit it without any accounting, at the time the money is received by the agent, and the statute of limitations begins to run at that time.—Jewell v. Jewell's Estate, 139 Mich. 578.

¶ 242. Where, by agreement between grantor and grantee money raised by the grantee's mortgaging the land to a third person is to be retained by the agent who made the loan, and is to be used by him in paying a prior mortgage when due or whenever the mortgagee will receive it, the surplus, if any, to be applied upon the purchase-price, and where, upon the grantee's selling the land subject to the mortgages, it is agreed between him, his grantor, the agent, and the purchaser, that the arrangement under which the money was deposited shall continue, the purchaser is not entitled to the money until he has paid the mortgage himself or has demanded an accounting from the agent, and therefore the statute of limitations does not begin to run until such demand.—Havens v. Church, 104 Mich. 135.

¶ 243. The statute of limitations held not to bar an action for the recovery of sheep which were not redelivered to the owner, but were retained by a bailee after the expiration of the term of bailment.—In re Parsell's Estate, 184 Mich. 522.

¶ 244. Where money is received by a husband from his wife to be paid to the latter's son upon her death, a cause of action for refusal of payment arises at the time of the death of the mother.—Pitcher v. Rogers' Estate, 199 Mich. 114.

¶ 245. Where wheat had been stored in an elevator subject to the owner's order of sale on or before a certain date the statute of limitations will be deemed to have run where the demand for the wheat was not made until eleven years after the date fixed in the receipt, and suit was not commenced for five years and eleven months after the demand.—Freeman v. Ingerson, 143 Mich. 7.

¶ 246. In an action to recover for certain drills, the defense being the statute of limitations, a letter stating that "I want those drills" written within six years of the time the action is begun in response to a demand for settlement is sufficient to toll the statute, the drills being in defendant's possession under a contract whereby title remained in plaintiff, since he had a right to retain them only upon paying the contract price.—DeKruif v. Flieman, 130 Mich. 12.

§ 64. Actions against liquidating partners.

Accounting suits between partners, see post § 72.

¶ 247. Where a surviving partner collects a partnership debt while the deceased partner's estate is being administered, a cause of action in favor of the administrator against such surviving partner accrues when the money is collected, unless there is a concealment of the cause of action; and after six years recovery is barred.—Daniells v. Daniells, 92 Mich. 208.

§ 65. Misappropriation and waste of corporate assets and properties.

Accrual of action to receiver for unpaid subscriptions, see ante ¶ 174.

¶ 248. Where a bill is filed by the receiver of an insolvent corporation on behalf of creditors to compel defendants, preferred stockholders, to refund certain dividends claimed to have been illegally paid on such stock, the action must be commenced within the period of limitations and the statute begins to run from the time the dividends are paid and not from the time creditors became such or the receiver acquired the right to bring suit.—Detroit Trust Co. v. Goodrich, 175 Mich. 168.

§ 66. Causes of action for tort.

See also ante ¶ 248.

For false imprisonment in insane asylum, see ante ¶ 167.

Conversion, trespass, and waste, see post §§ 67-69.

Statutory liabilities, see post § 70.
Nonrevivableness of tort causes, see post § 85.

¶ 249. The statutory limitation of an action for false imprisonment by one unlawfully imprisoned by a sheriff and physician and taken to an insane asylum begins to run when, if ever, a lawful restraint by the asylum authorities becomes substituted for that previously exercised or claimed by defendants.—Alexander v. Thompson, 195 Fed. 31.

¶ 250. Where it was not shown that the detention of a person in an insane asylum, after she had been brought back by a deputy sheriff, on the expiration of a period of probation, was unlawful, the statute of limitations against an action against the sheriff and a physician for damages for false imprisonment began to run from the time of the patient's re-entry into the hospital.—Alexander v. Thompson, 195 Fed. 31.

¶ 251. A cause of action in assumpsit, brought under Comp. L. 1897, § 10421, to recover for fraud and deceit whereby plaintiff was induced to discount certain notes and receive as collateral security certain corporate stock, accrues as soon as the notes are discounted and the shares of stock are accepted, even though it was provided that if the notes were not paid when due the assignee should have the right to sell the stock, the cause of action not being contingent on the nonpayment of the notes.—First Nat. Bank of Ovid v. Steel, 146 Mich. 308.

¶ 252. Whether How. St., § 8714, limiting actions for slanderous words to two years after the cause of action accrues, applies to an action for defamation of title by the execution of a deed and inserting therein a statement that the plaintiff had fraudulently obtained possession of the land, etc., quære. But if so, the continued claim of rights under the deed, which were settled adversely to defendants in a suit to remove the cloud thereby created less than two years prior to the commencement of suit, will save the action from the operation of the statute.—Chesebro v. Powers, 78 Mich. 472.

§ 67. ——Conversion of personalty.

Action for stored grain, see also ante ¶ 245.
Action by administrator for conversion of goods of decedent, see ante ¶ 173.
What deemed to be a conversion and when complete, see Conversion, I.
Laying conversion on one of successive or continuous acts, see also Conversion § 12.

¶ 253. The statute of limitations runs in favor of one who converts property from the time of the conversion, although another afterwards intermeddles with the property in such a way as to make him a joint wrongdoer with the person guilty of the original conversion.—Knisely v. Stein, 52 Mich. 380.

§ 68. ——Continuing trespasses and injuries.

¶ 254. Where one mining company has broken through the partition wall of an adjoining mine, the flow of water through the opening after the right of action for the original breaking has been barred cannot be connected therewith so as to defeat the running of the statute of limitations (How. St., § 8714).—National Copper Co. v. Minnesota Min. Co., 57 Mich. 83.

¶ 255. Where a mining company has broken through the wall between its mine and an adjoining one, going beyond the boundary in doing so, the mere continuance of the opening is not a continuous damage giving a new cause of action so as to prevent the running of the statute of limitations upon the original trespass, and to permit a recovery for injury caused by the flow of water through the opening two years after the breach was made.—National Copper Co. v. Minnesota Min. Co., 57 Mich. 83.

¶ 256. Breaking through the partition wall of an adjoining mine is not necessarily a trespass if not incident to an encroachment upon the latter's premises; and even if there were such encroachment the flow of water through the opening, after the right of action for the original trespass has been barred by lapse of time, cannot be connected with such trespass so as to defeat the operation of the statute of limitations. The mere continuance of the breach is no injury in itself, and as the right of action for the original trespass would have covered the cost of repairing the breach, the bar of the statute destroys that remedy. And a subsequent flooding will sustain no right of action if it only resulted from the exercise, by either mining company, of its right to discontinue operations, or to go on after the other has discontinued.—National Copper Co. v. Minnesota Min. Co., 57 Mich. 83.

¶ 257. A suit for a mandatory injunction to abate and restrain a continuing trespass is not barred until the trespasser has extinguished the easement claimed by adverse possession fifteen years.—Longton v. Stedman, 196 Mich. 543.

¶ 258. Action for damages for depreciation of rental value of abutting property caused by a bridge in a street, over a railroad track, is not barred by the statute of limitations, though action for the erection of the bridge is barred, this being a continuous wrong.—Phelps v. City of Detroit, 120 Mich. 447.

§ 69. ——Waste.

¶ 259. Where the owner of land upon which there were first and second mortgages, which were of record, sold the timber standing thereon to a company which at once began the removal thereof, the owner of the second mortgage has had his security impaired and suffered a present injury thereby, so as to start limitations against his right

of action, and it cannot be said that he has suffered no legal injury until after his mortgage has matured.—Jenks v. Hart Cedar & Lumber Co., 143 Mich. 449.

§ 70. Statutory liabilities.

¶ 260. The statute of limitations begins to run in favor of school officers who, by reason of their failure to require the statutory bond of a contractor for the erection of a school building, incur a statutory liability (How. St., § 8411a), to material men, as to each instalment of material furnished, immediately upon payment becoming due from the contractor for such instalment, and his default in such payment.—Staffon v. Lyon, 110 Mich. 260.

¶ 261. The statutory period of limitations on an action for sidewalk injury occurring before the passage of the act did not begin to run until the council took action upon the claim as decided in Springer v. City of Detroit, 118 Mich. 69, being distinguished from Klass v. City of Detroit, 129 Mich. 35, where it occurred after passage of the act.—Brown v. City of Detroit, 129 Mich. 588.

Period of limitation of action for wrongful death as determined by time of death or from appointment of administrator, see note, 12 N. C. C. A. 49-63.

§ 71. Equities and equitable rights.

Applicability of statute of limitations in equity, see ante § 4.
Accounting suits, see post § 72.
Foreclosure of mortgages, see post § 73.
Trust cases, see post § 74.
Bar of debt as barring suit to set aside conveyance in fraud of debt, see also ante ¶ 169.
Action to enforce charge of legacy on land, see also ante ¶ 178.

¶ 262. The owner of an equitable title is under no obligation to assert the same until after the repudiation of his rights, and limitations do not begin to run against him until such repudiation.—Stonehouse v. Stonehouse, 156 Mich. 43.

§ 72. Accounting suits.

Actions and suits to enforce trusts or call trustees to account, see post § 74.

¶ 263. The statute of limitations, if it runs at all against a partner's right to an accounting, is barred by dealings in the shape of a showing of balances.—Near v. Lowe, 49 Mich. 482.

§ 73. Default and foreclosure of mortgages.

Payments and indorsements to toll the statute, see post § 92.
What constitutes default and time for foreclosure suits, see Foreclosure § 3 et seq., § 12.
Reckoning of time for foreclosure suits, see Jud. Act, chap. IX, § 12; Comp. L. 1915, § 12322.

¶ 264. Laws of 1879, Act No. 204 (How. St., § 8709), barring mortgage foreclosures at law or in equity unless commenced within fifteen years from and after the maturity of the mortgage debt, or within a like period after the last payment was made thereon, does not apply to a mortgage upon which the last payment was made less than fifteen years after the passage of the act.—McKisson v. Davenport, 83 Mich. 211.

¶ 265. Under How. St., § 8709, barring foreclosure suit not begun within fifteen years after the mortgage became due or after the last payment thereon, but providing that the act should not apply to mortgages which became due or on which the last payment was made fifteen years before its passage, and that in such case suit should not be brought unless within five years after the act took effect, foreclosure of a mortgage that fell due more than fifteen years before the act's passage is barred in five years after the act took effect, notwithstanding a certificate of the amount due indorsed on the mortgage by the mortgagor; such certificate not operating as a renewal but merely as an estoppel to deny the amount thereof during the life of the mortgage.—Highstone v. Franks, 93 Mich. 52.

§ 74. Express, implied and constructive trusts.

Actions on bonds of fiduciaries and trustees, see ante § 61.
Action against state as trustee of express trust, see ante ¶ 107.
Demand against agent as trust demand, see also ante ¶ 236.

¶ 266. Where an express trust is created by a contract to hold lands and to dispose of them and account for the proceeds, the statute of limitations against the trustee begins to run from the time when his repudiation of the trust and the claim in his own right came to the beneficiary's knowledge.—Van Buren v. Stocking, 86 Mich. 246.

¶ 267. The statute of limitations does not run in favor of a trustee of an express trust, unless he repudiates the trust and assumes an adverse position with notice to the cestui que trust.—Thorne v. Foley, 137 Mich. 649.

¶ 268. The statute of limitations operates against an implied trust.—In re Sellman's Estate, 175 Mich. 700.

¶ 269. As to an express trust, the statute of limitations does not run as between trustee and cestui que trust.—Hatt v. Green, 180 Mich. 383.

¶ 270. Since the mere retention of chattels by a bailee, however long continued, will not of itself work a change of ownership, the

statute of limitations does not run in his favor until he sets up and asserts an adverse claim against the bailor.—In re Parsell's Estate, 184 Mich. 522.

¶ 271. As a general rule, the statute of limitations has no application in case of an express trust, and, as against an express or continuing trust, the statute does not run until repudiation by the trustee and knowledge thereof is brought home to the cestui que trust.—Pitcher v. Rogers' Estate, 199 Mich. 114.

¶ 272. The fact that a trustee of an express trust for the payment of money to one person after death of the former's wife uses the money on his own property, for his own use, as contemplated, instead of making investments in the usual securities for trust funds, does not constitute such repudiation by the trustee as to set the statute of limitations in motion.—Pitcher v. Rogers' Estate, 199 Mich. 114.

¶ 273. The running of the statute on a note and indorsements is not affected by the nonapplication of the proceeds of collaterals held by one of the indorsers, such proceeds being realized in 1892 and 1893, where such indorser received them as an attorney for collection for benefit of the holder, but later received other money on other collaterals and reported an application of it so as to imply a new promise as of such later time. Such circumstances would not show an undeclared voluntary trust in the proceeds received and a want of notice of it, so as to keep the statute running.—Myers v. Muskegon Improvement Co., 193 Mich. 697.

¶ 274. Where a suit is brought by the descendants of brothers and sisters of two brothers who occupied land, which had been occupied by the father under a concession from the French government, against the descendants of the two brothers and purchasers from them under a patent from the United States procured by one of the brothers occupying the land, claiming a tenancy in common, and the two brothers and those claiming under them have been in possession for 62 years the case depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within the class of cases in which courts of equity follow the courts of law in applying the statute of limitations.—Beaubien v. Beaubien, 23 How. (64 U. S.) 190, 16 L. ed. 484.

¶ 275. In the case of an express trust, the statute of limitations does not begin to run in favor of the trustee until the trust is repudiated by him, and notice of that fact is brought home to the cestui que trust.—Frank v. Morley's Estate, 106 Mich. 635; Shepherd v. Shepherd's Estate, 108 Mich. 82.

¶ 276. Where a general managing agent keeps in his own possession notes executed by him to his principal, with the mutual understanding that they shall enter into the accounting finally to be had between the parties, who stood in a relation of trust, the statute of limitations does not begin to run as against the right to recover the amount represented by said notes until an accounting has been demanded.—Shepherd v. Shepherd's Estate, 108 Mich. 82.

¶ 277. The statute of limitations does not prevent recovery of money retained by a trustee under a will and not accounted for by claimants who have attained their majority, on the ground that the trust was terminated when the age of majority was reached, as the mere fact that money due a cestui que trust is allowed by him to remain in the hands of the trustee does not change the nature of the debt, and until an accounting is had or demanded the statute of limitations does not run.—Jones v. Home Sav. Bank, 118 Mich. 155.

V. COMMENCEMENT OF ACTION AND COMPUTATION OF ELAPSED TIME.

§ 75. Necessity and sufficiency of commencement of action.

Inefficacy of disability or suspensive cause arising after running commences to toll statute, see ante § 24.

Interruption of action after commencement, see post § 76.

Effect of amendments to make new cause or abide by original declaration, see post § 77.

Computation and deductions of time, see post § 79.

Computation of time against set-offs, see post § 78.

Of commencement of new action under provision for extension for year after abatement or reversal, see post § 102.

Burden of proof of timely commencement, see post § 109.

Burden of showing error in date of unserved writ, see post ¶ 422.

Time of commencement as court or jury question, see post § 118.

Time when right to sue is deemed complete so as to set statute running, see ante IV.

As to what constitutes commencement of action, see also Actions § 6.

Sufficiency of service, see Process, II.

¶ 278. A suit is not begun for the purpose of the statute of limitations, merely by filling out a summons and leaving it in the justice's office until the return day, or by retaining it in plaintiff's custody; it must be issued with the intent that, if practicable, it shall be served.—Howell v. Shepard, 48 Mich. 472.

¶ 279. A suit begun by declaration under How. St., § 7291, is not duly commenced until copy of declaration with notice of rule to plead has been personally served upon defendant.—Detroit Free Press Co. v. Bagg, 78 Mich. 650.

¶ 280. An action on a judgment rendered by a justice of the peace commenced by declaration will not bar the plea of the statute of limitations until the declaration is served.—Galbraith v. Bostwick, How. N. P. 143.

¶ 281. An action on an account was barred before the commencement of the action, where the date of the lost item of the account was March 25, 1875, and the declaration filed March 23, 1881, but not served until March 29, 1881.—Messenger v. Gustin, How. N. P. 142.

¶ 281a. Under Comp. L. 1897, § 9985, making personal service of a copy of the declaration essential to the commencement of a suit by declaration, an action for personal injuries against a city is barred by the statute of limitations where service on the city comptroller was set aside and proper service obtained after the running of the year provided in Local Acts 1895, No. 463, § 46.—Wilton v. City of Detroit, 138 Mich. 67.

¶ 281b. Inasmuch as the commencement of a suit consists in suing out the summons, and delivering or transmitting it to an officer with the bona fide intention of having it served, a negligence suit commenced against the city of Detroit is barred as not having been commenced within one year from the time of the injury as required by Charter of Detroit, compilation of 1904, § 279, where it appears that the suit was commenced by summons issued November 15, 1904, and served the same day upon the city controller but not by an officer, and where the writ was not placed in the hands of an officer until December 3, 1904, upon which day it was served upon the city clerk, the injury having occurred on November 16, 1903.—Dedenbach v. City of Detroit, 146 Mich. 710.

¶ 281c. Where a plaintiff in a claim for damages against the city, serves the declaration upon the chief clerk in the office of the corporation counsel, and not until after the statutory period does she serve the proper officer, the city clerk, the service upon the former is void, and the latter suit is barred by the statute.—Boyle v. City of Detroit, 152 Mich. 248.

§ 76. Continuity or interruption of action.

Rule as to disabilities arising after running commences and rule as to tacking disabilities, see ante §§ 24, 32.

Writ of error as continuation of original action, see Appeal § 7.

¶ 282. Where the continuity of an action is interrupted by an interval between the return day of one writ of summons and the issue of an alias writ, the institution of the action will not bar the operation of the statute of limitations.—Johnson v. Mead, 58 Mich. 67.

¶ 283. Comp. L. 1871, § 5263, How. St. § 6828, provides that a plaintiff who has taken out an alias summons that has been returned not personally served "may, in further continuation of the suit, have an attachment against the defendant" on which property may be taken. Held, that this is an alternative remedy, and that instead of resorting to it the plaintiff may take out successive writs of summons for the purpose of keeping a suit alive under the statute of limitations.—Howell v. Shepard, 48 Mich. 472.

¶ 284. The suspension of the statute for infancy will not be raised by the appointment of a next friend for an infant plaintiff, or the actual commencement by him of an action subsequently discontinued.—Keating v. Michigan Cent. R. Co., 94 Mich. 219.

§ 77. Amendments and changes after commencement.

Impropriety of allowing amendments to introduce statute barred causes, see Pleading, VI.

Provision for applicability of law existing when right accrued, see Jud. Act, chap. IX, § 9; Comp. L. 1915, § 12319.

¶ 285. An amendment bringing in a new cause of action which has become barred since the action was originally begun will not relate back.—Gorman v. Newaygo Circuit Judge, 27 Mich. 138; Michigan Cent. R. Co. v. Kalamazoo Circuit Judge, 35 Mich. 227.

¶ 286. Where an amendment does not introduce a new cause of action, the running of the statute of limitations is arrested from the date of the institution of the suit.—Pratt v. Montcalm Circuit Judge, 105 Mich. 499.

¶ 286a. An amendment in an action for the negligent killing of plaintiff's intestate, a railroad fireman, on an interstate railroad by which the declaration was changed from one on the state law to one under the Federal Employers' Liability Act, relates back to the filing of the original declaration, it having been filed in time, and thus saves the bar of limitations.—Jorgensen v. Grand Rapids & I. R. Co., 189 Mich. 537.

¶ 287. An amendment to a bill is barred by the statute of limitations only where a new and different cause of action is introduced by the amendment, and not when it can fairly be said to be the same cause of action as that originally set up.—Belden v. Blackman, 124 Mich. 667.

¶ 288. Where a demurrer to a declaration for libel has been sustained because several publications, each constituting a distinct cause of action, were set out in one count, counts of an amended declaration that sets out each cause of action in a separate count pursuant to leave to amend are not to be stricken out because based on articles which were published more than two years before leave to amend was given, but which were not barred

when the original declaration was filed; the filing of the amended declaration is a continuation of the original suit without introducing a new cause of action.—Randall v. Wayne Circuit Judge, 96 Mich. 284.

¶ 289. A plea in bar that the cause of action did not accrue within six years before filing amended declaration is void.—Wilcox v. Kassick, 2 Mich. 165.

§ 78. Set-offs and recoupments.

Questions of law and fact as to bar, see post § 113.

Provision for reckoning time for bar of set-off, see Jud. Act. chap. IX, § 27; Comp. L. 1915, § 12337.

¶ 290. Under How. St., § 8731, a debt alleged by way of set-off is not barred by the statute of limitations unless the statutory period had run against it before the accruing of the claim upon which suit is brought.—Busch v. Wilcox, 106 Mich. 514.

§ 79. Computation of time and deductions.

From what day time is deemed to run, see ante IV.

Extensions by death, infancy, other disability, absence, fraud, or obstacle to suing, see ante III.

Deductions of time for existence of state of war or for absence of defendant from state, see Jud. Act, chap. IX, §§ 16, 17; Comp. L. 1915, §§ 12326, 12327.

Statutory rule as to computation of time since accrual to predecessor in title to land, see Jud. Act, chap. IX, § 2; Comp. L. 1915, § 12312.

¶ 291. To determine whether a claim against an estate for sums payable annually or any part of it is barred by limitations, the time which has elapsed since the right of action arose for each sum must be computed, deducting suspensions caused by deaths.—Stringer v. Stevens' Estate, 146 Mich. 181.

¶ 292. In computing the ten years within which an action upon a judgment must be brought to avoid the statute of limitations, the day of entering the judgment is excluded.—Warren v. Slade, 23 Mich. 1.

¶ 293. The two periods of limitation fixed for the recovery of land by R. S. 1838, pt. 3, tit. 6, chap. I, § 1, p. 573, cannot be blended, but stand by themselves for different classes of cases. Right of action against an independent intruder must date back only to the origin of his possession, while if one succeeds to another by transfer of title or claim, the right of action goes back to the first occupant in the chain of adverse possession, and action must be brought within twenty-five years after disseisin. Every action shall be brought within twenty years from the time it accrued.—Riopelle v. Gilman, 23 Mich. 33.

¶ 294. By a foreclosure decree, based on a conveyance and bond for support, secured by a mortgage, lands were charged with the payment of $200 a year during life to the wife of the original grantor. She died March 4, 1891. Letters of administration were granted Aug. 11, 1898, on her estate and a bill to enforce the lien was filed by the administrator Nov. 20, 1894, the instalments being in default since 1872. How. St., § 8722, suspends limitations, as against an administrator, until two years after the granting of letters, and How. St., § 8736, limits to ten years the right to recover on a decree. Held, that complainant could recover the instalments falling due within ten years prior to the date of the grantor's death, but no prior ones.—Field v. Loveridge, 114 Mich. 220.

¶ 295. A claimant against a decedent's estate must present his claim, before the the statute of limitations including the two-year period for administration has run upon it, else his remedy will be barred; hence a claim on a note is barred where not presented for ten years after the debtor's death.—First Nat. Bank v. Sherman's Estate, 117 Mich. 602.

VI. EXTENSION OF TIME, REVIVAL OF CAUSE, AND WAIVER AND ESTOPPEL.

A. ACKNOWLEDGMENT AND NEW PROMISE, AND WAIVER.

Suspension and arrest of statute to prevent its commencing to run by reason of disability to sue or obstacle to suit, see ante III.

§ 80. In general.

Acknowledgment that account is an open and running one, see ante § 51.

New promises and acknowledgments of debts, see post §§ 81-84.

Revivableness of tort causes, see post § 85.

Waiver of the statute and agreements and estoppels to claim bar, see post §§ 86-88.

Effect of agreement or negotiation for settlement or reimbursement, see post § 88.

Part payment as acknowledgment extending time or reviving cause, see post VI, B.

Statutory year to bring new action after failure of action commenced in time, see post VI, C.

Nonrevival of barred rights by commencement of partition proceedings, see Jud. Act, chap. XXXI, § 78; Comp. L. 1915, § 13335.

¶ 296. Where an action for the recovery of chattels is barred by the statute of limitations, admissions of the defendant that he held them as bailee is not an acknowledgment or new promise which §§ 9740, 9744, Comp. L 1897, §§ 14147, 14151, How.

St., 2nd Ed., requires to be in writing, but is evidence tending to show that the defendant did not hold the chattels adversely. —In re Parsell's Estate, 184 Mich. 522.

¶ 297. A debt barred by the statute of limitations cannot be revived by a subsequent transaction having no relation to the former debt.—McCarron v. Wheeler, 151 Mich. 222.

§ 81. Sufficiency of acknowledgment or new promise; necessity of writing.

Qualified or conditional promises or acknowledgments, see post § 82.
Indorsements of payments on instruments, see post § 91 et seq.
Part payment as an implied new promise or acknowledgment, see post § 89.
Effect of warrantor's agreement to pay cost of clearing title, see post ¶ 333.
New promise by one of several debtors, see post § 83.
Questions of law and fact and instructions, see post § 114.
Consideration for promise tolling statute, see post § 84.
Validity of new promises as contracts to pay barred debts and consideration for same, see Contracts § 127.
New promises to pay debts discharged in bankruptcy, see Bankruptcy § 24.
Statutory requirement of writing to evidence new promise or acknowledgment, see Jud. Act, chap. IX, § 21; Comp. L. 1915, § 12331.

¶ 298. An oral promise made since, to pay a simple contract debt barred by the statute of limitations before R. S. 1838 took effect, will not revive the cause of action, but such promise must be in writing as required by R. S. 1838, p. 578, § 13.—Joy v. Thompson, 1 D. 373.

¶ 299. The statutory requirement of a writing to evidence a new promise tolling the statute does not violate the obligation of contracts.—Joy v. Thompson, 1 D. 373.

¶ 300. How. St., § 8725, which operates to exclude the efficiency of a mere oral acknowledgment to renew a liability barred by the general statute of limitations, applies only to those cases within the provisions of such statute, the cases not within its provisions being governed by the common-law rule.—Perkins v. Cheney, 114 Mich. 567.

¶ 301. The oral promise of a surety on a guardian's bond that he will pay whatever is found due from the guardian is sufficient to remove the bar of the statute.—Perkins v. Cheney, 114 Mich. 567.

¶ 302. An oral promise to pay an old debt does not renew it so as to take it out of the statute of limitations, if it is not kept open by mutual dealings.—Hillebrands v. Nibbelink, 40 Mich. 646.

¶ 303. A verbal promise by an employer, after the termination of the employment, to deed the employee certain land in payment, does not prevent the statute of limitations from running against the claim.—Rodgers v. Lamb's Estate, 137 Mich. 241.

§ 82. ——Certainty and freedom from conditions.

¶ 304. Where a new promise is set up it ought to be proved in a clear and explicit manner, either expressly or by such an unqualified acknowledgment as authorizes its implication.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 305. The acknowledgment should contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay, and be unaccompanied by circumstances or declarations which repel the presumption of a promise or intention to pay.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 306. A new promise, to remove the bar of the statute of limitations, must contain an unqualified and direct admission of a present and subsisting debt which the party is liable and willing to pay and be unaccompanied by any circumstances or declarations which repel the presumption of a promise or intention to pay. Such an acknowledgment may be inferred from facts without words, and no set form of words is requisite.—Throop v. Russell, 145 Mich. 482.

¶ 307. A stipulation between the parties in a chancery suit brought to restrain proceedings on an execution under a judgment, that the injunction be dissolved, the execution be set aside, and a reference be taken to state an account, etc., was held not to be such an acknowledgment of debt as to warrant the implication of a new promise. —Ten Eyck v. Wing, 1 Mich. 40.

¶ 308. In order to avoid suit and to gain time to procure evidence of set-off, a debtor signed this writing in her creditor's book: "I extend this book account four months from April 30, 1886." Held a sufficient acknowledgment of the debt to take it out of the operation of the statute.—Crane v. Abel, 67 Mich. 242.

¶ 309. The mortgagor's certificate that at a certain date there is a certain sum due upon the mortgage will not operate to renew the mortgage or to interrupt the running of the statute of limitations against it.—Highstone v. Franks, 93 Mich. 52.

¶ 310. A statement by the maker of a note that a certain party has her note is not evidence tending to show that she has made a payment thereon, nor is it a prom-

ise to pay the note which will interrupt the running of the statute of limitations.—Fowles v. Joslyn, 130 Mich. 272.

¶ 311. An indorsement, "the within note shall not be outlawed," signed by the maker of the note just before it would otherwise have been barred by the statute of limitations, is a sufficient renewal by new promise.—In re King's Estate, 94 Mich. 411.

¶ 312. A signed letter written by the debtor before certain notes were outlawed stating that "Every cent I owe you will be paid" will prevent the running of the statute of limitations against all of the notes for six years from the date of the letter.—Rumsey v. Settle's Estate, 120 Mich. 372.

¶ 313. A signed letter from a debtor to his creditor stating that "I owe you" and "I want to fix your matter up," is a sufficient acknowledgment in writing under How. St. § 8725 to extend the time of all notes owing to the creditor and not already outlawed for six years from its date.—Rumsey v. Settle's Estate, 120 Mich. 372.

¶ 314. A promissory note barred by the statute of limitations is not revived under Comp. L. 1897, § 9740, requiring acknowledgment in writing and signed by the party, by a letter from the maker in which he says, "it will be impossible for me to do anything on that account this spring. I will pay something on it as soon as I can, but cannot say just when," as such a promise is conditional.—Halladay v. Weeks, 127 Mich. 363.

¶ 315. A letter from the mortgagor accepting the proposal of the mortgagee and promising to pay a certain amount to settle a mortgage debt does not operate as an acknowledgment of the debt nearly ten times as large so as to take it out of the bar of the statute.—Carr v. Carr, 138 Mich. 396.

¶ 316. A letter by an agent who has collected money belonging to his principal which he has not remitted, stating that "I have used the money and I want to turn out my property to make you all right," is a sufficient acknowledgment in writing of the debt to interrupt the running of the statute of limitations, under Comp. L. 1897, § 9740.—Jewell v. Jewell's Estate, 139 Mich. 578.

¶ 317. A letter of inquiry to ascertain if the mortgagee would discharge the mortgage as to part of the land if the mortgagor would make part payment of the mortgage is not sufficient to operate to suspend the statute of limitations.—Rodgers v. Robson, 147 Mich. 656.

¶ 318. An acknowledgment of indebtedness and a promise to pay cannot be inferred, in an action to recover on certain promissory notes, barred by the statute of limitations, from letters between plaintiff and defendant which make no direct mention of the notes in question; even though in such correspondence plaintiff urges defendant to pay him money by a certain date in answer to which defendant states that he is doing all he can to raise such money.—Throop v. Russell, 145 Mich. 482.

¶ 319. An acknowledgment of indebtedness and a promise to pay, so as to bar the statute of limitations, cannot be inferred, in an action to recover on certain notes, from a letter from the maker to the holder of such notes, in which he states that the fact that the notes are outlawed need not enter into the matter; and in which he offers a certain sum less than the face of the notes if the holder will surrender them to him; and further offers to furnish the holder money in the future if he should need it; and also states: "I am not backing up or repudiating anything"; and such proposition of the defendant must be construed as conditional, and not a waiver of his right to rely upon the defense of the statute.—Throop v. Russell, 145 Mich. 482.

§ 83. New promise by one of several obligors.

Statutory provision saving defense of limitations to one joint party notwithstanding other's new promise, see Jud. Act, chap. IX, § 22; Comp. L. 1915, § 12332.

¶ 320. An oral representation by a joint maker of an outstanding note that the note is "all right," etc., and that he will pay it, will not take it out of the statute of limitations.—Black v. Miller, 75 Mich. 323.

¶ 321. The oral promise of a surety on a guardian's bond that he will pay whatever is found due from the guardian is sufficient to remove the bar of the statute, and the surety's moral obligation is sufficient consideration for such promise.—Perkins v. Cheney, 114 Mich. 567.

¶ 322. The giving of a new note by one joint maker without the authority of the other will not renew it as to the other or prevent the running of the statute of limitations as to him.—Koons v. Vauconsant, 129 Mich. 260.

¶ 323. A new promise is not made out so as to take the claim out of the operation of the statute of limitations by showing that the father gave a mortgage to secure a renewal note to replace a previous joint note barred by the statute of limitations upon which renewal note both parties believed the son to have forged the father's name as comaker.—Koons v. Vauconsant, 129 Mich. 260.

¶ 324. Letters written by a surety to his principal at the request of the payee urging him to make payments on the note and expressing his own desire that such payments

be made, are not a sufficient acknowledgment in writing, under Comp. L. 1897, § 9740, to toll the running of the statute of limitations as to such surety.—Borden v. Fletcher's Estate, 131 Mich. 220.

§ 84. Consideration for new promise.

Consideration for new promise after complete bar, see Contracts § 127.

New promise as admission of consideration, see Contracts § 141.

¶ 325. The original consideration is sufficient, if recognized, to uphold a new promise to pay a debt barred by the statute.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 326. A new promise to pay a statute barred note is supported by sufficient consideration.—Koons v. Vauconsant, 129 Mich. 260.

¶ 327. The duty resting upon a surety to see that his principal performs the contract guaranteed subsists as a moral obligation after the statute has run against the right to enforce it, and will support a new promise by the surety to answer for the principal's default.—Perkins v. Cheney, 114 Mich. 567.

§ 85. Revival or extension as to tort causes.

¶ 328. An action of tort, once barred by the statute of limitations, cannot, like an action arising out of contract, be revived by either an express or implied agreement.—Holtham v. City of Detroit, 135 Mich. 17.

¶ 329. A slander once barred cannot be revived by admissions that it was made.—Vickers v. Stoneman, 73 Mich. 419.

¶ 330. Even if a common council, by directing a person injured on a sidewalk, to appear and produce witnesses, could have waived the statutory requirement for the giving of written notice of the injury to the city law department within three months of its happening, such cause of action could not have been revived after the expiration of the stated period.—Holtham v. City of Detroit, 136 Mich. 17.

§ 86. Waiver of the bar of the statute.

Effect of agreements and representations as estoppels, see post § 88.

Authority or disability of personal representatives or trustees to waive statute, see post § 87.

Necessity and mode of pleading the bar, see post § 103 et seq.

Waiver of question on error by failure to raise it on trial, see Saving Questions.

Waiver of plea by inconsistent plea or defense, see Pleading, XI.

Effect of appearance to waive plea of limitations, see Appearance § 10, ¶ 41.

Waiver of bar for failure to present claims against estate, see Estates of Decedents §§ 176-177.

§ 87. Authority and disability of representatives or trustees to revive or waive.

Right of person claiming under trustee to sue where trustee has delayed beyond period, see also Bankruptcy ¶ 82.

¶ 331. An administrator cannot waive the statute of limitations and thus charge the estate for a claim which the law presumes to have been paid.—McGee v. McDonald's Estate, 66 Mich. 628.

¶ 332. Payment of interest by an executor, regardless of the effect which it may have to preserve the lien of a mortgage, will not operate to revive the debt barred by the statute of limitations in favor of the estate.—Draper v. Brown, 153 Mich. 120.

§ 88. Agreements and estoppels.

Evidence of agreement preventing plea of limitations, see post ¶ 426.

¶ 333. The running of the statute of limitations against the right of action for breach of warranty in a deed is not suspended by the fact that the grantor authorized the grantee to commence suit to clear the title and agreed to pay the expense thereof, where the grantee settled the suit so begun, without grantor's consent, since such act terminated the agreement.—Bray v. Fletcher, 132 Mich. 272.

¶ 334. That verbal negotiations with the heirs for the reimbursement of a claim by the administratrix are going on will not prevent the running of the statute of limitations against her claim, nor can they have the effect of reviving the claim after the statute has run.—In re Young's Estate, 144 Mich. 663.

¶ 335. Within ten years from a deficiency decree in foreclosure, the complainant filed a petition for leave to have an execution issue. The defendant's attorney by conduct amounting to a fraud on the court procured leave to file a bill for review and an order staying the proceedings. The court was lulled into delaying action until limitations on the decree had run, when the petition for the bill for review was dismissed. Execution was then taken out and a bill filed in aid of such execution, which was demurred to on the ground that limitations had run. Held, the defendant was estopped from demurring on such ground, and it was immaterial that the complainant did not have knowledge of the stay order until limitations had run, or that the order did not prevent a suit at law upon the decree before the statute had run.—Albert v. Patterson, 172 Mich. 685.

¶ 336. Under Local Acts 1895, No. 463, § 46, providing that no action shall be brought against a city for negligent injuries unless it be commenced within one year, a city is not estopped to plead this statute

of limitations by evidence that the injured plaintiff continued to treat with the council committee appointed to investigate his claim after said committee's report to the council denying liability had been accepted and adopted, where there is no showing that the city knew that the plaintiffs were in ignorance concerning the council's action and no evidence of forbearance to sue because of the subsequent negotiations.—Klass v. City of Detroit, 129 Mich. 35.

¶ 337. The defendant, being the possessor, need not become the moving party, and unless he obtains delay by fraud is not answerable for disadvantages resulting to plaintiff from any neglect to speed the cause. He is not estopped by such neglect from taking advantage of the statute of limitations against the plaintiff.—Dubois v. Campau, 37 Mich. 248.

B. PART PAYMENT.

§ 89. In general; effect as acknowledgment of debt.

Effect of payment to make account an open one, see ante ¶¶ 193, 194.
Payments accompanied by disavowal or denial, see post § 90.
Indorsements of payment on instruments, see post §§ 91, 92.
Credits or payments applied without consent or knowledge of debtor, see post § 94.
Credits made under illegal agreement, see post § 98.
Payments by, to, or through agents, see post § 95.
Payments by codebtors or co-obligors or secondary obligors, see post §§ 96-98.
Payments applied to debt by person other than debtor, see post § 94.
Evidence as to making of payments, see post § 112.
Questions of law and fact and instructions as to part payment, see post § 114.
Statutory provisions as to effect of part payments, see Jud. Act, chap. IX, § 25; Comp. L. 1915, § 12335.

¶ 338. The theory upon which a part payment arrests the running of the statute of limitations is that it implies a new promise to pay, and a payment made under circumstances inconsistent with such an inference is ineffective.—Borden v. Fletcher's Estate, 131 Mich. 220.

¶ 339. Part payment of a demand, though neither a contract nor in itself a promise (How. St. § 8725), is an acknowledgment of the continued existence of the demand, and waives the right to plead the statute of limitations upon such lapse of time as may have preceded the payment. (How. St., § 8729.) And it renews from its date whatever right of action existed before.—Miner v. Lorman, 56 Mich. 212.

¶ 340. Where payments are made on a barred claim, there need be no written promise to make further payments.—Miner v. Lorman, 59 Mich. 480.

¶ 341. Payments on a judgment take it out of the statute of limitations although a judgment debtor made them because as a policeman he was required to pay his debts. —Neilands v. Wright, 134 Mich. 77.

¶ 342. The statute of limitations on a judgment is tolled by payments made notwithstanding the judgment was obtained by breach of faith and without the knowledge of the defendant where there is nothing to repel the presumption that by the payments the defendant recognized his obligation to pay it.—Neilands v. Wright, 134 Mich. 77.

§ 90. Payment accompanied by disavowal or denial.

Instruction on effect of denial, see post ¶ 452.

¶ 343. If the acknowledgment of a debt, or a partial payment of it, is accompanied by declarations or circumstances which rebut the implication of a promise to pay, or that the debtor, by the partial payment, admitted his obligation to pay the residue, the demand is not revived.—Jewett v. Petit, 4 Mich. 508.

¶ 344. A payment of a part of a debt, accompanied by acts or declarations showing that the debtor does not intend to pay more, will not revive the unpaid balance of a debt upon which the statute of limitations has taken effect.—Lester v. Thompson, 91 Mich. 245.

§ 91. Indorsements of payments.

Indorsement by party to be charged as evidence, see post ¶ 432.
Instructions on authority to make indorsement, see post ¶ 451.
Authorization of indorsement by debtor as jury question, see post ¶ 114.
Provision as to proof of part payment, insufficiency of indorsement made by payee, see Jud. Act, chap. IX, § 25; Comp. L. 1915, § 12335.

¶ 345. It is the part payment in addition to the indorsement, and not the indorsement of an alleged part payment, that takes a promissory note out of the statute of limitations, Comp. L. 1897, § 9744, How. 2nd Ed., § 14151.—Stretch v. Stretch, 191 Mich. 416.

¶ 346. Comp. L. 1897, § 9744, How. 2nd Ed., § 14151, providing that part payments written on a promissory note by or on behalf of the party to whom payment is to be made shall be deemed sufficient proof of payment so as to take the case out of the operation of the statute refers only to indorsements by or on behalf of the party to whom the payment is to be made, and not to the party making the payment.—Stretch v. Stretch, 191 Mich. 416.

§ 347. Unexplained indorsements and indorsements written by or for the payee are not sufficient proof of payment as against the debtor to take a case out of the statute of limitations.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265; Rogers v. Anderson, 40 Mich. 290.

¶ 348. An indorsement of a payment made on the back of a note by the holder, not in the presence of the maker, is not sufficient evidence of payment thereon to interrupt the running of the statute of limitations.—Fowles v. Joslyn, 130 Mich. 272.

§ 92. Payments and indorsements on mortgage debts.

Payment by grantee taking subject to mortgage, see post ¶ 375.

¶ 349. The indorsement by a mortgagee of a second mortgage, executed by the mortgagor and another, as a payment upon the first mortgage, under an agreement that it should be so treated, comes within the provisions of How. St., § 8729, and saves the debt from the operation of the statute of limitations.—Blair v. Carpenter, 75 Mich. 167.

¶ 350. Under Comp. L. 1897, § 9725, providing that no foreclosure proceedings shall be maintained unless commenced within 15 years after the mortgage became due or within 15 years after the last payment made thereon, the mere indorsement of part payment on the mortgage note without consideration cannot prevent the running of the statute of limitations, inasmuch as such a transaction cannot be said to be a payment under the statute.—Rodgers v. Robson, 147 Mich. 656.

¶ 351. Quære, whether the lien of a mortgage is not kept alive by an indorsement on it by the owner of the land that on a date within the period of limitations there was due on it a sum certain. The question was, however, not definitely decided because there was other testimony that it was kept alive by payments.—York v. West, 147 Mich. 549.

¶ 352. Comp. L. 1897, § 9745, limiting the effect of the payment by one of two joint debtors as to the running of the statute of limitations is limited in its terms to cases arising under chapter 268 and does not keep alive a mortgage debt that has outlawed from the fact that one of two joint mortgagors has made a payment thereon within the period of limitations.—Brown v. Hayes, 146 Mich. 474.

¶ 353. A payment by one joint mortgagor before the statute of limitations has begun to run keeps the debt alive, both as against the payor and his co-obligor or surety, inasmuch as Comp. L. 1897, § 9725, regarding the limitations as to mortgage foreclosures makes no provision to the contrary.—Brown v. Hayes, 146 Mich. 474.

¶ 354. The statute of limitations is not tolled as against the wife by a payment of $5.00 made by the husband where both husband and wife are parties to a mortgage covering lands owned by each and the husband is not shown to be the agent of the wife and the payment was made without her knowledge (Comp. L. 1897, § 9745).—Curtiss v. Perry, 126 Mich. 600.

¶ 355. Promissory notes given in payment of a chattel and subsequently barred by the statute of limitations are not taken out of the operation of the statute by an endorsement by the payee on the notes of the amount received upon the sale of the chattel under a mortgage: since there is nothing to show any intent to revive under Comp. L. 1897, § 9744.—Westinghouse Co. v. Boyle, 126 Mich. 677.

§ 93. Credit applied under illegal agreement.

¶ 356. Application by the creditor of the value of labor furnished by the debtor cannot be allowed as a part payment where the right to so apply it depended on a contract made on Sunday with a third person.—Pillen v. Erickson, 125 Mich. 68.

§ 94. Payments applied without consent or intent of debtor.

¶ 357. An outlawed note cannot be revived by applying upon it a payment not intended to be made on it, nor supposed to be so by the parties.—Krone v. Krone, 38 Mich. 661.

¶ 358. A part payment by an assignee for the benefit of creditors does not operate to take a debt out of the statute of limitations.—Parsons v. Clark, 59 Mich. 414.

§ 95. Payments made by, to or through agents of parties.

Payments by codebtors or other obligors, see post §§ 96-98.

¶ 359. The running of the statute of limitations is not arrested by a payment made by an agent of the debtor a year and a half after receiving the money from the debtor with instructions to make the payment.—Sweet v. Ellis, 109 Mich. 460.

¶ 360. Defendant corporation signed a note which was indorsed individually by the other defendants, among them one Erwin who owned stock in the corporation. Erwin was attorney for the payee and after the latter's death for many years had custody of the notes and of other notes turned in as collateral security. Many years after the running of the statute of limitations on the note in question, payments were made to Erwin on the said collateral notes, which were turned over by Erwin to the estate of the payee of the note in question and applied thereon. Erwin had authority from the payee and the maker and indorser of the note to make substitution from time

to time of collateral. Held, the said payments made on the note operated to renew the same and saved it from being barred by the statute.—Myers v. Muskegon Improvement Co., 169 Mich. 689.

¶ 361. Where the debt is due an estate, and the estate is closed without payment thereof, a subsequent part payment by the debtor to one of the distributees for the benefit of all, made for the express purpose of delaying the statute of limitations, is sufficient to accomplish such purpose.—Spring v. Perkins, 156 Mich. 327.

§ 96. Payment by codebtor or co-obligor.

Payments by, to, or through agents, see ante, § 95.
By guarantor, surety, or other secondary party, see post § 97.
Assent or knowledge of nonpaying co-obligors to payment, see post § 98.
On mortgage debt, see also ante ¶¶ 352, 353.
Effect of part payment made by one of two or more cocontractors or coexecutors or coadministrators, see Jud. Act, chap. IX, § 26; Comp. L. 1915, § 12336.

¶ 362. A payment by the estate of a joint and several promisor does not prevent another promisor from taking the benefit of the statute of limitations (Comp. L. 1871, § 7165, How. St., § 8730).—Holcomb v. Sloan, 39 Mich. 173.

¶ 363. One joint maker of a note does not lose the benefit of the statute of limitations by reason of payments made by another.—Rogers v. Anderson, 40 Mich. 290.

¶ 364. A payment or new promise by one of several joint debtors will not keep the obligation alive as to another who had no part or privity therein.—Tate v. Stevenson, 55 Mich. 320.

¶ 365. A partnership note is a joint contract within the meaning of Comp. L. 1871, § 7165 (How. St., § 8730), so that a payment thereon by one partner within the period of the statute of limitations will not bind the other if the firm had previously dissolved to the payee's knowledge.—Gates v. Fisk, 45 Mich. 522.

¶ 366. Where one partner in writing authorizes the other to make a separate composition with the firm creditors, and he does so, payments made by the latter on such composition will not keep alive the demand as to the other.—Sigler v. Platt, 16 Mich. 206.

¶ 367. A payment by one joint debtor from his own means, on the joint obligations, will not save the running of the statute as to the other debtor.—Littlefield v. Dingwall, 71 Mich. 223.

¶ 368. A promissory note barred by the statute of limitations cannot be revived as to all its indorsers by a payment made by one of them without the knowledge or consent of the others.—Myers v. Erwin, 180 Mich. 469.

¶ 369. Under Comp. L. 1897, § 9745, payment by a joint debtor will not arrest the running of the statute of limitations in favor of his codebtor, and the fact that the debtors had been partners does not change the rule where the partnership had been terminated prior to the payment.—Borden v. Fletcher's Estate, 131 Mich. 220.

¶ 370. Letters written by a surety on a note to his principal urging that he make payments and expressing his personal desire that such payments be made, the letters being written at the request of the payee, is not sufficient to make the payments when made by the principal, arrest the running of the statute of limitations as to the surety.—Borden v. Fletcher's Estate, 131 Mich. 220.

¶ 371. At common law the payment by one jointly bound unless the statute established a contrary rule, sufficed to prevent the running of the statute of limitations.—Brown v. Hayes, 146 Mich. 474.

§ 97. ——By surety or guarantor or secondary obligor.

Part payments by principal as affecting bar against surety, see ante ¶ 370.

¶ 372. A payment made by a wife with her own means upon a note in which she is a surety for her husband, he having nothing to do with such payment, does not take the note out of the statute as to him; nor would it were she liable on the note as a joint debtor.—Littlefield v. Dingwall, 71 Mich. 223.

¶ 373. Where a debtor and his surety go to the creditor together for the express purpose of making a payment, and for that alone, and both apparently co-operate in the transaction, though the debtor alone handles the money, the creditor has a right to consider it a joint payment binding the surety under the statute of limitations, unless the surety notifies him that it is not so.—Mainzinger v. Mohr, 41 Mich. 685.

¶ 374. The stockholders of a corporation, who join in executing a promissory note for its accommodation, do not, even though it is understood that the corporation shall pay the note, thereby constitute it their agent to make payments upon the indebtedness, so that such payments will arrest the running of the statute of limitations in their favor.—Patterson v. Collier, 113 Mich. 12.

¶ 375. A payment made by a grantee of mortgaged premises, who took them subject to the mortgage, will not, in the absence of any showing that he was acting as agent of

the mortgagor, or otherwise than for his own benefit, be deemed a payment by the mortgagor, in such sense as to arrest the running of the statute in the latter's favor.—Home Life Ins. Co. v. Elwell, 111 Mich. 689.

§ 98. ——Assent or knowledge of co-obligors.

See also ante ¶ 373.
Assent as jury question, see post § 114.

¶ 376. The mere presence of an accommodation indorser of a note when the interest thereon was paid by the maker is not sufficient to keep the demand alive so as to prevent the running of the statute of limitations as to such indorser.—Godde v. Marvin, 142 Mich. 518.

C. ABATEMENT OR FAILURE OF TIMELY ACTION.

§ 99. In general; discontinuance, dismissal or reversal for defects.

Right to bring new action, see post § 101.
Provision for bringing new personal action within year after timely action has failed or become abated, see Jud. Act, chap. IX, § 19; Comp. L. 1915, § 12329.
Provision as to new action for real property within year after abatement, etc., see Jud. Act, chap. IX, § 10; Comp. L. 1915, § 12320.

¶ 377. Suit being commenced in justice's court, the plaintiff employed an attorney to appear and prosecute the suit for him on the return day. The attorney was prevented from attending to the suit on that day, and requested another to appear, who did so, but his authority being required he was not able to prove it, and the action failed. It was held that these facts did not make out a case within R. S. 1838, part 3, tit. 6, chap. II, § 11, How. St. § 8723, allowing a new action within one year where "in any action duly commenced," etc., "the suit shall fail of a sufficient return, by any unavoidable accident, or by any neglect or default of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form; or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on writ or error."—Spier v. M'Queen, 1 Mich. 252.

¶ 378. The erroneous dismissal by the circuit court of a regular appeal from a justice is an avoidance of the action "for matter of form," and a new suit may be brought within one year from such dismissal.—Pattridge v. Lott, 15 Mich. 251.

¶ 379. In assumpsit brought within six years service was not obtained on one of the defendants until after the six years; and after judgment for plaintiffs had been reversed because the continuity of the action was interrupted by the interval between successive summons issued for that defendant, the action was by consent discontinued as to the other defendant. Held, that a new action commenced within one year against both defendants was not within How. St., § 8723, and was barred.—Johnson v. Mead, 73 Mich. 326.

¶ 380. How. St., § 8723, allowing a "new action" to be commenced within one year after abatement or reversal, etc., gives no further delay on account of plaintiff's death in the interval, but requires the personal representative, no mattter when appointed or qualified, to sue in the same year.—Foote v. Pfeiffer, 70 Mich. 581.

¶ 381. Comp. L. 1871, § 7158 (How. St. § 8723), whereby on reversal of a judgment on writ of error after the statute of limitations has run, a new action will lie at any time within a year, applies to reversals on writs of certiorari.—McOmber v. Chapman, 42 Mich. 117.

§ 100. Death of party and vacancy in administration.

Death of party during year after failure of action, see ante ¶ 380.
Right to bring new action, see post § 101.

¶¶ 382, 383. The death of the defendant in ejectment abates the suit; but the statute of limitations does not run during the pendency of the suit, and under How. St., § 8707, plaintiff may bring an action for the same cause at any time within one year after the suit is thus abated.—McKenzie v. Cook Co., 113 Mich. 452.

§ 101. Right to bring new action within year.

Death, or other abating cause or technical defects within meaning of statutory extension, see ante §§ 99, 100.
Timeliness and sufficiency of new action, see post § 102.
In case of personal service on nonresident and completion of period thereafter, see also ante ¶ 165.
Right to bring new ejectment within year after abatement, see also Abatement ¶ 60.

¶ 384. Under the statute of limitations (Comp. L. 1897, § 9738), which provides that where an action has been defeated for any matter of form, a new action may be brought within one year thereafter, where an action, brought in assumpsit for fraud in the sale of real estate, has been defeated because plaintiff had mistaken her form of remedy, an action in tort for the same cause may be brought within one year after the final termination of the former action.—McMillan v. Reaume, 137 Mich. 1.

§ 102. Timeliness and sufficiency of new action.

Sufficiency of commencement of original suit, see ante § 75.

¶ 385. How. St., § 8723, providing that in the case of an action "duly commenced within the time limited by the statute of limitations," if the judgment is reversed on a writ of error the plaintiff may begin a new action within one year after reversal, a suit begun by declaration is not begun until a copy of the declaration with notice of rule to plead has been personally served upon the defendant.—Detroit Free Press Co. v. Bagg, 78 Mich. 650.

¶ 386. Under Comp. L. 1897, § 9738, providing that if in any action duly commenced within the time limited, the writ or declaration shall fail of a sufficient service by default or neglect of the officer to whom it is committed, the plaintiff may commence a new suit within one year after the abatement of the original suit; the neglect of the sheriff in permitting 47 days to elapse between the return day of the original summons and the issuance of an alias, operated as an abatement of the original suit, and the service of the alias summons was the commencement of a new suit within one year after the abatement of the first action. —Ricaby v. Gentle, 122 Mich. 336.

VII. PLEADING, URGING AND PROVING OR AVOIDING THE STATUTORY BAR.

Pleading and proof as to adverse possession, see Adverse Possession, V.

§ 103. In general; necessity of plea or notice.

Mode of pleading, demurrer or plea, see post § 104.
Sufficiency of plea, answer, or notice, see post § 105.
Pleading limitations to set-off, see post § 106.
Pleading fraud or concealment to avoid bar, see post § 107.
Issues on the pleas and variances of proof from plea, see post § 108.
Completion of adverse possession as bar to original claim either by action or by defense, set ante ¶ 32.
Insufficiency of general issue to present limitation, see post § 105.
General law of pleading defenses in equity, see Equity, VII, C.
General law as to pleading defenses, see Pleading, III.
Propriety of leave to amend to plead limitations, see Pleading, VI.
Plea of limitations as waiver of objections to form of action, see Pleading, XI.

¶ 387. Notice of the statute of limitations must be added to the plea of the general issue to enable the defendant to avail himself of such defense.—Whitworth v. Pelton, 81 Mich. 98.

¶ 388. The statute of limitations is not available as a defense unless notice thereof is given with the plea.—Shank v. Woodworth, 111 Mich. 642.

¶ 389. Refusing on the trial to allow defendant to interpose the statute of limitations is not error.—Marx v. Hilsendegen, 46 Mich. 336.

¶ 390. It is too late on a motion for new trial to make the defense of limitations.—Moden v. Superintendents of Poor, 183 Mich. 120; Bennett v. Denton, 194 Mich. 610.

¶ 391. The upper court will not reverse a judgment on a claim barred by the statute of limitations, where notice of the defense was not served and it was not raised in the lower court.—Conger v. Hall, 158 Mich. 447.

¶ 392. Where, in an action on a note, the statute of limitations is not pleaded, a judgment thereon cannot be attacked though the fact of outlawry appears on the face of the note.—Whitworth v. Pelton, 81 Mich. 98.

¶ 393. While equity will follow the law in the application of statutes of limitation, it will not apply such statutes unless they are pleaded.—Harper v. Corcoran, 166 Mich. 474.

¶ 394. When a case stands on appeal from the allowance of a claim against an estate, it is not necessary to frame an issue to try a plea of limitations but the evidence is receivable without it, being within the issues on presentation of the claim.—McGee v. McDonald's Estate, 66 Mich. 628.

§ 104. Mode of pleading, demurrer or plea or answer.

Mode of pleading to writ of error that it is barred by time, see Appeal § 144.
Mode of pleading laches to bill, see Equity § 104.
When and how to urge bar of statute of limitation as to claim against estate, see Estates of Decedents ¶¶ 600, 601.
Leave to plead over demurrer where otherwise cause would be barred, see also Equity ¶ 835.

¶ 395. The defense of the statute of limitations must be pleaded in an action at law, and cannot be raised by demurrer.—Renackowsky v. Board of Water Com'rs of Detroit, 122 Mich. 613.

¶ 396. A defense that a right of action set up in the declaration is barred by the statute of limitations cannot be raised by demurrer, but must be pleaded.—Township of Forest v. American Bonding Co. of Baltimore, 180 Mich. 90.

¶ 397. The bar of the statute of limitations (How. St., § 8709) may be raised by

answer as well as by demurrer.—Highstone v. Franks, 93 Mich. 52.

¶ 398. Limitations may be raised by demurrer to a bill.—Campau v. Chene, 1 Mich. 400; McLean v. Barton, H. 279.

¶ 399. The answer may raise the defense that relief is barred by the statute of limitations.—Highstone v. Franks, 93 Mich. 52.

§ 105. Sufficiency of pleas, answers and notices.

¶ 400. The statute of limitations is not available under the general issue.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 401. The statute of limitations for actions for trespass on land, etc. (Comp. L. 1897, § 9729), cannot be taken advantage of under a plea of the general issue.—Bellows v. Butler, 127 Mich. 100.

¶ 402. The defense of the statute of limitations must, under Circuit Court Rule 7b, be specially pleaded.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 403. A plea of the statute of limitations, that the plaintiff's cause of action did not accrue within six years next before the filing of the plaintiff's amended declaration, is bad.—Wilcox v. Kassick, 2 Mich. 165.

¶ 404. A notice under the general issue in justice's court, apprising plaintiffs that defendant relies on the statute of limitations, is sufficient; and where he pleaded non assumpsit within six years, instead of actio non accrevit, he should have been allowed the benefit of the defense, with or without amendment.—Snyder v. Winsor, 44 Mich. 140.

¶ 405. A bill in aid of execution, setting out the dates of the judgments and levies, was filed more than one year and four months after the levies. Defendants stated in their answer that "on account of the time which is elapsed since the prosecution of the said judgments, the issuing of said execution, and levying of said real estate, the complainants are debarred and estopped from pursuing this remedy." Held, the answer was sufficient to raise the defense of the statute of limitations.—Rohrbacher v. Walsh, 170 Mich. 59.

¶ 406. Failure of defendant to plead exclusive possession in a plea of the statute of limitations, is cured where complainant in his bill distinctly avers exclusion for the whole time from the premises.—Butcher v. Butcher, 137 Mich. 390.

¶ 407. An answer in a bill to quiet title, setting up facts sustaining the defendant's claim of possession under How. § 8698, subd. 1, barring a right of entry after five years as against one occuying under a deed of a ministerial officer of a court of competent jurisdiction within this state, entitled such defendant to the benefit of the act without pleading it.—Potter v. Martin, 122 Mich. 542.

§ 106. Urging bar of claim pleaded as set-off.

¶ 408. The rule, that if relied upon, the statute of limitations must be pleaded, does not prevent a plaintiff without pleading it from having advantage of the statute against a demand sought to be set off by the defendant, of which notice was given at the time of filing of his plea, and which was barred by the statute.—Kincade v. Peck, 193 Mich. 207.

§ 107. Pleading fraud or concealment to avoid bar.

Anticipating defense of limitations by averments in bill, see Equity § 89.
General rules for pleading fraud, see Fraud, III.

¶ 409. To avoid the statute of limitations on the ground of a fraud of the defendants in concealing the cause of action, the pleading should set out the particular acts of fraud or concealment and the time when discovered.—Beaubien v. Beaubien, 23 How. (64 U. S.) 190, 16 L. ed. 484.

¶ 410. A bill by the descendants of brothers and sisters of two brothers, who had occupied land which their father had formerly occupied under a concession from the French government, against descendants of the two brothers and purchasers from them under a patent from the United States procured by one of the brothers occupying the land, claiming a tenancy in common, and averring that plaintiff, until the last few years had believed that the two brothers and their legal representatives were acting in good faith but that some fifty years after exclusive possession was taken they had discovered by information, after inquiry, that the brothers and their legal representatives intended to cheat and defraud them and those under whom they claimed of their just rights in the premises, was too general and indefinite in its allegations of fraud and concealment to avoid the operation of the statutes of limitation, act of May 15, 1820, limiting the right of action to 20 years after the same has accrued, and act of November 15, 1829, limiting the right of entry to 10 years, if the cause of action has then accrued.—Beaubien v. Beaubien, 23 How. (64 U. S.) 190, 16 L. Ed. 484.

§ 108. Issues and variances.

Insufficiency of general issue to present bar, see ante § 105.
Issues made and admissions involved by plea of limitations, see also Pleading, IX.

¶ 411. The issue of limitations is not presented if the period was not complete when

the suit was begun.—Parkinson v. Woulds, 125 Mich. 325.

¶ 412. A son made a claim against his father's estate for the amount of earnings which he had paid over to his father, and for certain outlays on his behalf. One item of the earnings had accrued so long ago as to be outlawed if standing alone, but it was averred to have entered into an account stated within the period of limitation. Held, that if set up as a single demand, not reduced by mutual credits, it would be barred, but, if properly declared on, it might be shown to have belonged to a series of open dealings which were not closed until within the period of limitation.—Hillebrands v. Nibbelink, 40 Mich. 646.

¶ 413. Where an entry on land under color of a tax deed was followed by possession for ten years, the period prescribed by § 9714, Comp. L. 1897, How. Ann. St., 2nd Ed., § 14119, as sufficient to ripen into title, possession for fifteen years, the time limited by the general statute of limitations for actions to recover land, may be shown, and the question whether title has been acquired under either statute be left to the jury.—Merritt v. Westerman, 180 Mich. 449.

§ 109. Presumptions and burden of proving bar or avoidance.

To prove account to be open and running or stated, see ante §§ 51, 52.

As to time of bar of lost instrument, see also post ¶ 440.

Presumption as to time of making demand to mature right of action, see also ante ¶ 182.

General law of presumptions and burden of proof, see Evidence, II.

Presumption as to possession accompanying title to land, see Jud. Act, chap. IX, § 4; Comp. L. 1915, § 12314.

¶ 414. Under a plea of the statute of limitations plaintiff has the burden of showing that suit was commenced within the statutory period.—Ayres v. Hubbard, 71 Mich. 594.

¶ 415. Prima facie outlawry of a note does not prevent its introduction in evidence under a declaration on the common counts with copy served.—Michael v. Tuttle, 37 Mich. 502.

¶ 416. The fact that a claim is apparently outlawed does not necessarily exclude evidence thereon; the question whether or not it is barred is one to be dealt with when the testimony is all in.—Cotherman v. Cotherman's Estate, 58 Mich. 465.

¶ 417. Where the parties in ejectment, being cotenants, rely upon an ouster, and defendant claims title by adverse possession, plaintiff has the burden of showing that he was ousted within the period of the statute of limitations, and the defendant of showing that he had ousted the adverse claimant so long before that the period of limitation had run since.—Highstone v. Burdette, 54 Mich. 329.

¶ 418. The detention of a patient in an insane asylum after the expiration of a period of probation and her re-entry into the asylum and until her discharge was presumptively lawful so as to cast the burden of proof upon plaintiff of proving the unlawfulness of her restraint so as to cause the running of the statute of limitations from the time of the return, in an action against a sheriff and physician for false imprisonment, where the patient was originally confined in the asylum by her relatives as a private patient and with her consent and she was released upon probation by the asylum officials and was taken back to the asylum just before the expiration of the probation period by a deputy sheriff and was required by the asylum officials, who acted in good faith, to remain in the asylum until she was, at a later time, taken from the asylum by relatives against the advice of such officials.—Alexander v. Thompson, 195 Fed. 31.

¶ 419. In an action for damages for false imprisonment against a sheriff and a physician for unlawfully taking plaintiff into custody and delivering her into the custody of the officials of an insane asylum, if an imprisonment originally unlawful is shown the burden is normally upon defendants to show the running of the statute of limitations by proving the termination of the unlawful imprisonment, but it is not necessary that proof to that effect be introduced by defendants, it being sufficient if the fact is shown by plaintiff's evidence.—Alexander v. Thompson, 195 Fed. 31.

¶ 420. Where a defendant who relies on the statute of limitations had resided a part of the time in a foreign country, the burden is upon him to show that the sum of the times of his presence within the jurisdiction was sufficient to satisfy the statute.—White v. Campbell, 25 Mich. 463.

¶ 421. In assumpsit counting on a note made in another state where it was admitted that no payments had been made on it and where no proof was offered to take it out of the bar of the statute which apparently had run against it, there could be no recovery.—Howard v. Coon, 93 Mich. 442.

§ 110. ——As to tolling or extension.

As to legal inference of residence from proven residence of debtor's family, see also post ¶ 439.

Questions for jury and instructions, see post § 114.

¶ 422. The date of an unserved writ is prima facie evidence of the time of its actual issue, and defendant has the burden

of proving on a plea of limitations that it was not then issued.—Howell v. Shepard, 48 Mich. 472.

¶ 423. Where one who has been under guardianship as a minor brings ejectment to test the validity of a sale made by his guardian, he has the burden of proving the continuance of his infancy to a date not more than five years before he began suit.—Stewart v. Ashley, 34 Mich. 188.

¶ 424. A bailor seeking to recover property retained by a bailee for many years after the expiration of the term of bailment, has the burden of proving a continuance of the bailment in order to prevent the running of the statute of limitations.—In re Parsell's Estate, 184 Mich. 522.

¶ 425. The burden of showing that the nonresident of the defendant in a bill avoided the running of the statute of limitations otherwise apparent on the face of the bill is upon the complainant.—Belden v. Blackman, 124 Mich. 667.

§ 111. Evidence as to bar or matters avoiding or suspending it.

Evidence and indicia of open account, or of statement of account, see ante §§ 51, 52.
Burden of proof and presumptions, see ante § 109.
As to new promise or part payment, see post § 112.
Admission of bailee that he is such as evidence against adverse claim, see ante ¶ 296.
Necessity of writing to prove new promise, see ante § 81.
General law of evidence, see Evidence.
Declarations admissible as showing nature of delay, whether indulgence or extension, see also Evidence ¶ 1867.
Testimony excluded as being equally within knowledge of deceased predecessor of party, see Witnesses, IV.
Evidence as to foreign domicile or residence, see Domicile § 7.

¶ 426. A plaintiff in a personal injury suit was permitted to meet the defense of the statute of limitations by showing that, before the time fixed by statute for the bar, the defendant by its course of conduct in promising to give him full pay as long as he was disabled and in actually making payments from time to time and then after the statute had run, declining to make further payments, had led him to believe that a suit to enforce his rights would be unnecessary, and had thereby lulled him into a feeling of security.—Renackowsky v. Board of Water Com'rs of Detroit, 122 Mich. 613.

¶ 427. Evidence in trover for a trespass on lands and the cutting of logs that defendant settled with a third person for a similar trespass on adjacent lands at the same time and by the same employee, which time was not beyond the period of limitations, is admissible to show that plaintiff's claim is not barred.—Ayres v. Hubbard, 71 Mich. 594.

¶ 428. A claim was made against an estate for a balance due on an open account, but an amendment to the demand claimed a balance struck on an adjustment of mutual accounts by the decedent's oral admission of a specific balance. But the jury found the open account barred by limitations and against the claim that it had passed into an account stated within the period. Held, that it was not saved from the bar.—Sperry v. Moore's Estate, 42 Mich. 353.

¶ 429. In an appeal in the circuit court on a claim on a promissory note, unenforceable under the statute of limitations unless certain payments were made, evidence that payments were made upon a note held by the claimant with no evidence that he held any other note and testimony that he did not, is sufficient to support a verdict for the claimant.—Ocobock v. Myers' Estate, 127 Mich. 181.

¶ 430. Undisputed evidence held to show that the defendant guardian did not fraudulently conceal the cause of action growing out of his final settlement so as to prevent the running of the statute of limitations, the ward having waited over 20 years before suing.—Ferguson v. Frink, 134 Mich. 375.

§ 112. ——As to new promise or part payment.

See also ante ¶ 429.
Necessity of writing to prove new promise and sufficiency of qualified or conditional promises or statements, see ante § 81 et seq.
Disavowal or denial accompanying payment as rebuttal of acknowledgment, see ante § 90.
Proofs in cases of indorsements, see also ante § 91.
Burden of proof and presumptions, see ante § 110.
Payment as an issue and proof of payment as a fact, see Payment, V.

¶ 431. A promise to pay the balance of a barred debt cannot be implied as an inference of law from the mere fact of part payment; that fact is merely evidence of such a promise, and the inference that such a promise was made or intended must be found as a fact on the trial.—Parsons v. Clark, 59 Mich. 414.

¶ 432. The indorsement of a partial payment upon a promissory note, written by the party to be charged thereby, is competent evidence of such payment to take the case out of the statute.—Chandler v. Lawrence, 3 Mich. 261.

¶ 433. Although the statute requires a new promise to be in writing, the fact of

payment may be proved by the admission of defendant or by other competent parol evidence.—Chandler v. Lawrence, 3 Mich. 261.

¶ 434. Testimony of an oral admission of a payment of interest on a note was competent to take the case out of the statute of limitations.—Fowles v. Joslyn, 135 Mich. 333.

¶ 435. In a suit upon an open account, against which the statute of limitations had run unless a payment had been made as testified by plaintiff, a letter written by defendant to plaintiff about two years after the time the payment is claimed to have been made, asking for a statement of defendant's account, and stating that plaintiff knew that defendant had paid some on it, is admissible as bearing upon the question of such payment.—Floersheim v. Vosburgh, 99 Mich. 11.

¶ 436. A note purporting on its face to be eight years overdue had upon it two indorsements, dated within six years of the time of bringing suit upon it. The only proof offered by the plaintiff in the case was that no other payments than those indorsed had been made. Held, that this did not prove or tend to prove the indorsed payments.—Snyder v. Winsor, 44 Mich. 140.

¶ 437. A payment on a mortgage debt subsequent to 1881 is not shown by evidence in depositions of the mortgagee and his wife that in letters the mortgagor often acknowledged the debt and that "about 14 years before the deposition" (which would make it about 1889) but at a time not stated a payment of $100 by draft was made, as against positive proof of a payment of that sum by draft in 1881 and letters subsequent thereto by deponent upbraiding the mortgagor for not having paid "anything" for 12 or 13 years, one such letter being dated in 1892, and in view of the nonproduction of the acknowleding letters and a claim that they were destroyed.—Carr v. Carr, 138 Mich. 396.

¶ 438. In an action on a promissory note claimed to be barred by the statute of limitations, proof of the existence of the note and an indorsement of part payment thereon in the handwriting of the maker is sufficient to establish a prima facie case of partial payment so as to prevent the operation of the statute of limitations.—Stretch v. Stretch, 191 Mich. 416.

§ 113. Questions of law and fact and instructions.

As to new promises and part payments, see post § 114.

Direction of verdict on opening statement showing complete bar, see Directing Verdict ¶ 98.

General law of instructions, see Instructions.

¶ 439. Where the statute of limitations is pleaded to an action of debt on a judgment, it cannot be held that the residence of defendant's family can, by itself, as matter of law, determine the place of his own residence.—Conrad v. Nall, 24 Mich. 275.

¶ 440. Where both the mortgage and the records have been destroyed it cannot be said in the absence of any proofs as to when the mortgage matured, that the statute of limitations has run against it on a bill to foreclose.—McCrath v. Myers, 126 Mich. 204.

¶ 441. The question whether the statute of limitations had run against the right of action on a note, is properly left to the jury where it depends upon what time the summons was delivered to the sheriff for service, upon which question the testimony is conflicting.—Newman v. Meddaugh, 131 Mich. 595.

¶ 442. It is a question of fact for the jury as to whether an actor who travels from place to place during the theatrical season and who contracted a debt while residing in another state acquired and had a home within the state which was so notorious as to be discoverable by a creditor residing within the state for a period sufficient to bar recovery where the evidence is conflicting.—Sproat v. Hall, 189 Mich. 28.

¶ 443. In an action by a wife involving a claim against her husband's estate for money furnished him, it is error to direct a verdict in favor of the estate on the ground that the statute of limitations had run against the claim, though the money was advanced to him 8 or 9 years before his death where at the time the money was advanced, he was poor and had nothing with which to repay but both expected that he would repay it at some future time, and he recognized the obligation for two years, and also two weeks before his death, since in such case it is not a fair inference that the money was to be repaid at once.—Wilcox v. Wilcox, 139 Mich. 365.

¶ 444. In an action for services performed and moneys expended for an incompetent, the item for services in handling the defendant's property need not be considered by itself but where the defendant guardian has examined the plaintiff's account and promised settlement it may be included in the general balance although the amount of compensation has never been agreed upon and no book entry made of it; and the question of whether it was mutual and whether the statute of limitations has run is for the jury.—Stoner v. Riggs, 128 Mich. 129.

¶ 445. In an action on a promissory note, evidence held to show that the defendant's counterclaim was barred by the statute of limitations, and that the court should so have instructed the jury.—Kincade v. Peck, 193 Mich. 207.

¶ 446. The question of whether an account sued upon was an open, mutual account current under the statute may be said to have been fairly submitted to the jury, if the trial court in submitting it drew the jury's attention to the tests under the statutory requirements.—Lester v. Thompson, 91 Mich. 245.

¶ 447. It was proper to refuse to charge that an item for royalties on a patent prior to a certain date beyond six years were barred, where there was evidence from which the jury might have found that the item was part of a running account.—Brazel v. Thompson Smith's Sons, 141 Mich. 628.

§ 114. ——As to new promise or part payment.

Burden of proof, presumptions, and evidence as to tolling or extension, see ante §§ 110, 112.

¶ 448. Whether a payment by one of the several indorsers of a promissory note was made with the knowledge and consent of the others, so as to remove the bar of the statute of limitations as to them, when resting on disputed testimony, is a question for the jury.—Myers v. Erwin, 180 Mich. 469.

¶ 449. On issue as to a particular payment on a note relied on to take the case out of the statute of limitations, a charge permitting the jury to take into consideration numerous circumstances was deemed not to have been misleading, where the charge otherwise limited the jury's inquiry to the particular payment.—Fowles v. Joslyn, 135 Mich. 333.

¶ 450. Where the question was whether an indorsement of payment on a promissory note was authorized by the maker of the note so as to take the case out of the operation of the statute of limitations, an instruction that the jury should take into consideration all the circumstances surrounding the case, as well as the letters which passed between the parties relative to making indorsements of credit, was held correct.—Brockett v. Sagendorph, 116 Mich. 643.

¶ 451. On the question whether an indorsement on a note tolling limitations was authorized by the debtor, an instruction that if plaintiff notified defendant of the indorsement having been made the jury might take that fact into consideration with other circumstances in determining whether defendant authorized the indorsement was held to be warranted by the evidence and proper.—Brockett v. Sagendorph, 116 Mich. 643.

¶ 452. In an action on account alleged to have been taken out of the operation of the statute of limitations by a payment in which the defendant claims to have always denied liability, a reference in the charge to the reasons for the defendant's denial of liability is not prejudicial error.—Bay City Iron Co. v. Emery, 128 Mich. 506.

¶ 453. In an action on an account, it is not prejudicial error to instruct that unless a payment has been made within the last six years there can be no recovery where taken in connection with the circumstances of the case payment must be held to include a credit for the use of property.—Bay City Iron Co. v. Emery, 128 Mich. 506.

¶ 454. A judge's omission, while calling attention to the conflict in testimony as to a disputed payment, to state what effect the truth of either statement would have in respect to the operation of the statute of limitations, was error warranting reversal, if he had been properly requested to charge that the items of plaintiff's claim were barred, unless renewed by the payment.—Hollywood v. Reed, 55 Mich. 308.

§ 115. Findings and decision.

Necessary findings as to part payment tolling the statute, see ante ¶ 431.

General requisites and sufficiency of verdicts and findings, see Verdicts and Findings.

Provision for judgment against part of joint defendants when bar is complete as to others, see Jud. Act, chap. IX, § 23; Comp. L. 1915, § 12333.

¶ 455. A finding that defendant with his family moved to Joliet, Illinois, in 1873, "and at that place resided up to the time of the commencement of this suit," is equivalent to a finding that during the intervening period he was absent from Michigan, and brings the case within the exception to the statute of limitations.—McKenzie v. Boylan, 40 Mich. 329.

LIMITED; LIMITS to LIQUORS.

Cross-References.

Limited Divorce—
Proper relief, absolute or limited, see Divorce § 93.

Limited Jurisdiction—
See Courts, V.

Limited Partnership Associations—
See Joint Stock Companies.

Limits of Indebtedness—
Of counties and municipalities, see Counties § 22 et seq.; Municipal Corporations, XI; Townships, VI.
Constitutional inhibitions, see Constitutional Law, XV.

Lineal Descendants—
See Descent; Wills, VI; Taxes, XIII (inheritance taxes).

Line of Duty—
As measure of scope and limits of liability as master or principal for act of subordinate, see Agency, II, B; Master and Servant, IV.

As measure of duty and liability of master or employer to servant or workman, see Master and Servant, III; Workmen's Compensation Law.
Line Trees and Fences—
As boundaries, see Boundaries.
Rights of adjoiners, see Adjoining Owners § 7.
Liquidated Damages—
See Damages, VI.
Liquidated Demands or Claims—
Stating and settling accounts, see Account Stated.
Accord and satisfaction, see Accord and Satisfaction.
Demands carrying interest, see Interest, I, A.
Maturity of demand for purpose of starting limitations, see Limitations, IV.
Liquidation of Corporations—
See Corporations, XXIII.
Liquidation of Partnership—
See Partnership, VII.
Liquors—
See Intoxicating Liquors.

LIS PENDENS.

TREATS of the effect of pending suits on transfers of property affected by such suits and of statutory and common law notices to charge transferors.

Analysis.

§ 1. In general; actions and properties within the doctrine.
§ 2. Statutory notices and filings.
§ 3. Operation and effect of notice or filing.
§ 4. Extent and items of claim.

§ 1. In general; actions and properties within the doctrine.

Notices, filings and effect thereof, see post §§ 3, 4.
Lien of attachment by levy, see Attachment, VIII.
Effect of creditors' bill as lis pendens, see Creditors' Suits § 31.
Bringing in parties on revival, see Abatement §§ 19, 20.

¶ 1. An action of ejectment is not notice to any one but the parties of its pendency.—Powers v. Scholtens, 79 Mich. 299.

¶ 2. The mortgagee, having proceeded to foreclose for an instalment, which foreclosure the owner of the equity of redemption then sued in equity to annul, was subject to the pending suit in equity in respect of an attempted foreclosure for the principal brought thereafter.—Louder v. Burch, 47 Mich. 109.

¶ 3. Rights in property which are acquired subsequent to the attaching of a mortgage lien are extinguished by the foreclosure and sale of the mortgaged property, since there is no privity of contract between the holder of the rights subsequently acquired and the purchaser.—Detroit, T. & I. R. Co. v. Western U. Tel. Co., 200 Mich. 2.

¶ 4. A franchise to maintain and operate a street railway in a street is an interest in land, and therefore a purchaser of such interest pending litigation to declare the franchise invalid, in the absence of proof of actual notice, is not bound by a decree in favor of the complainants, where notice of the pendency of the suit was not filed for record under Comp. L. 1897, § 441, requiring the filing of such notice to any purchaser of real estate, thus practically abolishing the doctrine of lis pendens as to real estate.—Detroit Citizens' St. Ry. Co. v. City of Detroit, 124 Mich. 449.

§ 2. Statutory notices and filings.

Filing and record of affidavit to attach lien for contribution on bill by owner of land sold with others on execution, see Jud. Act, chap. XXIII, §§ 134, 135; Comp. L. 1915, §§ 12949, 12950.

¶ 5. Lis pendens may be filed as soon as the bill is filed in the suit.—Gordon v. Tyler, 58 Mich. 629.

¶ 6. A notice of lis pendens for partition sufficiently states its object if it states that it is "for the purpose of partitioning and setting apart, either by division or by sale, and a division of the proceeds among the complainant and defendants, of the hereinafter described lands and premises according to their respective titles and interests therein; the complainant's interest being now claimed as an undivided fifth part thereof."—Alterauge v. Christiansen, 48 Mich. 60.

¶ 7. A notice of lis pendens in a foreclosure suit, referring to the mortgage by

record, suffices to identify the land with the paper title thereof, even if the description [in the bill?] was incorrect, where the mistake laid in a division of a parcel by the common grantor who deeded the several parcels intending them to coincide but failed to describe them properly.—Taber v. Shattuck, 55 Mich. 370.

¶ 8. Where the notice of pendency of an attachment suit, in addition to what was required by statute, erroneously stated that the writ was returnable in November next, instead of November instant, it was held that the mistake did not vitiate the proceedings.—Drew v. Dequindre, 2 D. 93.

§ 3. Operation and effect of notice or filing.

Effect of want of notice, see also ante ¶ 4.
Items of claim protected by notice, see post § 4.
Effect of recordation under recording acts, see Notice and Record of Title, II.
Priority of lien of lis pendens, see Liens § 11.
Intervention, parties entitled, see Parties.

¶ 9. A notice lis pendens affects those only who afterwards and pending suit seek to obtain interests, as purchasers or encumbrancers, in the property it refers to; and one who has begun suit to establish an equitable lien thereon upon the basis of previous dealings with defendant does not himself become thereby a purchaser or encumbrancer within the protection of the recording laws as against any rights acquired before the notice is filed.—Hammond v. Paxton, 58 Mich. 398.

¶ 10. A lis pendens need not be filed to bind one who has actual notice. It is required, in the absence of actual notice, to charge a party with constructive notice.—Baker v. Pierson, 5 Mich. 456.

¶ 11. The chief purpose of the notice lis pendens required by statute in mechanics' lien cases is to bind subsequent interests, and such notice seems unnecessary as against the original parties to the bill.—Sheridan v. Cameron, 65 Mich. 680.

¶ 12. The purpose of a notice lis pendens (How. St., § 6619) is to prevent defendant from so alienating the property in dispute as to affect complainant's rights and to bind it wherever it may be when decree is entered.—Hammond v. Paxton, 58 Mich. 398.

¶ 13. The object of the notice lis pendens in chancery proceedings against real estate is to enable persons interested to ascertain from it the persons and property affected by the bill, together with the general nature of the matters in controversy. But they are left to examine the court record for details and particulars, and are bound by what appears in the bill and proceedings thereon.—Alterauge v. Christiansen, 48 Mich. 60.

¶ 14. Filing a notice lis pendens in a suit to correct a deed is notice to the world that defendant is liable to be divested of any title claimed by him; and any subsequent purchaser of a mortgage given by defendant takes it with constructive notice of that fact, even though he never knew of the lis pendens or though it had without his fault been lost from the files and not been entered on the file-book.—Heim v. Ellis, 49 Mich. 241.

¶ 15. The operation of a lis pendens as notice lasts, if the suit is not abandoned, until it is closed by final decree, provided it is prosecuted with reasonable diligence and in good faith; otherwise a purchaser who has no actual notice is not affected by it.—Hammond v. Paxton, 58 Mich. 398.

¶ 16. A suit is abandoned if before its completion another seeking the same relief is instituted and carried to decree in its place; and the effect of a lis pendens filed on the institution of the first suit is not transferred to the other.—Hammond v. Paxton, 58 Mich. 398.

¶ 17. A notice lis pendens is ineffective as against a mortgagee whose mortgage antedated the notice though it was not recorded until after the notice was filed.—Hammond v. Paxton, 58 Mich. 398.

¶ 18. A suit and cross-suit constitute one cause, and notice of the suit is notice of the cross-bill also. So held in the case of a lis pendens filed in an original foreclosure suit, but not in a cross-suit for foreclosure; it was constructive notice to all the defendants.—Hall Lumber Co. v. Gustin, 54 Mich. 624.

¶ 19. A lis pendens, under How. St., § 6619, is effectual from the date of filing as notice of the claims made in the bill, irrespective of whether service upon all of the defendants therein is at the time complete.—Lockwood v. Noble, 113 Mich. 418.

¶ 20. A chattel mortgage of the crops growing or to be grown on land owned in common, given by the tenant in possession subsequent to the commencement of foreclosure proceedings against the interest of his co-tenant, and after lis pendens filed, in no way affects the rights of the complainant; and the purchaser at the foreclosure sale is entitled to his undivided interest in the crops, free from the lien of the mortgage.—Moreland v. Strong, 115 Mich. 211.

¶ 21. A bill was filed to foreclose two mortgages, one given to secure all obligations which the mortgagee might become liable for as indorser within a stipulated time, at the mortgagor's request, and the other, all indorsements theretofore or subsequently made for his benefit. The mortgagee paid cer-

tain notes under the erroneous supposition that they were covered by the mortgages, and, in his bill, claimed the amounts so paid as due thereon, but did not set forth in support of such claim an agreement of the parties, made after a settlement between them, which provided that said claims should be treated as a part of the mortgage debt, but which omission was supplied by amending the bill on the hearing to cover the proofs made in that regard. Held, that the lis pendens filed with the original bill was sufficient notice to a subsequent encumbrancer, who became such without actual notice of said agreement, of complainant's rights thereunder.—Burt v. Gamble, 98 Mich. 402.

¶ 22. Where, pending a suit for partnership accounting brought by one member of a firm formed to deal in lands against the other member, defendant sells to a third person certain lands which the bill alleged were held by defendant for the firm's benefit, such third person cannot maintain a bill against the two partners to discharge as a cloud upon his title the lis pendens filed in the suit for an accounting and covering the lands bought by him.—Hesselbacher v. Sprague, 104 Mich. 197.

¶ 23. Defendant contracted to sell, and give clear title to plaintiff, premises which were incumbered by a mortgage when defendant bought them. A previous owner of the mortgage brought a bill to cancel the transfers of the mortgage, and to have a lien on the premises declared in her favor. Held, a notice of lis pendens filed in this suit was constructive notice to defendant of the suit.—Cossett v. O'Riley, 160 Mich. 101.

§ 4. Extent and items of claim.

¶ 24. A lis pendens notice duly filed is notice of the right to costs as an incident of the judgment which may be recovered in a chancery suit, e. g., a partition suit. Barbour v. Patterson, 145 Mich. 459.

LITERAL MEANINGS.

Cross-References.

Literal Meanings—
Rules for construction of writings, see Contracts, VI, A; Deeds, III, A; Wills, VI, A; Statutes, V.

LITERARY PROPERTY.

TREATS of the right of property in literary productions as distinguished from the books or paper on which they appear and from names or designs coined and used for trade names and marks.

§ 1. In general.

Reasonableness of agreement not to produce competing book, see Contracts § 77, ¶ 305.
Leviability of unpublished manuscripts, see Executions ¶ 32.
Injunction to prevent infringement of literary or pictorial property, see also Injunctions, § 88.
Property in patents, inventions, and trade processes, see Patents.
Property in trade-marks, see Trade-Marks.

¶ 1. The right of the proprietor of an unpublished manuscript to publish it or to withhold it from publication is a purely incorporeal property right. Such manuscripts are not subject to execution.—Dart v. Woodhouse, 40 Mich. 399.

¶ 2. The copyright of a published work cannot be reached by the owner's creditors, nor can the author's rights be disturbed except in accordance with some statutory authority.—Dart v. Woodhouse, 40 Mich. 399.

Manuscript as baggage, see note, 1 N. C. C. A. 65-71.

LITIGIOUS RIGHTS to LOCAL.

Cross-References.

Litigious Rights—
Assignability, see Assignments, I; Champerty.
Devolution on death of party, see Descent; Estates of Decedents, V, XI.
Survival actions, see Abatement §§ 16, 17.
Littoral Rights—
See Navigable Waters; Waters, IV.
Livery Stables—
Rights of keepers and bailees of animals, see Animals; Bailments.
Innkeeper's liability respecting stabling of animals for guests, see Inns.
Live Stock—
General law of animals, see Animals.
Carriers of, see Carriers, III.
Sales and warranties, see Sales.
Chattel mortgages, see Chattel Mortgages.
Injuries to animals on railroads or street railways, other than to animals carried, see Railroads, VIII; Street Railways, IV.

Measure of damages for injury or killing, see Damages.
Lloyds—
See Insurance, II.
Loading Platforms—
As highway uses and obstructions, see Highways § 171.
Places for servants to work, see Master and Servant, III.
Places for taking on or discharging passengers, see Carriers § 156.
Loan and Trust Companies—
See Corporations; Banking; Building Associations.
Loans—
Of money, see specific topic treating of the contract for repayment or security of the loan, e. g., Negotiable Instruments; Mortgages; Chattel Mortgages; Pledges; Implied Contracts.
Legality of contract depending on purpose of the loan, see Contracts, IV.
Interest payable on loan, see Interest; Usury.
Power of corporations to enter into loan contracts, see Corporations § 80; Banking § 43; Municipal Corporations, XI; Municipal Bonds; Townships, III; Counties, § 26 et seq.
Loan, lease or hiring of chattels, see Bailments; Sales, XII.
Procedure and evidence for enforcing repayment of loan, see Assumpsit; Foreclosure; Chattel Mortgages, VII, VIII; Negotiable Instruments, XIV; and other topics treating of remedies on debts.
Presumption as to loan or payment where money is paid over, see Payment, V.
Loan or advancement to child, see Descent § 27.
Implication that sum is payable on demand, see Contracts § 181.
Overreaching bargains for loans as frauds, see Fraud § 70.
Lobbying Agreements—
Public policy relating to, see Contracts § 54.
Local Actions—
Venue or place for bringing, see Venue, I; Courts § 45.
Local Assessments—
See Local Improvements.
Local Customs and Usages—
See Customs and Usages.
Local Laws—
See Statutes, II.
Local Option—
See Intoxicating Liquors.
Local Self-Government—
See Constitutional Law, II, C.

LOCAL IMPROVEMENTS AND ASSESSMENTS.

TREATS of public improvements, chiefly such as street work, sewers and gutters, sidewalks, and pavements, and of the modes and proceedings by which the improvement is authorized and the cost ascertained and assessed against the properties locally benefited. The general law of Municipal Corporations and of Highways is treated in topics bearing those names respectively. Condemnation proceedings incident to the making of improvements or the opening of streets are treated in Eminent Domain and in Highways, II. The general law of taxation and of tax collection and sales for taxes is treated in Taxes.

Analysis.

I. Power, duty and occasion for exercise.
§ 1. In general.
§ 2. Power to grade, pave and improve streets.
§ 3. Power to lay or repair sidewalks.
§ 4. Power to lay or enlarge sewers.
§ 5. Power and duty of municipal council and other officers or boards.
§ 6. ——Power to determine materials.
§ 7. Power to require property owner to make improvement.
§ 8. ——Permission to abutter to improve street.
§ 9. Combining dissimilar improvements in one proceeding.
§ 10. Power and right of property owners to propose or oppose improvement.

II. Liability for costs, and funds, appropriations and provisions to meet same.
§ 11. Liability for expense and cost in general.

§ 12. Apportioning cost between local assessment and general fund.
§ 13. Rebates for walks or other improvements privately made.
§ 14. Funds, appropriations and provisions for cost.
§ 15. Repaving or replacement funds.

III. Preliminary proceedings for improvement.

§ 16. Petition for improvement.
§ 17. ——Persons entitled or qualified to petition.
§ 18. Preliminary inquest of necessity and benefits.
§ 19. Preliminary resolution or declaration of necessity.
§ 20. ——Sufficiency of resolution.
§ 21. ——Successive resolutions on one improvement.
§ 22. ——Unity or multiplicity of proceedings under one resolution.
§ 23. Resolution to determine manner of meeting cost.
§ 24. Estimate of cost and action on same.
§ 25. ——Sufficiency of estimates in gross.
§ 26. ——Sufficiency of plat, plan and specifications.
§ 27. Rescission or revocation of approval or action taken.
§ 28. Notice of improvement and hearing of objections.
§ 29. ——Sufficiency of service or publication.
§ 30. New notice on change of plans.
§ 31. Preliminary procedure for improvement by abutting owners.
§ 32. Conclusiveness of proceedings and right to review or attack.

IV. Proposals, contracts and bonds.

§ 33. In general; procedure preliminary to contract.
§ 34. Advertisements, bids, and letting of contracts.
§ 35. ——Necessity of letting contract to lowest bidder.
§ 36. ——Extra work and change agreements and new or additional contracts.
§ 37. Requisites, validity, interpretation, and effect of contracts.
§ 38. ——Stipulations as to hours or working conditions.
§ 39. Contracts specifying patented or monopolized materials.
§ 40. Letting work without formal competitive contract.

V. Injury to property and compensation of owners.

§ 41. In general.
§ 42. Waiver or estoppel to assert claim.

VI. Levying and making assessments.

A. In General.

§ 43. Theory, nature, general requisites, and validity of assessments.
§ 44. Beneficial character of work or improvement.
§ 45. Replacement or reconstruction work.
§ 46. Power and authority to make assessments.
§ 47. Proper board, body, or officer to make assessments.
§ 48. Predetermination of district to be assessed.
§ 49. Information, data and details on which to base assessment.
§ 50. Presumption as to validity of assessment.

B. PERSONS, PROPERTY AND DISTRICTS ASSESSABLE.

§ 51. Persons assessable in general.
§ 52. Property liable to or exempt from assessment.
§ 53. ——Beneficial proximity or abuttal on place improved.
§ 54. ——Property awarded damages for injury from improvement.
§ 55. ——Public property or property in public use.
§ 56. ——Railroads and public service properties.
§ 57. ——Cemetery property.
§ 58. ——Lands sold for delinquent taxes.
§ 59. ——Contracts exempting or relieving from assessment.
§ 60. Assessment districts and relation to area of benefit.
§ 61. ——Division of parcels or inclusion in more than one district.
§ 62. ——Power and authority to establish size and limits of district.
§ 63. ——Conclusiveness of action as to property benefited.

C. AMOUNT TO BE ASSESSED AND ITEMS INCLUDED.

§ 64. In general; limitations on amount or rate.
§ 65. Cost of improvement as limit.
§ 66. Items, expenses, and charges to be included.

D. VALUING AND APPORTIONING ASSESSMENTS; FRONT FOOT METHOD.

§ 67. Officer or body to make assessments.
§ 68. Relation of benefits to assessment.
§ 69. Relation of damages to assessment.
§ 70. Basis for computing and apportioning benefits and assessments.
§ 71. ——On basis of superficial area of property.
§ 72. ——On basis of foot frontage.
§ 73. ——On basis of land values.
§ 74. Assessment in parcels or in gross.
§ 75. Computation of amount and method of valuing lands.
§ 76. Dividing and combining parcels.

E. ASSESSMENT LIST, REPORT, OR RETURN AND ACTION THEREON.

§ 77. Assessment rolls and descriptions of parcels.
§ 78. ——Showing as to benefit equaling assessment.
§ 79. ——Effect of clerical errors.
§ 80. ——Certificate of board or officer making assessment.
§ 81. ——Effect and conclusiveness of certificate.
§ 82. Notice of assessment and opportunity for inspection.
§ 83. ——Evidence or proof of service.
§ 84. Hearing and review on return of assessment.
§ 85. Change or revision of assessment roll.
§ 86. Confirmation of assessment.
§ 87. Presumptions and evidence of confirmation.
§ 88. Conclusiveness of confirmation.

F. REASSESSMENTS AND ADDITIONAL ASSESSMENTS.

§ 89. In general; power to levy.
§ 90. Variations from original plans.
§ 91. Defects in original assessment curable by reassessment.

§ 92. Persons entitled to require or object to reassessment.
§ 93. Equalizing and adjustment of former assessments and payments.

G. Obligation, Lien and Enforcement of Assessments.

§ 94. Nature of obligation and time and manner of payment.
§ 95. Lien or charge in general.
§ 96. Extinguishment, merger or loss.
§ 97. ——Effect of adverse possession and limitations.
§ 98. Collection and enforcement of assessment.
§ 99. Property subject to sale for assessments.
§ 100. Enforcement against personalty.
§ 101. Defenses, bar or reductions of amount due.
§ 102. Costs and expenses of collection.
§ 103. Liability for expenses of illegal assessment.

VII. Illegal and excessive assessments and relief from same.

A. Defects and Irregularities and Effect of Same.

§ 104. In general; materiality of particular defects.
§ 105. Irregularities in bids and contracts.
§ 106. Vices in the assessments themselves.
§ 107. ——Interest of persons making or officiating in assessment.
§ 108. Irregularities in assessment roll or return and in proceedings thereon.
§ 109. Cure of defects.
§ 110. Persons entitled to question or object.
§ 111. Estoppel, waiver and bar of objections.
§ 112. ——Effect of petitioning for improvement.
§ 113. ——Knowledge of progress or completion of work without objection.

B. Appeal or Direct Judicial Review.

§ 114. In general.
§ 115. Review on certiorari.
§ 116. Waiver or loss of right.

C. Relief by Collateral Suit or Attack; Injunction, Vacating or Quieting Title.

§ 117. Collateral attack or impeachment in general.
§ 118. Persons entitled to equitable relief.
§ 119. ——Delay until improvement completed.
§ 120. Grounds and propriety of injunction against work or assessment.
§ 121. ——Against collection of assessment.
§ 122. ——Against payment of bonds for improvement.
§ 123. Necessary and proper parties to injunction.
§ 124. Pleading in injunction suits.
§ 125. Cross-bill to enforce assessment or share of cost.
§ 126. Suit in equity to set aside proceedings.
§ 127. ——Necessary and proper parties.
§ 128. Actions to quiet title.

D. Recovery of Excessive or Improper Payment.

§ 129. In general; actions for recovery.
§ 130. Involuntary payment and protest as condition precedent.

§ 131. Measure and amount of recovery.
§ 132. Defenses and bar to recovery.
§ 133. ——Estoppel, waiver or loss of right.
§ 134. Presumptions and evidence.

I. POWER, DUTY AND OCCASION FOR EXERCISE.

§ 1. In general.

[Note. It has not been deemed advisable to include in this topic statutory references which would have only local application. Accordingly the statutes cited are limited in number and are those having general scope, except where referred to in the digest paragraphs of the court decisions.]

Power to grade, pave and improve streets, see post § 2.

Power to lay and repair sidewalks, see post § 3.

Power to lay and enlarge sewers, see post § 4.

Power and duty of municipal council and other officers or boards, see post § 5.

Power to determine materials, see post § 6.

Power to require property owner to make improvement, see post §§ 7, 8.

Combining dissimilar improvements in one proceeding, see post § 9.

Power and right of property owners to propose or oppose improvements, see post § 10.

Liability for costs and funds, appropriations and provisions to meet same, see post II.

Preliminary proceedings for improvement, see post III.

Levying and making assessments, see post VI.

Illegal and excessive assessments and relief from same, see post VII.

Functions and powers of municipal corporations and mode of exercise, see Municipal Corporations, III.

Rights under charters of municipal corporations, see Municipal Corporations, III.

Proceedings to lay out and establish drains, see Drains, II, A.

Constitutional provision for uniformity of taxation as applying to special assessments for local improvements, see Taxes, I.

Public ownership of public service facilities, see Municipal Corporations, X.

Power to provide for public service or to operate utilities, see Municipal Corporations, III.

Procedure for local improvements and assessments in fourth class cities, see Comp. L. 1915, chap. 73, § 3106 et seq.

Procedure for local improvements and assessments in villages, see Comp. L. 1915, chap. 72, § 2704 et seq.

§ 2. Power to grade, pave and improve streets.

Power and right of property owners to propose or oppose improvement, see post ¶¶ 21, 22.

Power of municipal council to delegate to committee power to grade street, see Municipal Corporations, VIII.

Power to establish and change grades, see Highways § 118.

Paving in fourth class cities, see Comp. L. 1915, §§ 3094-3096.

Provisions for improvement of rural highways by local assessment, see Comp. L. 1915, § 4671 et seq.

¶ 1. The authority to pave streets in a city is a continuing power, and does not cease on being once exercised.—Williams v. City of Detroit, 2 Mich. 560.

¶ 2. The city of Detroit has authority to repave streets at the expense of adjacent property, when there is a necessity for repaving, and the method of procedure is the same as in other paving.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 3. The common council of a city may pave those portions of a street used as sidewalks and thus indirectly abolish the sidewalks. There is no rule of law requiring a portion of a street to be set apart for foot-passengers.—Brevoort v. City of Detroit, 24 Mich. 322.

§ 3. Power to lay or repair sidewalks.

Power to require property owner to lay or repair sidewalk, see post ¶ 14.

Duty of city or abutter to construct sidewalks, see also Highways § 107.

Provisions for construction of sidewalks along rural highways, see Comp. L. 1915, § 4571 et seq.

¶ 4. The provision for "repairing" sidewalks at the expense of the city in section 193 of the charter of the city of Detroit, was not intended to include an entire reconstruction when necessary, but relates to those ordinary repairs, which, without changing the character of the walk or amounting to substitution of one for another, are needed to keep the existing walk in a serviceable and safe condition.—Walker v. City of Detroit, 143 Mich. 427.

§ 4. Power to lay or enlarge sewers.

Power of highway commissioners to lay sewer in unincorporated village, see Townships.

¶ 5. The city of Grand Rapids has the power to construct a storm sewer in connection with the construction of a street where the sewer is constructed for surface water only and is necessary for the preserva-

tion of the street.—Gates v. City of Grand Rapids, 134 Mich. 96.

¶ 6. The fact that a sewer has been constructed for some distance in a city street does not prevent its extension and enlargement as the necessities of property farther out on the street require, or as the public health may demand.—Kuick v. City of Grand Rapids, 200 Mich. 582.

§ 5. Power and duty of municipal council and other officers or boards.

Power to determine materials, see post § 6.
General powers of municipal officers, see Municipal Corporations, XV; Officers.
Administrative and ministerial functions of municipal corporations in general, see Municipal Corporations, VIII.
Powers and functions of municipal corporations in general, see Municipal Corporations, III.
Authority of officers to make contracts for improvements binding on city, see Municipal Corporations § 186.

¶ 7. A city council has power to suspend or defer, and afterwards to resume, an improvement which it has declared to be a public necessity, and for which bids have been received; and the exercise of such power is entirely within its discretion, without reference to the reason for postponement.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 8. Under the charter of the city of Grand Rapids while the common council should avail itself of whatever knowledge or information the board of public works possesses in determining the general character of a public work, the authority for the expenditures necessary to its construction must originate with the common council, and includes the right to determine the question of cost, dimensions, and general character.—The Common Council of Grand Rapids v. Board of Public Works of Grand Rapids, 87 Mich. 113.

¶ 9. The provision of the charter of Detroit (compiler's section 314) that all sewers, water pipes, gas pipes, and all connections be made and completed at least one year before a street be paved, is, so far as it relates to water pipes and gas pipes, and their connections, inconsistent with the proper exercise of the general powers respecting street improvements conferred upon the common council, and is void; the matter of laying water pipes being entirely in the hands of the water board, and the laying of gas pipes being solely under the control of private corporations.—Goodwillie v. City of Detroit, 103 Mich. 283; Moore v. City of Detroit, 103 Mich. 292.

§ 6. ——Power to determine materials.

¶ 10. The board of public works of Grand Rapids under Laws 1873, Act No. 321, § 8, authorizing it to determine the kind or quantity of materials to be used in constructing any public work declared by the common council to be a necessary improvement, cannot adopt a different kind of material from that described in the resolution declaring the necessity.—Common Council of Grand Rapids v. Board of Public Works of Grand Rapids, 99 Mich. 392.

¶ 11. The authority given to the board of public works of the city of Grand Rapids by the charter to determine as to the particular kind and quality of materials to be used in the construction of any public work the construction of which the common council has declared to be a necessary improvement, has reference to the details and not to the general character of the work.—Common Council of Grand Rapids v. Board of Public Works of Grand Rapids, 87 Mich. 113.

¶ 12. A bill to set aside a sidewalk assessment was dismissed, where after complainants had been notified to build a sidewalk pursuant to certain specifications and had begun work on a tar walk, they were ordered to desist by the city attorney and subsequently continued the work with the alleged consent of the city engineer and an alderman, and where before the completion of the work an ordinance was passed extending the stone walk district to include complainant's property, and a resolution was also passed requiring complainants to build a stone walk, and where upon a notice of the passing of such resolution having been served upon complainants they stopped work, and, upon their refusal to build the stone walk, the city built it.—Scribner v. City of Grand Rapids, 119 Mich. 188.

§ 7. Power to require property owner to make improvement.

Permission to abutter to improve street, see post § 8.
Rebates for walks or other improvements privately made, see post § 13.
Procedure necessary for imposing liability on abutting owner to make improvement, see post § 31.
Duty of city or abutter to construct sidewalks, see also Highways § 107.
Power of municipal corporations in general, see Municipal Corporations, III.

¶ 13. A municipal ordinance is void for unreasonableness which requires a lot owner to build a sidewalk within five days after notice or be required to pay for its construction by the city.—Auditor General v. Hoffman, 129 Mich. 541.

¶ 14. The Detroit board of public works has no authority, except upon resolution of the common council, to notify a lot-owner to construct or repair a sidewalk.—Lynch v. Hubbard, 101 Mich. 43.

¶ 15. A notice to a property owner to repair a sidewalk, served upon him by an

inspector of the board of public works, who serves such notice without referring the matter to the board, and stamps on the notice the signature of the president of the board, is not a sufficient compliance with the Revised Ordinances of 1895, c. 56, § 13, of the City of Detroit, since under said ordinances the board itself is required to exercise its judgment in ordering said repairs.—Brady v. City of Detroit, 166 Mich. 252.

¶ 16. A city whose charter conferred upon the common council the control of its streets, had power to include a locality in a stone-walk district, and to compel an owner who had commenced to build a tar sidewalk, to change the material to stone.—In re O'Brien, 119 Mich. 540.

¶ 17. Section 57 of chap. 7 of the Charter of the City of Detroit, as amended (Local Acts 1901, No. 472), being section 198 of the Charter Comp. 1904, empowering the common council to require the owners or occupants of any land in the city to build when necessary, all sidewalks in the city in front of the property of such owner, is broad enough to include reconstruction when necessary.—Walker v. City of Detroit, 143 Mich. 427.

§ 8. ——Permission to abutter to improve street.

Rebates for walks or other improvements privately made, see post § 13.

¶ 18. The Detroit common council was not required by the act of April 13, 1841, to permit persons to pave the street in front of the lots owned or occupied by them, but was merely authorized so to do when it should deem it for the interest of the city. And the city ordinances contemplated the paving by lot owners or occupants only in case of special permission to do so from the council.—Williams v. City of Detroit, 2 Mich. 560.

§ 9. Combining dissimilar improvements in one proceeding.

Illegal or defective proceedings, see post VII.
Multiplicity of proceedings under one resolution, see post § 22.

¶ 19. Under the charter and local laws defining the powers of the Board of Public Works of the City of Grand Rapids and mentioning separately the making of "streets" and the construction of "sewers," the city cannot construct a sewer under a resolution providing for the grading and graveling of a street.—Peck v. City of Grand Rapids, 125 Mich. 416.

¶ 20. A city council having adopted a resolution for the grading and graveling of a street with curbing, bridges, culverts, catch-basins, approaches, and cesspools, could thereafter on reconsideration and as a substitute adopt a resolution adding to the foregoing storm water sewers, though it is contended and shown by evidence that no such improvement was necessary on account of the sandiness of the soil; since the court must assume that it was done as a legislative action of the city council regardless whether done on the recommendation of the city engineer or not.—Parsons v. City of Grand Rapids, 141 Mich. 467.

§ 10. Power and right of property owners to propose or oppose improvement.

¶ 21. Sections 3180, 3181, 3194, 3195 and 3196, Comp. Laws 1897, give to city common councils the power to initiate street improvements, to lay out assessment districts, and to determine what part of the cost shall be paid out of the general funds. They also provide for a system of giving notices to property owners, and the filing of plans and specifications of proposed improvements. Amendatory Act No. 136, Pub. Acts 1899, provided that when a majority of property owners subject to special assessment should petition for an improvement, the council should grant it. Held, this amendment did not give the owners the right to control a proposed paving improvement so as to dictate the kind of materials to be used.—Irish v. Common Council of City of Mt. Clemens, 156 Mich. 588.

¶ 22. Whether permission from the common council to lot owners on one side of an alley to grade the alley at their own expense and under their own management would give such owners the right to do anything in the way of grading except with the assent of the respective owners to be affected by the work, quære. Simple consent by a lot owner to the grading of the alley without charge to him by owners opposite, without proof of usage or custom to control or explain the meaning of this license, and in the absence of any evidence that, on being called upon, he had refused to allow or assign to the contractor employed by such lot owners any convenient place to deposit the gravel, would not authorize the contractor to carry it off beyond the alley, leaving the alley itself ungraded.—Cuming v. Prang, 24 Mich. 514.

II. LIABILITY FOR COSTS, AND FUNDS, APPROPRIATIONS AND PROVISIONS TO MEET SAME.

§ 11. Liability for expense and cost in general.

Apportioning cost between local assessment and general fund, see post § 12.
Rebates for walks or other improvements privately made, see post § 13.
Funds, appropriations and provisions for cost, see post § 14.
Repaving or replacement funds, see post § 15.
Persons, property and districts assessable, see post VI, B.
Amount to be assessed and items to be included, see post VI, C.

Valuing and apportioning assessments, see post VI, D.
Levying and making assessments, see post VI.
Illegal or excessive assessments and relief from same, see post VII.

¶ 23. Plaintiff contracted to construct a sidewalk and crossings for a village. The village gave defendant, an owner of real estate abutting on these walks, no notice that it sought to charge him or his real estate with the cost of their construction, and no proceedings were taken by the village authorities to assess the same. Defendant had no understanding with plaintiff to build the sidewalks for him, but knew they were in the process of construction. The village was incorporated under the general law for the incorporation of villages, which gave the village power to construct sidewalks and required the lots benefited to bear the expense or to require the owners to build and pay for them. Held, plaintiff could not recover of defendant for material, work and labor for the construction of the sidewalk in front of defendant's lots on the theory of an implied contract.—Labadie v. Perry, 170 Mich. 344.

¶ 24. A resolution for the opening of a street can properly require an apportionment of the damages among the premises benefited only in those cases in which such apportionment can be made under the charter, and not where the charter expressly provides that the damages shall be payable out of the city treasury, and the means therefor raised with the general city taxes.—Campau v. City of Detroit, 14 Mich. 276.

¶ 24a. Improvements in the city of Lansing, for which special assessments are authorized, are not chargeable on the city as ordinary corporate debts, and there is no liability to pay for them except through assessments made for that specific purpose.—Second Nat. Bank v. City of Lansing, 25 Mich. 207.

§ 12. Apportioning cost between local assessment and general fund.

See also post ¶ 307.

¶ 25. While it is true that a street to which every one has access, and which every person is as free to use as the abutting land-owners, must be maintained at public, and not a private, expense, except only to the extent that its improvement plainly and palpably benefits the property assessed in excess of the general benefit that all property derives from the improvement, the determination of the question of the benefit to be derived is vested in the municipal authorities, which determination is final in the absence of fraud.—Shimmons v. City of Saginaw, 104 Mich. 511.

¶ 26. It cannot be said that a special assessment for the construction of a sewer is fraudulent because the sewer as laid was for the benefit of the health of the city at large and to avoid polluting the waters of Flint River. It does not follow because of the necessity of carrying the sewer to a point where turning it into the river the public health would be as little harmed as possible that the sewer was built for the public health and should therefore become a general public charge.—W. F. Stewart Co. v. City of Flint, 147 Mich. 697.

¶ 27. As the legislature cannot fix an arbitrary percentage of the cost of a public improvement to be imposed upon a local assessment district without regard to the benefits received, Local Acts of 1895, No. 467, requiring at least half of the amount awarded as compensation to be assessed upon the district fixed by the common council, is unconstitutional.—City of Detroit v. Judge of Recorder's Court, 112 Mich. 588.

¶ 28. The legislature has no power to fix an arbitrary percentage of the cost of a public improvement to be imposed upon a local assessment district, regardless of the benefits received. Local Acts of 1895, No. 467, authorizing the City of Detroit to take private property for public use, and requiring at least one-half of the amount awarded as compensation to be assessed upon the district fixed by the common council, is therefore unconstitutional.—City of Detroit v. Judge of Recorder's Court, 112 Mich. 588.

§ 13. Rebates for walks or other improvements privately made.

Power to require property owner to make improvement, see ante § 7.

¶ 29. Where a city ordinance provides that if property owners build sidewalks according to a certain prescribed standard the city will reimburse the owners for a part of the cost, if for several years the city has permitted the owners to assign their claims for rebates to sidewalk contractors and has paid them, a sidewalk contractor may as assignee sue the city for a rebate assigned to him by a property owner.—Rice v. City of Pontiac, 173 Mich. 41.

¶ 30. Where a city ordinance requires that sidewalk contractors shall file a bond guarantying the work, a contractor who built a walk for a property owner under an ordinance entitling the owner to be reimbursed by the city for a part of the cost, and who filed a bond that was not officially accepted, may recover from the city on an assignment of the owner's claim if the jury believe that a commissioner of public streets informed him that his bond was all right and that he built the walk in question with the knowledge and consent of the commissioner.—Rice v. City of Pontiac, 173 Mich. 41.

¶ 31. Where a city ordinance provides that if property owners build sidewalks ac-

cording to a certain prescribed standard the city will reimburse them for a part of the cost, a sidewalk contractor suing the city as assignee of the owner's claim has the burden of proving that the quality of the work and material in constructing the walk conformed to the ordinance.—Rice v. City of Pontiac, 173 Mich. 41.

¶ 32. Where a city ordinance provides that if property owners build sidewalks according to a certain prescribed standard the city will reimburse them for a part of the cost, on a sidewalk contractor's suit against the city as assignee of the owner's claim, if the testimony is conflicting as to the quality of the work and material, the plaintiff may recover if the jury believe there has been a substantial compliance with the provisions of the ordinance.—Rice v. City of Pontiac, 173 Mich. 41.

§ 14. Funds, appropriations and provisions for cost.

Injunction against payment of bonds for improvement as remedy against illegal assessment, see post § 122.
Municipal bonds in general, see Municipal Bonds.
Revenues and appropriations of municipal corporations, see Municipal Corporations, XIII.
Power to issue municipal or public bonds, see Municipal Bonds, I.
Defective and illegal municipal bonds, see Municipal Bonds, III.
Power to borrow money in anticipation of assessments, see also Municipal Corporations ¶ 514.
Municipal debt making limits applicable to debts for local improvements, see also Municipal Corporations § 122.

¶ 33. The action of a city council in incurring expenditures for an improvement without providing funds for such improvements and to meet the obligations of the contracts, as required by the city charter, is invalid.—Bay City Traction & Electric Co. v. City of Bay City, 155 Mich. 393.

¶ 34. Charter of Grand Rapids tit. 10, § 3 (Local Acts 1877, No. 282), which provides that whenever there shall be found in the city treasury any sum of money not otherwise appropriated, or whenever any city fund shall contain a balance after all legal demands against it shall have been satisfied, the same shall be transferred by the city treasurer to the general fund under the direction of the common council, is not applicable to special improvement funds.—Thayer v. City of Grand Rapids, 82 Mich. 298.

¶ 35. A loan by the common council for a special improvement in anticipation of a special assessment, but not to exceed the amount of such assessment, is authorized by Comp. L. 1897, § 2872, and hence such loan is valid though the assessment was irregular because levied wholly against the property in excess of the per cent permitted by statute and a new assessment was required.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 36. Where the proportion of the cost of the construction of a sewer to be paid by a city, as determined by the council, exceeded by $180 the sum appropriated in the annual appropriation bill for that purpose, which excess was appropriated from the general sewer fund, land-owners who seek to enjoin the collection of special assessments upon their property for the construction of such sewer connot complain because of non-submission of the question of the appropriation of the $180 to the electors, as required by the charter, they not being injured thereby.—Townsend v. City of Manistee, 88 Mich. 408.

¶ 37. As taxes which the Laws 1869, Act No. 477 permits to be assessed against vacant lots in front of which water pipes are laid are not devoted to any specific purpose, they must go into the general fund; and as the statute does not apply them to expenses or constructions on the street or in any district within which they are raised, nor proportion them to the cost of the improvement, they cannot be classed as local assessments.—Jones v. Detroit Water Com'rs, 34 Mich. 273.

¶ 38. Plaintiff's proportion of deficiency in fund of one public improvement cannot be set off in his suit for share of surplus above expenses of another improvement.—Thayer v. City of Grand Rapids, 82 Mich. 298.

§ 15. Repaving or replacement funds.

Levying and making assessments for replacement or reconstruction work, see post § 45.

¶ 39. An improvement of a city street 200 feet wide, of which 40 feet in width in the center was originally paved, consisting of a driveway of asphalt 25 feet wide on each side of a strip 100 feet wide left in the middle of the street for park purposes, constitutes a repavement, where there is nothing to show that the original pavement was inadequate, within a provision in the charter requiring the cost of all "repaving" to be paid out of the repaving fund, instead of by the abutting lot owners.—Dickinson v. City of Detroit, 111 Mich. 480.

III. PRELIMINARY PROCEEDINGS FOR IMPROVEMENT.

§ 16. Petition for improvement.

Persons entitled or qualified to petition, see post § 17.
Preliminary inquest of necessity and benefits, see post § 18.

Preliminary resolution or declaration of necessity, see post §§ 19-22.
Resolution to determine manner of meeting cost, see post § 23.
Estimate of cost and action on same, see post §§ 24-26.
Rescission or revocation of approval or action taken, see post § 27.
Notice of improvement and hearing of objections, see post §§ 28, 29.
New notice on change of plan, see post § 30.
Preliminary procedure for improvement by abutting owners, see post § 31.
Sufficiency of petition, see also post ¶ 95.
Effect of petitioning for improvement on right to object or question assessment, see post § 112.
Conclusiveness of proceedings and right to review or attack, see post § 32.
Levying and making assessments, see post VI.
Proposals, contracts and bonds, see post IV.
Preliminary procedure for improvement by abutting owners, see post § 31.
Effect of petitioning for improvement on right to recover excessive or illegal assessment involuntarily paid, see post ¶ 443.
Estoppel to claim damages by joining in petition for improvement, see post § 42, ¶¶ 123, 124.
Petition and proceedings for construction and repair of highways, see also Highways § 112.
Application and proceedings thereon to lay out and establish drains, see Drains, II, A.

¶ 40. Under a statute providing that street improvements may be made by the town board "upon petition of a majority of the resident property holders upon such highway or street," names upon a petition which was laid on the table and never used cannot be counted towards the majority requisite to authorize the ordering of the improvement upon a second petition.—Aplin, Auditor-General v. Fisher, 84 Mich. 128.

¶ 41. To determine the frontage of the real estate abutting a pavement under a petition for paving a street, it is necessary to measure the pavement and then deduct the width of the intersecting streets and alleys from the length thereof.—Brady v. City of Detroit, 166 Mich. 252.

§ 17. ——Persons entitled or qualified to petition.

Persons entitled to require reassessment, see post § 92.
Persons entitled to object or question improvement, see post § 110.
Sufficiency of signature of one spouse on petition for local improvement where property held by the entireties, see Husband and Wife ¶ 69.

¶ 42. The fact that jurors in condemnation proceedings must be males as well as freeholders does not support the conclusion that a female freeholder may not exercise the rights of a property owner, and join with other property owners in procuring public improvements.—Patterson v. Mead, 148 Mich. 659.

¶ 42a. Church societies owning lands fronting upon a street must, it seems, be regarded as "resident property holders," the signatures of a majority of whom are required upon a petition for the improvement of such street.—Aplin, Auditor-General v. Fisher, 84 Mich. 128.

§ 18. Preliminary inquest of necessity and benefits.

Relation of benefits to assessments, see post § 68.
[Note. In so far as the preliminary proceedings are condemnatory in their nature and object they have been treated ante in Eminent Domain and Highways, II, B, 5 respectively. For cases on "necessity of taking," see those topics.]
Condemnation and compensation incident to establishment of drains, see Drains §§ 27 et seq., 55, 56.
Ascertainment of general benefits to public as criterion of public necessity for opening or extension of street, see Highways, II, V.
Public uses and necessities for purposes of condemnation, see Eminent Domain, II.
Condemnation proceedings in general, see Eminent Domain, V.
Necessity and measure of compensation for appropriated property, see Eminent Domain, IV.

¶ 43. The owner of property taken for a public improvement is entitled to full compensation, and when the damages are to be charged on property according to its benefits, no property can lawfully be charged with more than its benefits, and if the aggregate benefits do not equal the cost, that disproves the necessity of taking it and ends the inquiry.—Paul v. City of Detroit, 32 Mich. 108.

¶ 44. Act 124 of 1883, regulating assessments of local benefits, as amended by act 48 of 1887 (How. St. §§ 3064a-3064y) requires the jury to consider how much benefit the public generally will receive from the proposed improvement, and makes it unnecessary for the jury to consider the local benefits.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 45. It would seem that in street opening proceedings, the question of the necessity of the improvement and the valuation of the property may be determined by different juries.—Boussneur v. City of Detroit, 153 Mich. 585.

¶ 46. Laws 1883, Act No. 124, for taking land for streets (How. St., pp. 1295-1300), is not clearly open to the objection that it

does not require the necessity of the improvement to be determined by a jury. And if the provisions for special taxation districts are invalid, they do not invalidate the entire act, since a general tax is also contemplated.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

§ 19. Preliminary resolution or declaration of necessity.

Sufficiency of resolution, see post § 20.
Successive resolutions on one improvement, see post § 21.
Unity or multiplicity of proceedings under one resolution, see post § 22.
Resolution to determine manner of meeting costs, see post § 23.
Preliminary procedure for improvement by abutting owners, see post § 31.
Conclusiveness of proceedings and right to review or attack, see post § 32.
Cure of defective resolution by adoption of new resolution and reassessment, see post ¶ 305.
Proceedings for construction and repair of highways, see also Highways § 112.
Proceedings to lay out and establish drains, see Drains, II, A.
Relief against invalid resolutions of municipal corporations, see Municipal Corporations, VII.

¶ 47. The resolution of a council as to the necessity for an improvement is jurisdictional.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 48. A preliminary resolution declaring that a public improvement is deemed a necessity is jurisdictional only if required by statute or municipal charter, when a failure to comply with such requirement will vitiate all subsequent proceedings.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 49. Where a city charter provides that when the council shall decide an improvement to be necessary they shall so declare by resolution, such declaration of the necessity is a distinct preliminary act, indispensable to give jurisdiction of future proceedings.—Hoyt v. City of East Saginaw, 19 Mich. 39.

¶ 50. The charter of the city of Saginaw, title 6, § 1 which makes the declaration by the common council of the necessity of public improvements, the cost, or any portion of the cost of which is to be assessed upon the locality of the improvement, essential as preliminary to the making of the same, does not contemplate that, before a tax shall be levied or bonds issued to provide the fund out of which the proportion of the cost to be borne by the city is to be paid, such necessity shall be first declared.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 51. Under Port Huron Charter, ch. 7, § 15 (Loc. Acts 1895, No. 381), which provides that no resolution imposing taxes, or incurring any indebtedness in excess of $50, and no ordinance, shall be passed at the same meeting as introduced, if objection is made thereto, "and no ordinance shall be passed except by a two-thirds vote of the aldermen elect," a resolution or proceeding imposing a special assessment does not require a two-thirds vote, such provision applying to the passage of ordinances alone.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 52. Under Act 268, P. A. 1909, amendatory of the Grade Separation Law (secs. 4229 to 4261, C. L. 1897), postponing the institution of judicial proceedings for the determination of the public necessity for making an improvement and the assessment of damages therefor until after the completion of the work, and providing that the petition, as the commencement of judicial proceedings, might be filed within one year after the completion of the work of separating the grades, the provision providing that a resolution of necessity must be passed and attached to the agreement and filed with the city attorney, as a condition precedent, is construed to conform to the amendment, and the resolution need not be passed until after the work is completed, but in time to be filed with the city attorney previously to the institution of the judicial proceedings.—Mead v. Michigan Cent. R. Co., 174 Mich. 521.

¶ 53. Where a city council after ordering a public improvement adopted a resolution deferring the letting of the contract, and where the bids which had been advertised for were returned unopened, the council could afterwards, without another declaration of public necessity, let a contract for making such improvement.—Davies v. City of Saginaw, 87 Mich. 439.

§ 20. ——Sufficiency of resolution.

See also ante ¶ 24, and post ¶ 178.
Relief against invalid municipal resolutions, see Municipal Corporations, VII.

¶ 54. The declaration of the necessity of a public improvement does not necessarily involve an enumeration of details, but, although general in character, covers the doing of whatever is deemed or found to be necessary in the course of an improvement of the character designated.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 55. A resolution declaring that a public improvement is "deemed advisable" is sufficient where neither statute nor municipal charter requires it to be declared a "public necessity."—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 56. The determination by the common council of Detroit to pave a street with stone is sufficiently declared by an order directing a contract for the work to be made.—Williams v. City of Detroit, 2 Mich. 560.

¶ 57. The jurisdictional step of declaring a proposed improvement of a sewer system a public necessity must be deemed to have been taken, although it is necessary to use larger pipe and dig a deeper trench and to extend the sewer, where the resolution provides for the "lowering" of the existing main and laterals and the construction of an extension on the same street.—Kuick v. City of Grand Rapids, 200 Mich. 582.

¶ 58. A statute (East Saginaw charter—Laws 1859, Act. No. 246; Sess. L. 1859, p. 997, § 2) requiring the resolution of a city council ordering a public improvement to "describe the contemplated improvement" is substantially complied with when the order for the paving of a street described the improvement as "the paving of a street with the Nicholson pavement," and for the purpose of the act this description will include such incidental work as the removal of the earth for paving and the setting of curb-stones. —Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 59. A resolution of a common council declaring the necessity of a street improvement is not invalidated by including "the necessary bridges, culverts," etc., without specifying what was necessary, especially if it does not appear that anything was necessary beyond the improvement of the street; the resolution does not delegate authority to decide upon the necessity, as details may afterwards be settled by the council.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 60. A resolution of the common council of a city, declaring the paving of a street to be a necessary public improvement, was silent as to the width of the roadway. Held, that this fact did not vitiate the proceedings. —Fuller v. Grand Rapids, 105 Mich. 529.

§ 21. ——Successive resolutions on one improvement.

Conclusiveness of proceedings in general, see post § 32.

¶ 61. The council has power to reconsider a resolution fixing an assessment district, and to enlarge the district by subsequent action. —Trowbridge v. City of Detroit, 99 Mich. 443.

¶ 62. The superintendent of public works of a city submitted plans and specifications for a proposed paving improvement with estimates for six kinds of pavements. The council adopted his recommendations by resolution. Later they passed a second resolution selecting the particular kind of pavement decided upon. Held, the second resolution did not vacate the first so as to make the proceedings void for irregularity.—Auditor General v. Wellman, 160 Mich. 512.

§ 22. ——Unity or multiplicity of proceedings under one resolution.

Combining dissimilar improvements in one proceeding, see ante § 9.

¶ 63. The common council of a city may provide by resolution for the improvement of a part of a street at a time, when only a part needs improving at the time or in the way provided; but to lay several assessments at the same time for improving different parts of the same street in the same way must often be highly inexpedient.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 64. The fact that a single street has different names for different parts of it does not preclude the whole of it being paved under a single resolution of the common council. The unity of the work must determine the right to deal with it as a whole and not the diversity of names that may be given to its various parts.—Cuming v. City of Grand Rapids, 46 Mich. 150.

§ 23. Resolution to determine manner of meeting cost.

Estimate of cost and action thereon, see post § 24.

Conclusiveness of proceedings and right to review or attack, see post § 32.

Preliminary resolution as to necessity, see ante § 19.

Relief against invalid municipal resolution, see Municipal Corporations, VII.

¶ 65. Where, after the completion of an improvement, the common council of Saginaw passed a resolution reciting the improvement, the amount of its total cost, the apportionment of the cost among the parties interested, and the amount to be assessed on the lands benefited, such action was in full compliance with the charter (Local Acts 1885, No. 355, tit. 6, § 7).—Auditor-General v. Maier, 95 Mich. 127.

¶ 66. By a joint construction of the city charter of Saginaw, tit. 6, §§ 6, 7, it was held that a declaration by the common council that the expense of a public improvement shall be defrayed by the property owners benefited need not be made before the work is begun, but may be made after the improvement is completed.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 67. Laws 1883, Act No. 124, provides that an assessment for benefits where a city has taken land for public use, shall be levied and collected as is provided in the charter for collecting the expense of a public improvement when a street is graded. Held, that there was no merit in the objection that a resolution of the city council directing the assessment to be made omitted the words "where a street is graded."—Beecher v. City of Detroit, 92 Mich. 268.

¶ 68. A resolution passed by the common council of Kalamazoo, authorizing and directing city assessors to make a special assessment roll for a street improvement held a sufficient compliance with § 7, chap. 23, of the City Charter, Local Act of 1897, No. 475, requiring a statement of the method of

assessment.—City of Kalamazoo v. Ferris, 194 Mich. 484.

§ 24. Estimate of cost and action on same.
Sufficiency of estimates in gross, see post § 25.
Sufficiency of plat, plan and specifications, see post § 26.

¶ 69. Comp. L. 1897, § 2868, requiring an estimate of the expenses to be made before any money shall be borrowed, raised, or expended for the purchase or construction of water works in any village, is not sufficiently complied with by a tentative estimate made by engineers, which was accompanied by written instructions and suggestions whereby it could be reduced in amount, when there was no official action upon the acceptance or adoption of such estimate.—Richardi v. Village of Bellaire, 152 Mich. 560.

¶ 70. A provision that the board of public works shall estimate the cost of a proposed public improvement and report it to the common council before an assessment is made therefor is sufficiently observed if the board adopts, approves and reports to the council an estimate made by the city surveyor, it being proper for the board to make use of the surveyor's services in preparing the estimate.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 71. Charter of the City of Detroit, chap. 15, § 12, providing that when any public improvement is proposed, the common council shall refer the matter to the board of public works, which upon examination shall report to the council, giving detailed estimates of the cost of the improvement and make recommendations, is not violated where the board assumes the initiative and sends a recommendation to the council that a street should be paved, accompanied by a detailed estimate of the cost, and the council then approved it.—Cass Farm Co. v. City of Detroit, 124 Mich. 433, aff'd 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

¶ 72. The estimate of the board of public works, previously made and submitted to the council, specified a roadway 38 feet wide, being the width of the roadway as then in use. Before the contract for paving the street was entered into, the plans and specifications were filed, showing the roadway to be 42 feet wide, and bids were solicited on such plans and specifications, which had been adopted by the board of public works and council, and the contract was let accordingly. Held, that the change in the width of the roadway did not vitiate the proceedings.—Fuller v. City of Grand Rapids, 105 Mich. 529.

¶ 73. The action of a city council in incurring expenditures for an improvement without submitting the question to and procuring an approval of the contracts by the board of estimates is invalid.—Bay City Traction & Electric Co. v. City of Bay City, 135 Mich. 388.

¶ 74. The public works act of Detroit requires proposed public improvements to be submitted to the board of public works for estimates and recommendations. Held that bids for paving contracts could not properly be invited until such reference and report.—Butler v. City of Detroit, 43 Mich. 552.

§ 25. ——Sufficiency of estimates in gross.

¶ 75. Whether an assessment for a public improvement is invalid because the estimate of its cost was submitted in gross and not in detail, and whether, if the estimate was adopted, any question can afterwards be raised, quære.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 76. Where the common council of a city, pursuant to the charter, has declared what proportion of the expense of making a public improvement shall be defrayed by an assessment upon the lands benefited thereby, and the board of public works has reported to the council an estimate in detail of the probable cost and expense of the improvement, a further provision (Local Laws 1891, title 6, § 5, p. 491) requiring said board, after the improvement has been completed, to certify to the council "a detail statement of the cost of such improvement, showing the amount to be assessed upon the property benefited," is sufficiently complied with by the submission of a tabular statement showing the amounts in gross to be paid by the city and by the property owners, respectively, by reason of the improvement.—Duffy v. City of Saginaw, 106 Mich. 385.

¶ 77. The charter of Detroit requires the common council to secure in advance from the board of public works a detailed estimate of the cost of a proposed improvement. Where the council called upon the board for such an estimate and the board reported the estimated cost in gross, upon which the paving was ordered, it was held in a suit to enjoin collection of an assessment for such paving that as no further particulars had been asked for it must be assumed that the information received was sufficiently specific to enable the council to act intelligently.—Goodwillie v. City of Detroit, 108 Mich. 283.

§ 26. ——Sufficiency of plat, plan and specifications.

See also post ¶ 180.

¶ 78. The provision in the revised charter of Grand Rapids of 1883, p. 129, § 8, that the board of public works, when the common council decides that the construction of any public work is a necessary improvement, shall determine as to the kind and quantity of materials to be used, and estimate the probable cost and expense of the work, and of the materials to be used in detail, and

cause the necessary plans and specifications to be prepared, was held substantially complied with, where, on receiving a resolution for the construction of a sewer, the board of public works directed the city surveyor to prepare the necessary plans and specifications, and where he at once presented plans already prepared by him under the direction of the board, which contained a profile of the proposed sewer, and showed in detail the manner of construction, the size and shape, and the kind and quantity of materials to be used, the cost of construction and of material not being carried out in detail, but being susceptible of computation from the data furnished, and which plans, etc., were examined and approved by the board at the same meeting.—Baisch v. Grand Rapids, 84 Mich. 666.

¶ 79. The plans and specifications required to accompany the report of the superintendant of public works on a petition for a paving improvement could not be found in the files of the city clerk. The council in adopting the superintendent's recommendation to order the improvement had referred in its resolution to these plans and specifications, and adopted them. Held, the evidence was sufficient that the said plans were before the city council when it made the resolution.—Auditor General v. Wellman, 160 Mich. 512.

§ 27. Rescission or revocation of approval or action taken.

Conclusiveness of proceedings and right to review or attack, see post § 32.

¶ 80. The recommendation of the board of public works to the city council that the building of a sidewalk be deferred for one year was not a rescission by implication of action previously taken by such board in establishing the grade for such walk, under the direction of such council; since the action recommended was delay, merely, and the council did not acquiesce.—Cuming v. Gleason, 140 Mich. 195.

§ 28. Notice of improvement and hearing of objections.

Sufficiency of service or publication, see post § 29.
New notice on change of plans, see post § 30.
Conclusiveness of proceedings and right to review or attack, see post § 32.
Failure to give notice as material defect, see post ¶ 336.
Abortive attempt to cure want of notice by resolution ordering reassessment, see post ¶ 306.

¶ 81. Notice to property owners of city's intent to make special assessments for improvements is not necessary in the absence of statute.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

¶ 82. In a proposed paving improvement under Act No. 542, Local Acts 1903, c. 17, abutting owners are not entitled to notice outside of the general publication specified by the statute.—Auditor General v. Wellman, 160 Mich. 512.

¶ 83. Where, in the levy of a special assessment for a sewer system, the city charter requires notice of the proposed improvement and of the district to be assessed to be published in the official newspaper of the city, such notice is fatally defective if it fails to give the approximate location of the proposed improvement and the property to be assessed therefor.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

¶ 84. Where notice of the making and filing of the map or plat showing the district included in a special assessment district is given according to law, notice to one owning land within such district must be presumed.—Van Zanten v. City of Grand Haven, 174 Mich 282.

§ 29. ——Sufficiency of service or publication.

¶ 85. An ordinance requiring that notice of a proposed public improvement shall be served upon a land-owner personally, or by leaving it at his place of residence, is not complied with by leaving such notice on the table in his business office during his absence therefrom.—Mills v. City of Detroit, 95 Mich. 422.

¶ 86. Under the charter of Detroit, where the common council makes a contract for a sewer without an estimate of the cost thereof from the board of public works, and where notice of the improvement is not served upon the owner of the land to be assessed as directed by the ordinance, and where it does not appear that such notice was published as the ordinance directs, the proceedings are void, and the collection of a tax levied to pay for the sewer is properly enjoined.—Mills v. City of Detroit, 95 Mich. 422.

¶ 87. Publication of notice of hearing of objections to a proposed improvement by the city clerk under the instructions of the common council, was a sufficient compliance with Comp. L. 1897, § 3195, requiring the council to give notice of such hearing.—Auditor General v. Calkins, 136 Mich. 1.

¶ 88. Under Comp. L. 1897, § 3195 requiring the giving of notice of a proposed improvement, a publication of notice of hearing objections made by the clerk under the instruction of the common council, was a sufficient compliance with the requirement that such council give notice of such hearing.—Auditor General v. Calkins, 136 Mich. 1.

¶ 89. Where a notice is required to be published for five successive days, inserting it in a paper for three successive days, and on the fifth and sixth days, is not sufficient, it appearing that the paper was published

on the omitted day, which was Sunday.—Mills v. City of Detroit, 95 Mich. 422.

¶ 90. Under Comp. L. 1897, § 3195, requiring the common council to publish notice for at least two weeks, of a proposed improvement the cost of which is to be defrayed by special assessment, publication upon Thursday of one week and upon Thursday of the following week, of a notice that the board would meet to hear objections upon Friday of the second week, was not a compliance with the statute.—Auditor General v. Calkins, 136 Mich. 1.

§ 30. New notice on change of plans.

¶ 91. A city council on August 20, 1906, voted a special assessment for a sewer system, and set September 17, 1906, as a day to hear objections. On September 17, 1906, instead of hearing objections, it ordered the sewer plans to be amended. On October 8, 1906, it adopted the modified plans by resolution, and provided therein for the special assessments. Held, the resolution of October 8 was independent of that of August 20, and any irregularities as to notice in proceeding upon the resolution of October 8 were not cured by the acts done pursuant to the resolution of August 20.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

§ 31. Preliminary procedure for improvement by abutting owners.

Power to require abutting owner to make improvement, see ante § 7.

¶ 92. Where, by the provisions of a city charter, before a person can be required to build a sidewalk, the council must pass an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be constructed, the enactment of such ordinance is a condition precedent to any liability for the penalty prescribed for failing to build said sidewalk.—City of Port Huron v. Jenkinson, 77 Mich. 414.

§ 32. Conclusiveness of proceedings and right to review or attack.

See also post ¶ 376.

Relief from illegal or excessive assessments, see post VII.

Review of assessment on certiorari, see post § 115.

¶ 93. The action of municipal officers with reference to public improvements, when within the powers conferred upon them, is final, in the absence of fraud. Whether the courts have jurisdiction to interfere even where fraudulent conduct is shown, quære.—Nelson v. City of Saginaw, 106 Mich. 659.

¶ 94. Where the power exists to repave a street once improved, the question of necessity must be determined by the body in whom such power is vested, and is not open to review or attack collaterally, except in a clear case of fraud.—Shimmons v. City of Saginaw, 104 Mich. 511.

¶ 95. A petition for paving a street recited that it was signed by the owners of a majority of the property on both sides thereof. The department of public works, to whom the petition was referred, reported back to the common council that the petitioners were owners of the greater number of feet frontage of real estate abutting on the avenue proposed to be improved, and recommended the pavement. The common council accepted the report and ordered the street to be paved. Held, the finding of the council that the owners of a majority of the frontage joined in the petition was conclusive until the contrary was shown by a complainant seeking to enjoin the collection of an assessment, and the burden of proving the contrary was on said complainant.—Brady v. City of Detroit, 166 Mich. 252.

¶ 96. Whether a majority of the property-holders have signed a petition for a street improvement is not conclusively determined by the town board, but, in the absense of statutory provision to the contrary, may be inquired into collaterally; and the want of such majority may be shown as a defense in an action to collect the assessment.—Aplin, Auditor General v. Fisher, 84 Mich. 128.

IV. PROPOSALS, CONTRACTS AND BONDS.

§ 33. In general; procedure preliminary to contract.

Advertisements, bids and letting of contracts, see post §§ 34-36.

Requisites, validity, interpretation and effect of contracts, see post §§ 37, 38.

Contracts specifying patented or monopolized materials, see post § 39.

Letting work without competitive contract, see post § 40.

Necessity for second preliminary resolution of necessity, see also ante ¶ 53.

Irregularities in bids and contracts as affecting validity of assessment, see post § 105.

Contracts of municipal corporations in general, see Municipal Corporations, XI, and Public Contracts.

Interpretation and performance of provisions relating to construction work, see Building Contracts.

Power and authority to make public contracts in general, see Public Contracts, I.

Initiating, forming and executing public contract in general, see Public Contracts, II.

Implied contracts for public work, see Public Contracts, V.

Bond or indemnity for performance and payment of labor and claims, see Public Contracts, VII.

Rights against bond for injury from contractor's negligence, see Public Contracts, VII.

Actions to enforce bonds, see Public Contracts, VII.
Who are laborers and materialmen and subcontractors and what is material within meaning of statutes requiring bonds on public contracts for security of such, see Public Contracts, VII.
Liability of abutters, private persons and corporations to indemnify or exonerate the public, see Highways, XII, G, 2.

¶ 97. No contract for paving can be made until the common council has submitted the matter to the board of public works for estimates and recommendations and received from that board the reports and information provided for in the public works act. But an assessment will not be held void when this has been done substantially in accordance with the purposes of that act but in an irregular manner.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 98. Under the charter of Grand Rapids, conferring on the council the power to require and make street improvements, allowing it to proceed therewith and anticipate collection of assessments and taxes, and providing for notice to the taxpayers after the assessments and in relation thereto, and requiring no other notice, it is not necessary to give them any notice before letting the contract and approving the bond for such work.—Parsons v. City of Grand Rapids, 141 Mich. 467.

§ 34. Advertisements, bids, and letting of contracts.

Necessity of letting contract to lowest bidder, see post § 35.
Extra work and change agreements and new or additional contracts, see post § 36.
Effect of defective advertisement, see post ¶ 338.
Bids and letting of public contracts in general, see Public Contracts, II.

¶ 99. Notices to bidders must contain the substantial requisites of specifications, so that bidders can from such notices obtain the information necessary to enable them to prepare their bids.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 100. Under a municipal charter which requires contracts to be publicly let to the lowest responsible bidder it is not necessary, in advertising for proposals to pave a street, that the kind of pavement should be specified. The charter provision aims, for the public benefit, to secure competition among contractors for public works and supplies, and necessarily leaves something to the discretion of the city authorities, who must determine in each case what competition the nature of the case will admit of, and the best method to secure it.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 101. A city charter (Local Laws 1889, title 13, § 3, p. 945) provided that, when the making of a public improvement should have been determined upon, the board of public works should advertise for proposals for furnishing the material and for the performance of the work. No time was fixed for which the publication should continue. An improvement having been ordered by the council, the board instructed its clerk to "advertise for proposals" until a certain date, but the first publication was not made until three days after such direction had been given. Held, that the board, by receiving bids at the time specified, would be presumed to have ratified the action of the clerk, and determined that the advertisement was for a sufficient period.—Duffy v. City of Saginaw, 106 Mich. 335.

¶ 102. Where a statute required that the board of public works should advertise for paving bids, an advertisement was held sufficient that purported to issue from the office of the board, signed with the name of its president, and stating that bidders must file with the board a satisfactory bond, and which was afterward acted upon by that body.—Beniteau v. Detroit, 41 Mich. 116.

¶ 103. A street-paving bid is not defective in not distinguishing between the portions of the improvement chargeable to the lots fronting on the street, and the portion chargeable to the city, where the relative proportions have already been fixed.—Beniteau v. Detroit, 41 Mich. 116.

¶ 104. Whether, where work to be done under a municipal contract involves operations the difficulty and cost of which cannot be accurately foreseen, there can be any flexibility in the terms of the contract and any scope for a choice among bids, quære.—McBrian v. City of Grand Rapids, 56 Mich. 95.

¶ 105. Under a charter which requires that contracts be let to the lowest bidder, the city council has no power to release the lowest bidder from his offer, claimed to be a mistake, without advertising again, and allowing the other bidders to revise their bids; and an assessment based upon such proceedings is void.—Twiss v. City of Port Huron, 63 Mich. 528.

¶ 106. Complainant made a bid to defendant village on a paving job and the bid was accepted by resolution of the village council. Defendant expected to raise the funds to meet the contract by special assessment. It later learned that its taxing power was not adequate to do this and rescinded its former action, no written contract having been executed. There was evidence that complainant and defendant at the time of the acceptance of complainant's bid expected a formal written contract would be entered into. Held, no valid contract resulted.—Central Bitulithic Paving Co. v. Village of Highland Park, 164 Mich. 223.

§ 35. ——Necessity of letting contract to lowest bidder.

See also post ¶¶ 118, 119.

¶ 107. In passing upon bids the city authorities may give regard to the relative value of the kinds of paving for which there are bids made; and the rejection of the kind for which the lowest bid is made is not, therefore, necessarily erroneous.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 108. Whether, where there are two bidders upon the same kind of patented pavement, the common council may reject the lowest bid on the ground that those who make it, having no right under the patent to lay the pavement, are not responsible bidders, notwithstanding they have filed a bond of indemnity as required by resolution of the council, and to contract with the next higher bidders who own the patent, quære.—Kelly v. Hendrie, 26 Mich. 263.

¶ 109. An assessment by a village council of a tax to pay for paving, which by ordinance should be let by contract to the lowest bidder, is void, where it appears that no bid was accepted, but there was a writing not purporting to be a bid responsive to the call and not appearing to be the lowest.—Whitney v. Hudson Common Council, 69 Mich. 189.

§ 36. ——Extra work and change agreements and new or additional contracts.

¶ 110. Where a city charter requires contracts for improvements in any streets to be let by advertisement to the lowest bidder, a contract with the successful bidder to do extra work in raising the grade of a street not included in the original specifications, is a contract for "improvements" within the meaning of the charter.—Peterson v. City of Ionia, 152 Mich. 678.

¶ 111. The charter of Grand Rapids, title 6, § 15, provides that the plans and specifications of the work for the payment of which an assessment is ordered to be made may be changed, and the work added to or diminished, at any time before the completion of the assessment roll therefor. Held, that this does not enable the council to add to a contract for grading a street another contract for paving the gutters in such street, thus materially increasing the cost of the work over the estimate of the board of public works, and over the contract price, without again seeking competitive bids and letting the contract to the lowest bidder as required by the charter.—Ely v. City of Grand Rapids, 84 Mich. 336.

¶ 112. Where a common council advertised for bids for paving a street a specified distance, and then had a contract made with the lowest bidders for paving only a portion of that distance "or further, if ordered," and afterward directed a contract to be made with the same parties for paving the rest of the distance, it was held that the whole work was covered by the original contract, and that the action of the council in ordering the latter part of the work was not the letting of a new contract requiring a second advertising for proposals.—Brevoort v. City of Detroit, 24 Mich. 322.

¶ 113. Local Acts 1897, No. 448, § 120 (Charter of Bay City), provides by implication for the letting of contracts on bids to the lowest bidder, and section 134, authorizing "changes," was not intended to confer the power to dispense with the formalities of a new contract after the original plan had been changed.—Auditor General v. Stoddard, 147 Mich. 329.

¶ 114. A special assessment levied on a resolution of the common council of Bay City which changed a contract regularly let for the construction of street pavements so as to widen the pavement, after work had been commenced under the original plan and contract is invalid; the charter provision authorizing changes in a contract (Local Acts 1897, No. 448, § 134) was not intended to confer the power to dispense with the formalities of a new contract after an original plan has been changed; and the facts that only a mathematical calculation is required to determine the cost of the additional work, that the original contract provided that changes could be made when necessary, or when deemed advisable by the city engineer, and that the right was reserved without incurring any increased liability as to price to increase or diminish the amount of work or material within limits deemed advisable by the common council did not authorize the council to make the change in the contract by resolution after work had been commenced.—Auditor General v. Stoddard, 147 Mich. 329.

§ 37. Requisites, validity, interpretation, and effect of contracts.

Stipulations as to hours or working conditions, see post § 38.

Absence of contractor from jurisdiction as affecting right to injunction against construction of improvement, see post ¶ 397.

Necessary and proper provisions and compliance with statutory requirements, see Public Contracts, III.

General law of public contracts, see Public Contracts.

General law of building and construction contracts except in so far as peculiar to public contracts for construction work, see Building and Construction Contracts.

Rights between contractor and the public growing out of performance or breach or partial or variant performance, see Public Contracts, IV; Building Contracts, II et seq.

Rights between contractor and the public growing out of extra work or changes by agreement, see Public Contracts, IV; Building Contracts, V.

Rights growing out of performance under invalid public contract, see Public Contracts, V.
Mandamus to compel payment of contractors for work done, see Mandamus § 93 et seq.
Interpretation and effect of public contracts in general, see Public Contracts, IV.
Changes in contract pending its performance, see Public Contracts, IV.

¶ 115. Under an authority in the charter to provide funds for the construction of pavements, the contracts for pavement may be made to include grading, curb-stones, gutters and cross-walks.—Williams v. City of Detroit, 2 Mich. 560.

¶ 116. Plaintiff contracted with the defendant city to build a sewer between certain designated points, according to plans on file, for a specified price "per lineal foot." From the plans it appeared that part of the sewer was to consist of a single cylinder, 9 feet in diameter, and the remainder, of two parallel cylinders, each 6 feet, 8 inches, in diameter, with concrete between. The word "sewer," however, was used throughout to indicate the structure in all its parts. Held, that each cylinder should not be treated as a separate sewer in determining the amount to which plaintiff was entitled, but that payment should be limited to the number of lineal feet of the entire structure.—Campau v. City of Detroit, 106 Mich. 414.

§ 38. ——Stipulations as to hours or working conditions.

¶ 117. A city, which is required by its charter to let contracts in excess of two hundred dollars to the lowest responsible bidder, cannot by ordinance impose a condition upon contract work as to the number of hours work per day which a contractor may require of his workmen.—Attorney General ex rel. Hudson v. City of Detroit, 153 Mich. 525.

§ 39. Contracts specifying patented or monopolised materials.

¶ 118. The fact that an article is patented does not necessarily prevent any person but the patentee from contracting to supply it; others may do so, taking the risk of being able to obtain the patentee's license. Therefore the fact that the charter provides that contracts by the city shall be made with the lowest bidder, after advertisement for proposals, does not prevent the city letting a contract for paving a street with a patented pavement, notwithstanding the only bidder is the owner of the patent.—Hobart v. City of Detroit, 17 Mich. 246; Motz v. City of Detroit, 18 Mich. 495.

¶ 119. Under a charter provision providing that paving shall be done upon contracts and specifications prepared by the board of public works which shall advertise for proposals and which may contract with the lowest bidder, a city is not precluded from specifying, as the material to be used, some article which by reason of patent or of circumstances is in the hands or under the control of a single dealer.—Holmes v. Common Council of Detroit, 120 Mich. 226.

§ 40. Letting work without formal competitive contract.

See also ante ¶ 106.

¶ 120. The commissioner of public works, with the approval of the common council of Detroit, contracted with certain parties to build certain sidewalk intersections. The work did not proceed satisfactorily, and the commissioner, with the approval of the board, contracted with the relator to put in specific intersections. The council did not approve this contract until after relator had completed the work. Held, the contract with relator was invalid under § 240 of the city charter, requiring consent of the council to such contracts, and that the subsequent approval of the council was not a valid ratification.—Garner v. Doremus, 154 Mich. 323.

V. INJURY TO PROPERTY AND COMPENSATION OF OWNERS.

§ 41. In general.

Waiver or estoppel to assert claim, see post § 42.
Relation of damages to assessment, see post § 69.
General nature of public and relative private rights in streets and highways, see Highways, X.
Liability for diversion or disturbance of surface waters by means of highway construction, see Highways § 111; and see also Waters, II.
Damages for establishment and changes of grade, see Highways § 119 et seq.
Damages and procedure for taking property for public use, see Highways, II, B; Eminent Domain, IV, V.

¶ 121. In grading a street neither the contractor nor the city has a right to deposit earth outside of the lines of the street, without the consent of the owner, for the purpose of supporting the embankment made by filling in the street.—Davies v. City of East Saginaw, 66 Mich. 37.

¶ 122. The act of depositing earth on an abutter's lot in paving a roadway in the street, being unnecessary, was not the natural result of making the improvement, and the trespass was one, therefore, for which the contractor, and not the city, was liable.—Fuller v. City of Grand Rapids, 105 Mich. 529.

§ 42. Waiver or estoppel to assert claim.

General principles of estoppel, see Estoppel.

¶ 123. By joining in a petition for grading a street, and by allowing, without objection, work to be completed according to the actual grade with which he is familiar, a lot-owner

estops himself from claiming damages resulting from the grading.—Collins v. City of Grand Rapids, 95 Mich. 286.

¶ 124. A lot-owner who, with full knowledge of the situation, joins in a petition to the common council of a city to establish the grade of and improve a street upon which his lots abut, and who makes no objections on the review of the assessment roll for said improvement, upon which he is assessed a certain sum as benefits, which he voluntarily pays, has had his day in court, and cannot afterwards be heard in an independent proceeding to recover damages for the stoppage of water and the temporary flowage of his land caused by such improvement, he having failed to exercise his right to appear before the city council and urge his claim for such damages.—Hembling v. City of Big Rapids, 89 Mich. 1.

VI. LEVYING AND MAKING ASSESSMENTS.

A. IN GENERAL.

§ 43. Theory, nature, general requisites, and validity of assessments.

Beneficial character of work or improvement, see post § 44.
Replacement or reconstruction work, see post § 45.
Power and authority to make assessments, see post § 46.
Proper board, body or officer to make assessments, see post § 47.
Predetermination of district to be assessed, see post § 48.
Information, date and details on which to base assessment, see post § 49.
Presumption as to validity of assessment, see post § 50.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Persons, property and districts assessable, see post VI, B.
Amount to be assessed and items included, see post VI, C.
Valuing and apportioning assessments, see post VI, D.
Assessment list, report or return and action thereon, see post VI, E.
Reassessments and additional assessments, see post VI, F.
Obligation, lien and enforcement of assessments, see post VI, G.
Illegal and excessive assessments and relief from same, see post VII.
Vices in assessment as affecting its validity, see post §§ 106, 107.
Necessity for uniformity in application of rule for spreading assessment over district, see post ¶¶ 223, 224.
Reassessment where assessment is held illegal on jurisdictional grounds, see post ¶ 297.
Limitations on taxing power and constitutional rules for apportionment, see Taxes, I; and see also Constitutional Law.
Due process in local assessment proceedings, see Constitutional Law § 155.
Inefficacy of majority approval to cure want of due process to minority, see also Constitutional Law § 152.
Local assessments as distinct from police power, see Constitutional Law § 99.
Taxing power in general, see Taxes, I.
Making tax levy in general, see Taxes, VII.
Local assessments for laying out private road, see Highways § 417.
Procedure to levy and spread assessments for drains, see Drains, II, C.
Proceedings by fence viewers to apportion cost of fences, see Fences § 7.
Assessments distinguished from taxes, see Taxes, I.
Provisions for improvement of rural highways by local assessment, see Comp. L. 1915, § 4671 et seq.

¶ 125. The whole theory of a legal assessment depends upon a uniform rule of charges within some defined district, and resting on some intelligible principle.—Clay v. City of Grand Rapids, 60 Mich. 451.

¶ 126. The theory sustaining levies for sewer improvements is that the party assessed is locally and pecuniarily benefited over and above the ordinary benefit which as one of the community he receives in all public improvements to the precise extent of the assessment.—Kuick v. City of Grand Rapids, 200 Mich. 582.

¶ 127. The sole ground for imposing a part or all of the cost of a public improvement upon a part of a municipality is that the part burdened with the cost receives corresponding benefits which the general public does not receive.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 128. Assessments or taxes for local special improvements are sustained on the theory that the premises are bettered by the improvement.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553. (Brooke, J., dissenting.)

¶ 129. Assessments or taxes for local special improvements are not "taxes," within the proper meaning of that word, but represent a value or betterment added to the land itself.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553. (Brooke, J., dissenting.)

¶ 130. An assessment for a public improvement must deal with the entire expense.—City of Manistee v. Harley, 79 Mich. 238.

¶ 131. An assessment for a public improvement must act upon all persons and property concerned. It cannot be made by separate action for each person or each piece of land.—City of Manistee v. Harley, 79 Mich. 238.

§ 44. Beneficial character of work or improvement.

See also ante ¶ 127.

Relation of benefits to assessment, see post § 68.

¶ 132. A law permitting a city to assess abutting owners for the cost of sprinkling the streets is unconstitutional, since the sprinkling does not add to the value of the land.—City of Kalamazoo v. Crawford, 154 Mich. 58. (Montgomery, Blair and Moore, JJ., dissenting.)

¶ 133. A statute authorizing a municipal corporation to pass an ordinance requiring the cost of street sprinkling to be assessed upon the abutting land in proportion to frontage, is void, on the ground that a local assessment can only rest upon a substantial enhancement of value in the land assessed.—Stevens v. City of Port Huron, 149 Mich. 536. (Moore, Blair and Montgomery, JJ., dissenting.)

§ 45. Replacement or reconstruction work.

Repaving and replacement funds, see ante § 15.

¶ 134. In an action by a city to recover from an abutting property owner a special assessment for the repavement of a street, held that the city by its election, when the street was originally paved, to charge the entire cost thereof to the city at large, did not thereby estop itself from assessing the cost of the repavement against the abutting property owners, as such a conclusion would not only be unreasonable but contrary to a section of the city charter providing that the city should have power to pave and repave streets, etc., and to cause the expense thereof, or any part thereof, to be paid by the city or assessed on adjacent property owners.—City of Kalamazoo v. Perrin, 194 Mich. 484.

¶ 135. Under a charter provision that where a street has been graded and paved at the expense of the abutting owners, such owners shall not be liable for any assessment occasioned by any subsequent change of grade in such pavement unless petitioned for by a majority of the owners, an assessment may be levied without such petition for the cost of changing a cobblestone pavement which had been laid at the expense of the abutting owners, to an asphalt pavement, though the change may also necessitate a slight change in the grave of the pavement since in such case the assessment cannot be said to be occasioned by a change of grade.—Auditor General v. Chase, 132 Mich. 630.

¶ 135a. Where abutting owners have been assessed for grading and paving a street, they cannot, under a charter which provides that "the cost of all repaving of streets shall be paid out of the repairing fund," be again assessed for repaving the old roadway and extension thereof caused by widening the roadway so as to include 15 feet on each side previously occupied by grass and trees.—Wreford v. City of Detroit, 132 Mich. 348.

§ 46. Power and authority to make assessments.

Proper body, board or officer to make assessments, see post § 47.

Power and authority to establish size and limits of district, see post § 62.

Power to exempt from assessment by contract, see post § 59.

Power and authority to levy reassessments, see post § 89.

Power and authority to make assessments without opportunity for hearing, see also post ¶ 280.

Mandamus to compel levy of assessments in general, see Mandamus § 87.

Local assessments for laying out private road, see Highways § 417.

Power of municipal corporations in general, see Municipal Corporations, III.

¶ 136. A valid assessment by municipal authorities requires a valid statutory provision to warrant it.—Motz v. City of Detroit, 18 Mich. 495.

¶ 137. Grants of power to make local assessments are strictly construed and must be strictly followed.—Whitney v. Hudson Common Council, 69 Mich. 189.

¶ 138. A village has no power to extend a sewer assessment over a number of years in the absence of any statute conferring such power.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 139. Laws 1883, Act No. 124, which provides that if the common council believes that a portion of the city in the vicinity of the proposed improvement will be benefited thereby, it may determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be benefited, and that they shall thereupon by resolution fix the district benefited, and specify the amount to be assessed, is not invalid as conferring arbitrary power upon the council.—Beecher v. City of Detroit, 92 Mich. 268.

§ 47. Proper board, body, or officer to make assessments.

Proper body or officer to change or revise assessment, see also post § 85.

¶ 140. When a charter (East Saginaw charter—Act 246 of 1859; Sess. L. 1859, p. 1011, § 38) gives the common council the power, upon ordering a public improvement, of "designating and directing three resident freeholders * * * to make an assessment upon all the owners, etc., of the amount of expense in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire by the making of such improvements," it does not authorize the council to

does not require the necessity of the improvement to be determined by a jury. And if the provisions for special taxation districts are invalid, they do not invalidate the entire act, since a general tax is also contemplated.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

§ 19. Preliminary resolution or declaration of necessity.

Sufficiency of resolution, see post § 20.
Successive resolutions on one improvement, see post § 21.
Unity or multiplicity of proceedings under one resolution, see post § 22.
Resolution to determine manner of meeting costs, see post § 23.
Preliminary procedure for improvement by abutting owners, see post § 31.
Conclusiveness of proceedings and right to review or attack, see post § 32.
Cure of defective resolution by adoption of new resolution and reassessment, see post ¶ 305.
Proceedings for construction and repair of highways, see also Highways § 112.
Proceedings to lay out and establish drains, see Drains, II, A.
Relief against invalid resolutions of municipal corporations, see Municipal Corporations, VII.

¶ 47. The resolution of a council as to the necessity for an improvement is jurisdictional.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 48. A preliminary resolution declaring that a public improvement is deemed a necessity is jurisdictional only if required by statute or municipal charter, when a failure to comply with such requirement will vitiate all subsequent proceedings.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 49. Where a city charter provides that when the council shall decide an improvement to be necessary they shall so declare by resolution, such declaration of the necessity is a distinct preliminary act, indispensable to give jurisdiction of future proceedings.—Hoyt v. City of East Saginaw, 19 Mich. 39.

¶ 50. The charter of the city of Saginaw, title 6, § 1 which makes the declaration by the common council of the necessity of public improvements, the cost, or any portion of the cost of which is to be assessed upon the locality of the improvement, essential as preliminary to the making of the same, does not contemplate that, before a tax shall be levied or bonds issued to provide the fund out of which the proportion of the cost to be borne by the city is to be paid, such necessity shall be first declared.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 51. Under Port Huron Charter, ch. 7, § 15 (Loc. Acts 1895, No. 381), which provides that no resolution imposing taxes, or incurring any indebtedness in excess of $50, and no ordinance, shall be passed at the same meeting as introduced, if objection is made thereto, "and no ordinance shall be passed except by a two-thirds vote of the aldermen elect," a resolution or proceeding imposing a special assessment does not require a two-thirds vote, such provision applying to the passage of ordinances alone.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 52. Under Act 268, P. A. 1909, amendatory of the Grade Separation Law (secs. 4229 to 4261, C. L. 1897), postponing the institution of judicial proceedings for the determination of the public necessity for making an improvement and the assessment of damages therefor until after the completion of the work, and providing that the petition, as the commencement of judicial proceedings, might be filed within one year after the completion of the work of separating the grades, the provision providing that a resolution of necessity must be passed and attached to the agreement and filed with the city attorney, as a condition precedent, is construed to conform to the amendment, and the resolution need not be passed until after the work is completed, but in time to be filed with the city attorney previously to the institution of the judicial proceedings.—Mead v. Michigan Cent. R. Co., 174 Mich. 521.

¶ 53. Where a city council after ordering a public improvement adopted a resolution deferring the letting of the contract, and where the bids which had been advertised for were returned unopened, the council could afterwards, without another declaration of public necessity, let a contract for making such improvement.—Davies v. City of Saginaw, 87 Mich. 439.

§ 20. ——Sufficiency of resolution.

See also ante ¶ 24, and post ¶ 178.
Relief against invalid municipal resolutions, see Municipal Corporations, VII.

¶ 54. The declaration of the necessity of a public improvement does not necessarily involve an enumeration of details, but, although general in character, covers the doing of whatever is deemed or found to be necessary in the course of an improvement of the character designated.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 55. A resolution declaring that a public improvement is "deemed advisable" is sufficient where neither statute nor municipal charter requires it to be declared a "public necessity."—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 56. The determination by the common council of Detroit to pave a street with stone is sufficiently declared by an order directing a contract for the work to be made.—Williams v. City of Detroit, 2 Mich. 560.

¶ 57. The jurisdictional step of declaring a proposed improvement of a sewer system a public necessity must be deemed to have been taken, although it is necessary to use larger pipe and dig a deeper trench and to extend the sewer, where the resolution provides for the "lowering" of the existing main and laterals and the construction of an extension on the same street.—Kuick v. City of Grand Rapids, 200 Mich. 582.

¶ 58. A statute (East Saginaw charter—Laws 1859, Act. No. 246; Sess. L. 1859, p. 997, § 2) requiring the resolution of a city council ordering a public improvement to "describe the contemplated improvement" is substantially complied with when the order for the paving of a street described the improvement as "the paving of a street with the Nicholson pavement," and for the purpose of the act this description will include such incidental work as the removal of the earth for paving and the setting of curb-stones.—Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 59. A resolution of a common council declaring the necessity of a street improvement is not invalidated by including "the necessary bridges, culverts," etc., without specifying what was necessary, especially if it does not appear that anything was necessary beyond the improvement of the street; the resolution does not delegate authority to decide upon the necessity, as details may afterwards be settled by the council.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 60. A resolution of the common council of a city, declaring the paving of a street to be a necessary public improvement, was silent as to the width of the roadway. Held, that this fact did not vitiate the proceedings.—Fuller v. Grand Rapids, 105 Mich. 529.

§ 21. ——Successive resolutions on one improvement.

Conclusiveness of proceedings in general, see post § 32.

¶ 61. The council has power to reconsider a resolution fixing an assessment district, and to enlarge the district by subsequent action.—Trowbridge v. City of Detroit, 99 Mich. 443.

¶ 62. The superintendent of public works of a city submitted plans and specifications for a proposed paving improvement with estimates for six kinds of pavements. The council adopted his recommendations by resolution. Later they passed a second resolution selecting the particular kind of pavement decided upon. Held, the second resolution did not vacate the first so as to make the proceedings void for irregularity.—Auditor General v. Wellman, 160 Mich. 512.

§ 22. ——Unity or multiplicity of proceedings under one resolution.

Combining dissimilar improvements in one proceeding, see ante § 9.

¶ 63. The common council of a city may provide by resolution for the improvement of a part of a street at a time, when only a part needs improving at the time or in the way provided; but to lay several assessments at the same time for improving different parts of the same street in the same way must often be highly inexpedient.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 64. The fact that a single street has different names for different parts of it does not preclude the whole of it being paved under a single resolution of the common council. The unity of the work must determine the right to deal with it as a whole and not the diversity of names that may be given to its various parts.—Cuming v. City of Grand Rapids, 46 Mich. 150.

§ 23. Resolution to determine manner of meeting cost.

Estimate of cost and action thereon, see post § 24.

Conclusiveness of proceedings and right to review or attack, see post § 32.

Preliminary resolution as to necessity, see ante § 19.

Relief against invalid municipal resolution, see Municipal Corporations, VII.

¶ 65. Where, after the completion of an improvement, the common council of Saginaw passed a resolution reciting the improvement, the amount of its total cost, the apportionment of the cost among the parties interested, and the amount to be assessed on the lands benefited, such action was in full compliance with the charter (Local Acts 1885, No. 355, tit. 6, § 7).—Auditor-General v. Maier, 95 Mich. 127.

¶ 66. By a joint construction of the city charter of Saginaw, tit. 6, §§ 6, 7, it was held that a declaration by the common council that the expense of a public improvement shall be defrayed by the property owners benefited need not be made before the work is begun, but may be made after the improvement is completed.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 67. Laws 1883, Act No. 124, provides that an assessment for benefits where a city has taken land for public use, shall be levied and collected as is provided in the charter for collecting the expense of a public improvement when a street is graded. Held, that there was no merit in the objection that a resolution of the city council directing the assessment to be made omitted the words "where a street is graded."—Beecher v. City of Detroit, 92 Mich. 268.

¶ 68. A resolution passed by the common council of Kalamazoo, authorizing and directing city assessors to make a special assessment roll for a street improvement held a sufficient compliance with § 7, chap. 23, of the City Charter, Local Act of 1897, No. 475, requiring a statement of the method of

assessment.—City of Kalamazoo v. Perrin, 194 Mich. 484.

§ 24. Estimate of cost and action on same.

Sufficiency of estimates in gross, see post § 25.

Sufficiency of plat, plan and specifications, see post § 26.

¶ 69. Comp. L. 1897, § 2893, requiring an estimate of the expenses to be made before any money shall be borrowed, raised, or expended for the purchase or construction of water works in any village, is not sufficiently complied with by a tentative estimate made by engineers, which was accompanied by written instructions and suggestions whereby it could be reduced in amount, when there was no official action upon the acceptance or adoption of such estimate.—Richardi v. Village of Bellaire, 158 Mich. 560.

¶ 70. A provision that the board of public works shall estimate the cost of a proposed public improvement and report it to the common council before an assessment is made therefor is sufficiently observed if the board adopts, approves and reports to the council an estimate made by the city surveyor, it being proper for the board to make use of the surveyor's services in preparing the estimate.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 71. Charter of the City of Detroit, chap. 15, § 12, providing that when any public improvement is proposed, the common council shall refer the matter to the board of public works, which upon examination shall report to the council, giving detailed estimates of the cost of the improvement and make recommendations, is not violated where the board assumes the initiative and sends a recommendation to the council that a street should be paved, accompanied by a detailed estimate of the cost, and the council then approved it.—Cass Farm Co. v. City of Detroit, 124 Mich. 433, aff'd 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

¶ 72. The estimate of the board of public works, previously made and submitted to the council, specified a roadway 38 feet wide, being the width of the roadway as then in use. Before the contract for paving the street was entered into, the plans and specifications were filed, showing the roadway to be 42 feet wide, and bids were solicited on such plans and specifications, which had been adopted by the board of public works and council, and the contract was let accordingly. Held, that the change in the width of the roadway did not vitiate the proceedings.—Fuller v. City of Grand Rapids, 105 Mich. 529.

¶ 73. The action of a city council in incurring expenditures for an improvement without submitting the question to and procuring an approval of the contracts by the board of estimates is invalid.—Bay City Traction & Electric Co. v. City of Bay City, 155 Mich. 393.

¶ 74. The public works act of Detroit requires proposed public improvements to be submitted to the board of public works for estimates and recommendations. Held that bids for paving contracts could not properly be invited until such reference and report.—Butler v. City of Detroit, 43 Mich. 552.

§ 25. ——Sufficiency of estimates in gross.

¶ 75. Whether an assessment for a public improvement is invalid because the estimate of its cost was submitted in gross and not in detail, and whether, if the estimate was adopted, any question can afterwards be raised, quære.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 76. Where the common council of a city, pursuant to the charter, has declared what proportion of the expense of making a public improvement shall be defrayed by an assessment upon the lands benefited thereby, and the board of public works has reported to the council an estimate in detail of the probable cost and expense of the improvement, a further provision (Local Laws 1891, title 6, § 5, p. 401) requiring said board, after the improvement has been completed, to certify to the council "a detail statement of the cost of such improvement, showing the amount to be assessed upon the property benefited," is sufficiently complied with by the submission of a tabular statement showing the amounts in gross to be paid by the city and by the property owners, respectively, by reason of the improvement.—Duffy v. City of Saginaw, 106 Mich. 335.

¶ 77. The charter of Detroit requires the common council to secure in advance from the board of public works a detailed estimate of the cost of a proposed improvement. Where the council called upon the board for such an estimate and the board reported the estimated cost in gross, upon which the paving was ordered, it was held in a suit to enjoin collection of an assessment for such paving that as no further particulars had been asked for it must be assumed that the information received was sufficiently specific to enable the council to act intelligently.—Goodwillie v. City of Detroit, 108 Mich. 283.

§ 26. ——Sufficiency of plat, plan and specifications.

See also post ¶ 180.

¶ 78. The provision in the revised charter of Grand Rapids of 1883, p. 129, § 8, that the board of public works, when the common council decides that the construction of any public work is a necessary improvement, shall determine as to the kind and quantity of materials to be used, and estimate the probable cost and expense of the work, and of the materials to be used in detail, and

cause the necessary plans and specifications to be prepared, was held substantially complied with, where, on receiving a resolution for the construction of a sewer, the board of public works directed the city surveyor to prepare the necessary plans and specifications, and where he at once presented plans already prepared by him under the direction of the board, which contained a profile of the proposed sewer, and showed in detail the manner of construction, the size and shape, and the kind and quantity of materials to be used, the cost of construction and of material not being carried out in detail, but being susceptible of computation from the data furnished, and which plans, etc., were examined and approved by the board at the same meeting.—Baisch v. Grand Rapids, 84 Mich. 666.

¶ 79. The plans and specifications required to accompany the report of the superintendant of public works on a petition for a paving improvement could not be found in the files of the city clerk. The council in adopting the superintendent's recommendation to order the improvement had referred in its resolution to these plans and specifications, and adopted them. Held, the evidence was sufficient that the said plans were before the city council when it made the resolution.—Auditor General v. Wellman, 160 Mich. 512.

§ 27. Rescission or revocation of approval or action taken.

Conclusiveness of proceedings and right to review or attack, see post § 32.

¶ 80. The recommendation of the board of public works to the city council that the building of a sidewalk be deferred for one year was not a rescission by implication of action previously taken by such board in establishing the grade for such walk, under the direction of such council; since the action recommended was delay, merely, and the council did not acquiesce.—Cuming v. Gleason, 140 Mich. 195.

§ 28. Notice of improvement and hearing of objections.

Sufficiency of service or publication, see post § 29.
New notice on change of plans, see post § 30.
Conclusiveness of proceedings and right to review or attack, see post § 32.
Failure to give notice as material defect, see post ¶ 336.
Abortive attempt to cure want of notice by resolution ordering reassessment, see post ¶ 306.

¶ 81. Notice to property owners of city's intent to make special assessments for improvements is not necessary in the absence of statute.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

¶ 82. In a proposed paving improvement under Act No. 542, Local Acts 1903, c. 17, abutting owners are not entitled to notice outside of the general publication specified by the statute.—Auditor General v. Wellman, 160 Mich. 512.

¶ 83. Where, in the levy of a special assessment for a sewer system, the city charter requires notice of the proposed improvement and of the district to be assessed to be published in the official newspaper of the city, such notice is fatally defective if it fails to give the approximate location of the proposed improvement and the property to be assessed therefor.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

¶ 84. Where notice of the making and filing of the map or plat showing the district included in a special assessment district is given according to law, notice to one owning land within such district must be presumed.—Van Zanten v. City of Grand Haven, 174 Mich 282.

§ 29. ——Sufficiency of service or publication.

¶ 85. An ordinance requiring that notice of a proposed public improvement shall be served upon a land-owner personally, or by leaving it at his place of residence, is not complied with by leaving such notice on the table in his business office during his absence therefrom.—Mills v. City of Detroit, 95 Mich. 422.

¶ 86. Under the charter of Detroit, where the common council makes a contract for a sewer without an estimate of the cost thereof from the board of public works, and where notice of the improvement is not served upon the owner of the land to be assessed as directed by the ordinance, and where it does not appear that such notice was published as the ordinance directs, the proceedings are void, and the collection of a tax levied to pay for the sewer is properly enjoined.—Mills v. City of Detroit, 95 Mich. 422.

¶ 87. Publication of notice of hearing of objections to a proposed improvement by the city clerk under the instructions of the common council, was a sufficient compliance with Comp. L. 1897, § 3195, requiring the council to give notice of such hearing.—Auditor General v. Calkins, 136 Mich. 1.

¶ 88. Under Comp. L. 1897, § 3195 requiring the giving of notice of a proposed improvement, a publication of notice of hearing objections made by the clerk under the instruction of the common council, was a sufficient compliance with the requirement that such council give notice of such hearing.—Auditor General v. Calkins, 136 Mich. 1.

¶ 89. Where a notice is required to be published for five successive days, inserting it in a paper for three successive days, and on the fifth and sixth days, is not sufficient, it appearing that the paper was published

on the omitted day, which was Sunday.—Mills v. City of Detroit, 95 Mich. 422.

¶ 90. Under Comp. L. 1897, § 3195, requiring the common council to publish notice for at least two weeks, of a proposed improvement the cost of which is to be defrayed by special assessment, publication upon Thursday of one week and upon Thursday of the following week, of a notice that the board would meet to hear objections upon Friday of the second week, was not a compliance with the statute.—Auditor General v. Calkins, 136 Mich. 1.

§ 30. New notice on change of plans.

¶ 91. A city council on August 20, 1906, voted a special assessment for a sewer system, and set September 17, 1906, as a day to hear objections. On September 17, 1906, instead of hearing objections, it ordered the sewer plans to be amended. On October 8, 1906, it adopted the modified plans by resolution, and provided therein for the special assessments. Held, the resolution of October 8 was independent of that of August 20, and any irregularities as to notice in proceeding upon the resolution of October 8 were not cured by the acts done pursuant to the resolution of August 20.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

§ 31. Preliminary procedure for improvement by abutting owners.

Power to require abutting owner to make improvement, see ante § 7.

¶ 92. Where, by the provisions of a city charter, before a person can be required to build a sidewalk, the council must pass an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be constructed, the enactment of such ordinance is a condition precedent to any liability for the penalty prescribed for failing to build said sidewalk.—City of Port Huron v. Jenkinson, 77 Mich. 414.

§ 32. Conclusiveness of proceedings and right to review or attack.

See also post ¶ 376.

Relief from illegal or excessive assessments, see post VII.

Review of assessment on certiorari, see post § 115.

¶ 93. The action of municipal officers with reference to public improvements, when within the powers conferred upon them, is final, in the absence of fraud. Whether the courts have jurisdiction to interfere even where fraudulent conduct is shown, quære.—Nelson v. City of Saginaw, 106 Mich. 659.

¶ 94. Where the power exists to repave a street once improved, the question of necessity must be determined by the body in whom such power is vested, and is not open to review or attack collaterally, except in a clear case of fraud.—Shimmons v. City of Saginaw, 104 Mich. 511.

¶ 95. A petition for paving a street recited that it was signed by the owners of a majority of the property on both sides thereof. The department of public works, to whom the petition was referred, reported back to the common council that the petitioners were owners of the greater number of feet frontage of real estate abutting on the avenue proposed to be improved, and recommended the pavement. The common council accepted the report and ordered the street to be paved. Held, the finding of the council that the owners of a majority of the frontage joined in the petition was conclusive until the contrary was shown by a complainant seeking to enjoin the collection of an assessment, and the burden of proving the contrary was on said complainant.—Brady v. City of Detroit, 166 Mich. 252.

¶ 96. Whether a majority of the property-holders have signed a petition for a street improvement is not conclusively determined by the town board, but, in the absense of statutory provision to the contrary, may be inquired into collaterally; and the want of such majority may be shown as a defense in an action to collect the assessment.—Aplin, Auditor General v. Fisher, 84 Mich. 128.

IV. PROPOSALS, CONTRACTS AND BONDS.

§ 33. In general; procedure preliminary to contract.

Advertisements, bids and letting of contracts, see post §§ 34-36.

Requisites, validity, interpretation and effect of contracts, see post §§ 37, 38.

Contracts specifying patented or monopolized materials, see post § 39.

Letting work without competitive contract, see post § 40.

Necessity for second preliminary resolution of necessity, see also ante ¶ 53.

Irregularities in bids and contracts as affecting validity of assessment, see post § 105.

Contracts of municipal corporations in general, see Municipal Corporations, XI, and Public Contracts.

Interpretation and performance of provisions relating to construction work, see Building Contracts.

Power and authority to make public contracts in general, see Public Contracts, I.

Initiating, forming and executing public contract in general, see Public Contracts, II.

Implied contracts for public work, see Public Contracts, V.

Bond or indemnity for performance and payment of labor and claims, see Public Contracts, VII.

Rights against bond for injury from contractor's negligence, see Public Contracts, VII.

Actions to enforce bonds, see Public Contracts, VII.
Who are laborers and materialmen and subcontractors and what is material within meaning of statutes requiring bonds on public contracts for security of such, see Public Contracts, VII.
Liability of abutters, private persons and corporations to indemnify or exonerate the public, see Highways, XII, G, 2.

¶ 97. No contract for paving can be made until the common council has submitted the matter to the board of public works for estimates and recommendations and received from that board the reports and information provided for in the public works act. But an assessment will not be held void when this has been done substantially in accordance with the purposes of that act but in an irregular manner.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 98. Under the charter of Grand Rapids, conferring on the council the power to require and make street improvements, allowing it to proceed therewith and anticipate collection of assessments and taxes, and providing for notice to the taxpayers after the assessments and in relation thereto, and requiring no other notice, it is not necessary to give them any notice before letting the contract and approving the bond for such work.—Parsons v. City of Grand Rapids, 141 Mich. 467.

§ 34. Advertisements, bids, and letting of contracts.

Necessity of letting contract to lowest bidder, see post § 35.
Extra work and change agreements and new or additional contracts, see post § 36.
Effect of defective advertisement, see post ¶ 338.
Bids and letting of public contracts in general, see Public Contracts, II.

¶ 99. Notices to bidders must contain the substantial requisites of specifications, so that bidders can from such notices obtain the information necessary to enable them to prepare their bids.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 100. Under a municipal charter which requires contracts to be publicly let to the lowest responsible bidder it is not necessary, in advertising for proposals to pave a street, that the kind of pavement should be specified. The charter provision aims, for the public benefit, to secure competition among contractors for public works and supplies, and necessarily leaves something to the discretion of the city authorities, who must determine in each case what competition the nature of the case will admit of, and the best method to secure it.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 101. A city charter (Local Laws 1889, title 13, § 3, p. 945) provided that, when the making of a public improvement should have been determined upon, the board of public works should advertise for proposals for furnishing the material and for the performance of the work. No time was fixed for which the publication should continue. An improvement having been ordered by the council, the board instructed its clerk to "advertise for proposals" until a certain date, but the first publication was not made until three days after such direction had been given. Held, that the board, by receiving bids at the time specified, would be presumed to have ratified the action of the clerk, and determined that the advertisement was for a sufficient period.—Duffy v. City of Saginaw, 106 Mich. 335.

¶ 102. Where a statute required that the board of public works should advertise for paving bids, an advertisement was held sufficient that purported to issue from the office of the board, signed with the name of its president, and stating that bidders must file with the board a satisfactory bond, and which was afterward acted upon by that body.—Beniteau v. Detroit, 41 Mich. 116.

¶ 103. A street-paving bid is not defective in not distinguishing between the portions of the improvement chargeable to the lots fronting on the street, and the portion chargeable to the city, where the relative proportions have already been fixed.—Beniteau v. Detroit, 41 Mich. 116.

¶ 104. Whether, where work to be done under a municipal contract involves operations the difficulty and cost of which cannot be accurately foreseen, there can be any flexibility in the terms of the contract and any scope for a choice among bids, quære.—McBrian v. City of Grand Rapids, 56 Mich. 95.

¶ 105. Under a charter which requires that contracts be let to the lowest bidder, the city council has no power to release the lowest bidder from his offer, claimed to be a mistake, without advertising again, and allowing the other bidders to revise their bids; and an assessment based upon such proceedings is void.—Twiss v. City of Port Huron, 63 Mich. 528.

¶ 106. Complainant made a bid to defendant village on a paving job and the bid was accepted by resolution of the village council. Defendant expected to raise the funds to meet the contract by special assessment. It later learned that its taxing power was not adequate to do this and rescinded its former action, no written contract having been executed. There was evidence that complainant and defendant at the time of the acceptance of complainant's bid expected a formal written contract would be entered into. Held, no valid contract resulted.—Central Bitulithic Paving Co. v. Village of Highland Park, 164 Mich. 223.

§ 35. ——Necessity of letting contract to lowest bidder.

See also post ¶¶ 118, 119.

¶ 107. In passing upon bids the city authorities may give regard to the relative value of the kinds of paving for which there are bids made; and the rejection of the kind for which the lowest bid is made is not, therefore, necessarily erroneous.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 108. Whether, where there are two bidders upon the same kind of patented pavement, the common council may reject the lowest bid on the ground that those who make it, having no right under the patent to lay the pavement, are not responsible bidders, notwithstanding they have filed a bond of indemnity as required by resolution of the council, and to contract with the next higher bidders who own the patent, quære.—Kelly v. Hendrie, 26 Mich. 263.

¶ 109. An assessment by a village council of a tax to pay for paving, which by ordinance should be let by contract to the lowest bidder, is void, where it appears that no bid was accepted, but there was a writing not purporting to be a bid responsive to the call and not appearing to be the lowest.—Whitney v. Hudson Common Council, 69 Mich. 189.

§ 36. ——Extra work and change agreements and new or additional contracts.

¶ 110. Where a city charter requires contracts for improvements in any streets to be let by advertisement to the lowest bidder, a contract with the successful bidder to do extra work in raising the grade of a street not included in the original specifications, is a contract for "improvements" within the meaning of the charter.—Peterson v. City of Ionia, 152 Mich. 678.

¶ 111. The charter of Grand Rapids, title 6, § 15, provides that the plans and specifications of the work for the payment of which an assessment is ordered to be made may be changed, and the work added to or diminished, at any time before the completion of the assessment roll therefor. Held, that this does not enable the council to add to a contract for grading a street another contract for paving the gutters in such street, thus materially increasing the cost of the work over the estimate of the board of public works, and over the contract price, without again seeking competitive bids and letting the contract to the lowest bidder as required by the charter.—Ely v. City of Grand Rapids, 84 Mich. 336.

¶ 112. Where a common council advertised for bids for paving a street a specified distance, and then had a contract made with the lowest bidders for paving only a portion of that distance "or further, if ordered," and afterward directed a contract to be made with the same parties for paving the rest of the distance, it was held that the whole work was covered by the original contract, and that the action of the council in ordering the latter part of the work was not the letting of a new contract requiring a second advertising for proposals.—Brevoort v. City of Detroit, 24 Mich. 322.

¶ 113. Local Acts 1897, No. 448, § 120 (Charter of Bay City), provides by implication for the letting of contracts on bids to the lowest bidder, and section 134, authorizing "changes," was not intended to confer the power to dispense with the formalities of a new contract after the original plan had been changed.—Auditor General v. Stoddard, 147 Mich. 329.

¶ 114. A special assessment levied on a resolution of the common council of Bay City which changed a contract regularly let for the construction of street pavements so as to widen the pavement, after work had been commenced under the original plan and contract is invalid; the charter provision authorizing changes in a contract (Local Acts 1897, No. 448, § 134) was not intended to confer the power to dispense with the formalities of a new contract after an original plan has been changed; and the facts that only a mathematical calculation is required to determine the cost of the additional work, that the original contract provided that changes could be made when necessary, or when deemed advisable by the city engineer, and that the right was reserved without incurring any increased liability as to price to increase or diminish the amount of work or material within limits deemed advisable by the common council did not authorize the council to make the change in the contract by resolution after work had been commenced.—Auditor General v. Stoddard, 147 Mich. 329.

§ 37. Requisites, validity, interpretation, and effect of contracts.

Stipulations as to hours or working conditions, see post § 38.

Absence of contractor from jurisdiction as affecting right to injunction against construction of improvement, see post ¶ 397.

Necessary and proper provisions and compliance with statutory requirements, see Public Contracts, III.

General law of public contracts, see Public Contracts.

General law of building and construction contracts except in so far as peculiar to public contracts for construction work, see Building and Construction Contracts.

Rights between contractor and the public growing out of performance or breach or partial or variant performance, see Public Contracts, IV; Building Contracts, II et seq.

Rights between contractor and the public growing out of extra work or changes by agreement, see Public Contracts, IV; Building Contracts, V.

Rights growing out of performance under invalid public contract, see Public Contracts, V.
Mandamus to compel payment of contractors for work done, see Mandamus § 93 et seq.
Interpretation and effect of public contracts in general, see Public Contracts, IV.
Changes in contract pending its performance, see Public Contracts, IV.

¶ 115. Under an authority in the charter to provide funds for the construction of pavements, the contracts for pavement may be made to include grading, curb-stones, gutters and cross-walks.—Williams v. City of Detroit, 2 Mich. 560.

¶ 116. Plaintiff contracted with the defendant city to build a sewer between certain designated points, according to plans on file, for a specified price "per lineal foot." From the plans it appeared that part of the sewer was to consist of a single cylinder, 9 feet in diameter, and the remainder, of two parallel cylinders, each 6 feet, 8 inches, in diameter, with concrete between. The word "sewer," however, was used throughout to indicate the structure in all its parts. Held, that each cylinder should not be treated as a separate sewer in determining the amount to which plaintiff was entitled, but that payment should be limited to the number of lineal feet of the entire structure.—Campau v. City of Detroit, 106 Mich. 414.

§ 38. ——Stipulations as to hours or working conditions.

¶ 117. A city, which is required by its charter to let contracts in excess of two hundred dollars to the lowest responsible bidder, cannot by ordinance impose a condition upon contract work as to the number of hours work per day which a contractor may require of his workmen.—Attorney General ex rel. Hudson v. City of Detroit, 153 Mich. 525.

§ 39. Contracts specifying patented or monopolized materials.

¶ 118. The fact that an article is patented does not necessarily prevent any person but the patentee from contracting to supply it; others may do so, taking the risk of being able to obtain the patentee's license. Therefore the fact that the charter provides that contracts by the city shall be made with the lowest bidder, after advertisement for proposals, does not prevent the city letting a contract for paving a street with a patented pavement, notwithstanding the only bidder is the owner of the patent.—Hobart v. City of Detroit, 17 Mich. 246; Motz v. City of Detroit, 18 Mich. 495.

¶ 119. Under a charter provision providing that paving shall be done upon contracts and specifications prepared by the board of public works which shall advertise for proposals and which may contract with the lowest bidder, a city is not precluded from specifying, as the material to be used, some article which by reason of patent or of circumstances is in the hands or under the control of a single dealer.—Holmes v. Common Council of Detroit, 120 Mich. 226.

§ 40. Letting work without formal competitive contract.

See also ante ¶ 106.

¶ 120. The commissioner of public works, with the approval of the common council of Detroit, contracted with certain parties to build certain sidewalk intersections. The work did not proceed satisfactorily, and the commissioner, with the approval of the board, contracted with the relator to put in specific intersections. The council did not approve this contract until after relator had completed the work. Held, the contract with relator was invalid under § 240 of the city charter, requiring consent of the council to such contracts, and that the subsequent approval of the council was not a valid ratification.—Garner v. Doremus, 154 Mich. 323.

V. INJURY TO PROPERTY AND COMPENSATION OF OWNERS.

§ 41. In general.

Waiver or estoppel to assert claim, see post § 42.
Relation of damages to assessment, see post § 69.
General nature of public and relative private rights in streets and highways, see Highways, X.
Liability for diversion or disturbance of surface waters by means of highway construction, see Highways § 111; and see also Waters, II.
Damages for establishment and changes of grade, see Highways § 119 et seq.
Damages and procedure for taking property for public use, see Highways, II, B; Eminent Domain, IV, V.

¶ 121. In grading a street neither the contractor nor the city has a right to deposit earth outside of the lines of the street, without the consent of the owner, for the purpose of supporting the embankment made by filling in the street.—Davies v. City of East Saginaw, 66 Mich. 37.

¶ 122. The act of depositing earth on an abutter's lot in paving a roadway in the street, being unnecessary, was not the natural result of making the improvement, and the trespass was one, therefore, for which the contractor, and not the city, was liable.—Fuller v. City of Grand Rapids, 105 Mich. 529.

§ 42. Waiver or estoppel to assert claim.

General principles of estoppel, see Estoppel.

¶ 123. By joining in a petition for grading a street, and by allowing, without objection, work to be completed according to the actual grade with which he is familiar, a lot-owner

estops himself from claiming damages resulting from the grading.—Collins v. City of Grand Rapids, 95 Mich. 286.

¶ 124. A lot-owner who, with full knowledge of the situation, joins in a petition to the common council of a city to establish the grade of and improve a street upon which his lots abut, and who makes no objections on the review of the assessment roll for said improvement, upon which he is assessed a certain sum as benefits, which he voluntarily pays, has had his day in court, and cannot afterwards be heard in an independent proceeding to recover damages for the stoppage of water and the temporary flowage of his land caused by such improvement, he having failed to exercise his right to appear before the city council and urge his claim for such damages.—Hembling v. City of Big Rapids, 89 Mich. 1.

VI. LEVYING AND MAKING ASSESSMENTS.

A. IN GENERAL.

§ 43. Theory, nature, general requisites, and validity of assessments.

Beneficial character of work or improvement, see post § 44.
Replacement or reconstruction work, see post § 45.
Power and authority to make assessments, see post § 46.
Proper board, body or officer to make assessments, see post § 47.
Predetermination of district to be assessed, see post § 48.
Information, date and details on which to base assessment, see post § 49.
Presumption as to validity of assessment, see post § 50.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Persons, property and districts assessable, see post VI, B.
Amount to be assessed and items included, see post VI, C.
Valuing and apportioning assessments, see post VI, D.
Assessment list, report or return and action thereon, see post VI, E.
Reassessments and additional assessments, see post VI, F.
Obligation, lien and enforcement of assessments, see post VI, G.
Illegal and excessive assessments and relief from same, see post VII.
Vices in assessment as affecting its validity, see post §§ 106, 107.
Necessity for uniformity in application of rule for spreading assessment over district, see post ¶¶ 223, 224.
Reassessment where assessment is held illegal on jurisdictional grounds, see post ¶ 297.
Limitations on taxing power and constitutional rules for apportionment, see Taxes, I; and see also Constitutional Law.
Due process in local assessment proceedings, see Constitutional Law § 155.
Inefficacy of majority approval to cure want of due process to minority, see also Constitutional Law § 152.
Local assessments as distinct from police power, see Constitutional Law § 99.
Taxing power in general, see Taxes, I.
Making tax levy in general, see Taxes, VII.
Local assessments for laying out private road, see Highways § 417.
Procedure to levy and spread assessments for drains, see Drains, II, C.
Proceedings by fence viewers to apportion cost of fences, see Fences § 7.
Assessments distinguished from taxes, see Taxes, I.
Provisions for improvement of rural highways by local assessment, see Comp. L. 1915, § 4671 et seq.

¶ 125. The whole theory of a legal assessment depends upon a uniform rule of charges within some defined district, and resting on some intelligible principle.—Clay v. City of Grand Rapids, 60 Mich. 451.

¶ 126. The theory sustaining levies for sewer improvements is that the party assessed is locally and pecuniarily benefited over and above the ordinary benefit which as one of the community he receives in all public improvements to the precise extent of the assessment.—Kuick v. City of Grand Rapids, 200 Mich. 582.

¶ 127. The sole ground for imposing a part or all of the cost of a public improvement upon a part of a municipality is that the part burdened with the cost receives corresponding benefits which the general public does not receive.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 128. Assessments or taxes for local special improvements are sustained on the theory that the premises are bettered by the improvement.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553. (Brooke, J., dissenting.)

¶ 129. Assessments or taxes for local special improvements are not "taxes," within the proper meaning of that word, but represent a value or betterment added to the land itself.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553. (Brooke, J., dissenting.)

¶ 130. An assessment for a public improvement must deal with the entire expense.—City of Manistee v. Harley, 79 Mich. 238.

¶ 131. An assessment for a public improvement must act upon all persons and property concerned. It cannot be made by separate action for each person or each piece of land.—City of Manistee v. Harley, 79 Mich. 238.

§ 44. Beneficial character of work or improvement.

See also ante ¶ 127.

Relation of benefits to assessment, see post § 68.

¶ 132. A law permitting a city to assess abutting owners for the cost of sprinkling the streets is unconstitutional, since the sprinkling does not add to the value of the land.—City of Kalamazoo v. Crawford, 154 Mich. 58. (Montgomery, Blair and Moore, JJ., dissenting.)

¶ 133. A statute authorizing a municipal corporation to pass an ordinance requiring the cost of street sprinkling to be assessed upon the abutting land in proportion to frontage, is void, on the ground that a local assessment can only rest upon a substantial enhancement of value in the land assessed.—Stevens v. City of Port Huron, 149 Mich. 536. (Moore, Blair and Montgomery, JJ., dissenting.)

§ 45. Replacement or reconstruction work.

Repaving and replacement funds, see ante § 15.

¶ 134. In an action by a city to recover from an abutting property owner a special assessment for the repavement of a street, held that the city by its election, when the street was originally paved, to charge the entire cost thereof to the city at large, did not thereby estop itself from assessing the cost of the repavement against the abutting property owners, as such a conclusion would not only be unreasonable but contrary to a section of the city charter providing that the city should have power to pave and repave streets, etc., and to cause the expense thereof, or any part thereof, to be paid by the city or assessed on adjacent property owners.—City of Kalamazoo v. Perrin, 194 Mich. 484.

¶ 135. Under a charter provision that where a street has been graded and paved at the expense of the abutting owners, such owners shall not be liable for any assessment occasioned by any subsequent change of grade in such pavement unless petitioned for by a majority of the owners, an assessment may be levied without such petition for the cost of changing a cobblestone pavement which had been laid at the expense of the abutting owners, to an asphalt pavement, though the change may also necessitate a slight change in the grave of the pavement since in such case the assessment cannot be said to be occasioned by a change of grade.—Auditor General v. Chase, 132 Mich. 630.

¶ 135a. Where abutting owners have been assessed for grading and paving a street, they cannot, under a charter which provides that "the cost of all repaving of streets shall be paid out of the repairing fund," be again assessed for repaving the old roadway and extension thereof caused by widening the roadway so as to include 15 feet on each side previously occupied by grass and trees.—Wreford v. City of Detroit, 132 Mich. 348.

§ 46. Power and authority to make assessments.

Proper body, board or officer to make assessments, see post § 47.

Power and authority to establish size and limits of district, see post § 62.

Power to exempt from assessment by contract, see post § 59.

Power and authority to levy reassessments, see post § 89.

Power and authority to make assessments without opportunity for hearing, see also post ¶ 280.

Mandamus to compel levy of assessments in general, see Mandamus § 87.

Local assessments for laying out private road, see Highways § 417.

Power of municipal corporations in general, see Municipal Corporations, III.

¶ 136. A valid assessment by municipal authorities requires a valid statutory provision to warrant it.—Motz v. City of Detroit, 18 Mich. 495.

¶ 137. Grants of power to make local assessments are strictly construed and must be strictly followed.—Whitney v. Hudson Common Council, 69 Mich. 189.

¶ 138. A village has no power to extend a sewer assessment over a number of years in the absence of any statute conferring such power.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 139. Laws 1883, Act No. 124, which provides that if the common council believes that a portion of the city in the vicinity of the proposed improvement will be benefited thereby, it may determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be benefited, and that they shall thereupon by resolution fix the district benefited, and specify the amount to be assessed, is not invalid as conferring arbitrary power upon the council.—Beecher v. City of Detroit, 92 Mich. 268.

§ 47. Proper board, body, or officer to make assessments.

Proper body or officer to change or revise assessment, see also post § 85.

¶ 140. When a charter (East Saginaw charter—Act 246 of 1859; Sess. L. 1859, p. 1011, § 38) gives the common council the power, upon ordering a public improvement, of "designating and directing three resident freeholders * * * to make an assessment upon all the owners, etc., of the amount of expense in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire by the making of such improvements," it does not authorize the council to

give directions to the commissioners which shall govern them in making the assessment. It is the judgment of the commissioners and not of the common council which is to determine this.—Steckert v. City of East Saginaw, 22 Mich. 104.

§ 48. Predetermination of district to be assessed.

Assessment districts and relation to area of benefit, see post §§ 60-62.

¶ 141. Where the tax is not general, the proper, if not the necessary, course is to define the taxing district in advance; but where such a course could not be resorted to in harmony with the general purposes of the statute, without placing the assessment of damages and of benefits from the proposed improvement in different hands, to be managed separately, it would not be practicable to adopt it.—Powers' Appeal, 29 Mich. 504.

§ 49. Information, data and details on which to base assessment.

Items, expenses and charges to be included in the assessment, see post § 66.

¶ 142. The validity of a special assessment does not depend upon the fact whether or not the members of the council have viewed the property assessed, or the assessment district, with reference to that particular action. Aldermen are expected to have a general knowledge of the geography as well as the topography of their own city, and to know the location and condition of its streets, and to act upon information furnished by committees whose duty it is to collect data and arrange details.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 143. The validity of a special assessment is not affected by the fact that the assessor or city engineer furnished the information or data upon which the council acted, or because the officers actually outlined the assessment district, provided their action was adopted, approved and confirmed by the council.—Davies v. City of Saginaw, 87 Mich. 439.

§ 50. Presumption as to validity of assessment.

Invalid assessments and relief therefrom, see post VII.

¶ 144. The presumption is in favor of the validity of a special assessment.—Auditor General v. Maier, 95 Mich. 127.

¶ 145. There is a presumption in favor of proper, as distinguished from improper, official action, and taxpayers have the right to assume that sewer improvements will be made by a city and the cost thereof levied and collected as provided by law.—Kuick v. City of Grand Rapids, 200 Mich. 582.

¶ 146. It will not be presumed, in the absence of clear proof, that there has been an intentional violation of their official oaths by officers making assessments for the expense of a public improvement.—Shimmons v. City of Saginaw, 104 Mich. 511.

¶ 147. Where in paving a street occupied by a street-car company the company was assessed only for the paving between its tracks, it is presumed on a record silent as to those facts that the ordinance under which the company operates only requires it to pay for improvements between its tracks, and not according to benefits, where otherwise the assessment might have been invalid.—Davies v. City of Saginaw, 87 Mich. 439.

B. PERSONS, PROPERTY AND DISTRICTS ASSESSABLE.

§ 51. Persons assessable in general.

Property liable to or exempt from assessment, see post §§ 52-59.
Assessment districts and relation to area of benefit, see post §§ 60-63.
Relation of benefits to assessments in general, see post § 68.
Apportioning cost between local assessment and general fund, see ante § 12.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Nonbeneficial taxes in general, see Taxes, II, A.
Procedure to levy and spread assessments for drains, see Drains, II, C.
Persons, objects and interests taxable in general, see Taxes, II.

¶ 148. The common council cannot, by calling a sewer a street improvement, throw the cost of building it upon the few fronting owners who would be called upon to pay for a simple repair of the street.—Clay v. City of Grand Rapids, 60 Mich. 451.

¶¶ 149, 150. Under the charter of Grand Rapids requiring unoccupied lots belonging to a resident of the city to be assessed to him, an assessment in the name of the owner's wife is void.—Hiel v. Warrell, 87 Mich. 135.

§ 52. Property liable to or exempt from assessment.

Beneficial proximity or abuttal on place improvement, see post § 53.
Property awarded damages for injury from improvement, see post § 54.
Public property or property in public use, see post § 55.
Railroads and public service properties, see post § 56.
Cemetery property, see post § 57.
Lands sold for delinquent taxes, see post § 58.
Contracts exempting or relieving from assessment, see post § 59.
Assessment districts and relation to area of benefit, see post §§ 60-63.
Apportioning cost between local assessment and general fund, see ante § 12.

Disability to levy assessment on whole tract where only one lot thereof is within assessment district, see also post ¶ 183.
Amount to be assessed and items to be included, see post VI, C.
Tax exemptions in general, see Taxes, III.
Exemption of houses of public worship from taxation and extension of exemption to local assessments, see Taxes, III.
Construction and effect of tax exemptions to include or exclude exemption from local assessments, see Taxes, III.

¶ 151. It is within the power of the legislature to say that real estate alone shall be subject to special assessment for local improvements, since the benefits therefrom almost always accrue exclusively to lands.—City of Detroit v. Weil, 180 Mich. 593.

¶ 152. The right to assess land for a local improvement does not depend upon the use to which the owner may choose to put such land, or whether he may see fit to put it to any use.—Powers v. City of Grand Rapids, 98 Mich. 393.

§ 53. ——Beneficial proximity or abuttal on place improved.

¶ 153. The legislature may confer power on municipal corporations to determine over what territory the benefits accruing from local improvements are diffused so as to permit a special assessment therefor to be spread on all the lands within the city limits.—City of Detroit v. Weil, 180 Mich. 593.

¶ 154. The fact that a parcel of land is separated from a street by a narrow strip does not necessarily make it exempt from assessment for street improvements; where it adjoined on land which does abut and the two parcels are used as one.—Parsons v. City of Grand Rapids, 141 Mich. 467.

¶ 155. Complainant is the owner of the river front on each side of the western terminus of Bridge street bridge (which spans Grand river in the city of Grand Rapids, and connects east and west Bridge streets), and has constructed, and maintained for some time, between the dock line and the original river bank, a canal, which is used to furnish power to factories in the vicinity. Over the east bank of the canal, on the south side of and facing the bridge, complainant has erected a brick building, and upon his application the common council caused the removal of the south rail of the bridge, thus giving access to the building from the southerly footway of the bridge, such building being also accessible from West Bridge street via an intersecting street, and a private bridge erected by the complainant over the canal in the rear of said building. The land in question was assessed on account of the expense of paving West Bridge street, and complainant objects to the assessment on the ground that the land is in the bed of the river, and does not abut upon and is not accessible from said street. Held, the objection is untenable.—Powers v. City of Grand Rapids, 98 Mich. 393.

§ 54. ——Property awarded damages for injury from improvement.

Relation of damages to assessment, see post § 69.

¶ 156. An award of damages for injury to property from opening a street is not a bar to an assessment against the same land for benefits arising from such improvement.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

§ 55. ——Public property or property in public use.

¶ 157. Being one of the political subdivisions of the state, a county is impliedly exempt from taxation not only under the general law but for assessments for sewers, etc.—City of Big Rapids v. Mecosta County Sup'rs, 99 Mich. 351.

¶ 158. A city cannot assess a county's public property, such as a court house and jail, and the land they lie upon, for a local improvement such as a sewer.—City of Big Rapids v. Mecosta County Sup'rs, 99 Mich. 351.

¶ 159. The charter of Detroit provides that for paving public streets, the lots fronting thereon shall be assessed according to frontage. A public park constituted about one-fourth of the frontage of a street ordered to be paved. Held, such park was not exempted from its share of the special tax.—Newberry v. City of Detroit, 164 Mich. 410.

¶ 160. Real estate, consisting of vacant unimproved lots, owned by the regents of the state university, but not being used for governmental purposes of the university, is subject to a special assessment for local improvements.—Auditor General v. MacKinnon Boiler & Machine Co., 199 Mich. 489. (Ostrander and Stone, JJ., dissenting.)

§ 56. ——Railroads and public service properties.

¶ 161. A railroad company is not liable to assessment for paving a street because its track is located therein, and abuts upon the section of the street so improved, although the assessment is made according to frontage.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 162. Property of a railroad company, consisting of a freight house and a portion of its road-bed and right of way, cannot be sold for nonpayment of assessments thereon for local improvements on the theory that being a terminal the sale would not affect the rights of the public.—Lake Shore & M. S. R. Co. v. City of Grand Rapids, 102 Mich. 374.

¶ 163. A section of the right of way of a railroad company, occupied by its tracks and used for no other purpose, cannot be assessed for the expense of improving a street which crosses it, under a city charter requiring such assessments to be made according to benefits received.—Detroit, G. H. & M. R. Co. v. City of Grand Rapids, 106 Mich. 13.

§ 57. ——Cemetery property.

¶ 164. Under an act constituting the charter of a rural cemetery association (Comp. L. 1915, § 11160 et seq.) and providing that the land is "wholly exempt from taxation of any kind whatsoever" and in view of the policy of the state towards cemeteries and the inalienability of the lands from cemetery uses, such land in a cemetery in the city of Detroit by reason of extension of the city limits is not subject to local assessment.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553 (equal division of court, four justices holding that such lands were subject though inalienable by sale for delinquent assessments).

¶ 165. Dictum, that the legislature has undoubted power to exempt cemetery lands from assessments.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553, per Ostrander, J.

§ 58. ——Lands sold for delinquent taxes.

¶ 166. Special assessments for local improvements are not within § 130 of Act No. 206 of Pub. Acts 1893 as amended by Act No. 107 of Pub. Acts 1899 and Act No. 211 of Pub. Acts 1905, How. 2nd Ed., § 1901, providing that all taxes charged against lands sold for delinquent taxes in the office of the auditor-general at the time they are deeded to the state shall be canceled and such lands omitted and canceled from the assessment rolls and not be liable for any assessment until again sold and deeded by the state.—Case v. City of Saginaw, 196 Mich. 687. (Equally divided court.)

§ 59. ——Contracts exempting or relieving from assessment.

Parol evidence that boulevard was given to public on consideration of exemption from local assessments, see Evidence § 161, ¶ 853.

Invalidity of condition in deed to city that other lands should be exempt from assessments, see Deeds ¶ 302.

¶ 167. A city has no power to contract that certain land shall be exempt from special assessments for public improvements, since the statutes require it to establish assessment districts which must include all lands benefited.—Leggett v. City of Detroit, 137 Mich. 247.

¶ 168. A grantor in conveying a strip of land to the City of Detroit for a public boulevard, stated in the deed that the conveyance was made as contemplated by Act No. 374, Local Acts 1879, which provided that improvements should be made in the boulevard by general taxation. The board of public works in accepting the grant agreed that the abutting land should not be subject to taxation for improvements. Act No. 374 was repealed. Held, there was a binding contract on the city that the grantor should not be liable for a sidewalk assessment.—Scovel v. City of Detroit, 159 Mich. 95.

¶ 169. Where the construction of a storm-water sewer was necessitated in part by the act of a property owner, and a common council enters into an agreement with such owner within a district assessed for cost of the sewer construction whereby the property owner is virtually relieved of his proportionate share of the cost, such proceedings should be had as will cause such owner to bear his share of the cost of the improvement.—Berston v. City of Flint, 176 Mich. 266.

§ 60. Assessment districts and relation to area of benefit.

Division of parcels or inclusion in more than one district, see post § 61.

Power and authority to establish size and limits of district, see post § 62.

Conclusiveness of action as to property benefited, see post § 63.

Predetermination of district to be assessed, see ante § 48.

Apportioning cost between local assessment and general fund, see ante § 12.

Place or district for taxation, see Taxes, IV.

¶ 170. To every legal assessment there must be an assessing district, and this must be designated before the assessment can be apportioned and the burden imposed.—Kinnie v. Bare, 68 Mich. 625.

¶ 171. It is illegal to make a private property of small extent assume the name of an assessment district.—Clay v. City of Grand Rapids, 60 Mich. 451.

¶ 172. A taxing district cannot be fixed so that it has no public character, and so as to make a purely private charge under pretense of setting it off.—City of Detroit v. Daly, 68 Mich. 503.

¶ 173. Where a common council in fixing the boundaries of a special assessment district for the construction of a sewer, includes therein land not draining into the sewer and excludes therefrom land which must drain into it, thus ignoring known or ascertainable facts, its action is invalid.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 174. Although natural drainage should be taken into account in fixing the limits of a special assessment district and in the apportionment of benefits where the sewers serve the purpose for which storm drains

separate from sewers are sometimes constructed, property benefited otherwise than by surface drainage should be considered as enjoying an additional benefit and advantage on account of said sewers.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 175. The designation of a taxing district by its street frontage between certain terminal points, a railroad and a bridge, where that method of assessment is to be followed, is a sufficient compliance with a charter provision (Local Acts 1885, No. 318, chap. 22, § 7) requiring the common council, in cases of special assessments, to "describe or designate the lots and premises or locality to be assessed."—City of Kalamazoo v. Francoise, 115 Mich. 554.

¶ 176. The carving out of a special assessment district in a city is a practical matter, depending wholly upon the facts, and if the improvement is a sewer, it cannot be supposed that the governing body can fix the boundaries of the district precisely in accordance with the boundaries of property benefited by the improvement.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 177. An assessment made under How. St. § 3064o providing that if the common council believe that a portion of the city in the vicinity of a proposed improvement will be benefited thereby, they may assess owners or occupants deemed to be thus benefited, and shall fix the district to be benefited, does not limit the assessment district to lots fronting on a proposed street opening and extension.—Goodrich v. City of Detroit, 123 Mich. 559, aff'd in 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

¶ 178. The charter of the village of Hudson (Laws 1867, Act No. 266, § 38) provides that the council may levy a tax for paving streets upon such premises as in their opinion are benefited thereby. Held, that a resolution to pave a part of a street, constituting "the real estate abutting or adjoining said street the taxation district" for such purpose, is illegal as not specifying a definite taxing district.—Whitney v. Hudson Common Council, 69 Mich. 189.

¶ 179. Where under proceedings to pave a street, instituted by a city incorporated under the general law (How. St., ch. 80), a plat and diagram of the proposed improvement has been filed with the city clerk, in compliance with section 2645, which includes all the parcels of land abutting on the portion of the street that is to be paved, and gives the relative location of each lot or parcel, the lot numbers, the names of the various plats in cases where the land has been platted, the frontage and boundary lines of each parcel, and the name of the owner of each, a resolution of the council designating the district to be assessed as "all the lots, premises, and parcels of land fronting upon" such portion of the street, "as shown by a map of the proposed district on file in the office of the city clerk," sufficiently defines the assessment district.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 180. The passing of a resolution instructing the city surveyor to make a plat including the property liable for special assessments for a proposed improvement, followed by the making of such plat showing the location of each lot, the numbers and the frontage of each parcel, and the filing of the plat in the city clerk's office, was a sufficient designation of the district to be assessed within Comp. L. 1897, § 3198.—Auditor General v. Calkins, 136 Mich. 1.

§ 61. ——Division of parcels or inclusion in more than one district.

¶ 181. Where the paving for which the assessment is made terminates in the middle of a block, it is no valid objection to such assessment that the assessment district divides a block. The amended Detroit charter (Laws of 1869, Act No. 486, ch. 7, § 39; Sess. Laws 1869, p. 1724) did not require that paving shall be extended further than the public needs require in order to make a cross-street its terminus.—Brevoort v. City of Detroit, 24 Mich. 322.

¶ 182. Corner lots abutting on two streets may be included as an entire parcel in two assessment districts where both intersecting streets are being paved.—Nowlen v. City of Benton Harbor, 134 Mich. 401.

¶ 183. Where only one lot of a parcel of land owned by complainant is within a special assessment district, it is improper to spread an assessment on the entire parcel, which becomes a lien thereon, as complainant's share of the cost of the improvement.—Grand Haven Basket Factory v. City of Grand Haven, 174 Mich. 279.

§ 62. ——Power and authority to establish size and limits of district.

Power of council to reconsider resolution fixing assessment district and change bounds of same, see also ante ¶ 61.

¶ 184. The legislature may empower the common council to determine what property is specially benefited by the improvement, and to define the taxing district accordingly.—Hoyt v. City of East Saginaw, 19 Mich. 39.

¶ 185. The charter of Detroit provides that for street-paving purposes the lots fronting on the street shall constitute one local assessment district unless the common council shall subdivide it. Held, that if a resolution of the council declaring that the lots shall constitute one district is necessary at all, it is not fatally defective in not excepting the cost of paving the intersections of the streets from the purposes of the assessment, since the charter also provides that

that shall be done by the city.—Beniteau v. Detroit, 41 Mich. 116.

¶ 186. The provisions of the charter of Grand Haven as to the authority of the common council for sanitary purposes to open ditches and drain swamps, marshes and other low-lands, and as to fixing the taxing district for the expense of such improvements, do not apply to sewers, the necessity for the construction of which stands on different considerations from those which pertain to the drainage of the natural surface; the council can designate a local taxing district for the construction of a sewer on the basis of the increase in value of premises benefited.—Warren v. City of Grand Haven, 30 Mich. 24.

¶ 187. After the institution of proceedings to pave a street under a charter empowering the city council to fix the assessment district, the charter was so amended as to vest said power in the board of public works. Two days after the amendment had taken effect, the council, in ignorance of the change in the charter, adopted a resolution fixing the assessment district. On learning of the amendment, the council, by resolution, referred the assessment district as fixed to the board of public works, and that body approved the same, but specifically negatived, in a certificate attached to the roll prepared by the city engineer, any claim that the board considered itself bound to limit the assessment for benefits to the district fixed by the council. Held, that the assessment made by the board was valid, though the limits of the district were the same as those fixed by the council.—Shimmons v. City of Saginaw, 104 Mich. 511.

§ 63. ——Conclusiveness of action as to property benefited.

Power of council to reconsider resolution fixing assessment district, see ante ¶ 61.

¶ 188. Where the charter leaves it to the council to fix an assessment district to pay for a street opening, its judgment as to the lands benefited is conclusive.—Brown v. City of Saginaw, 107 Mich. 643.

¶ 189. Where a common council has in good faith, with reference to ascertainable facts, defined a special assessment district, its conclusion is final.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 190. The fact that a resolution of the common council, providing for the submission to the electors of a proposition to bond the city for the expense of paving a certain part of a street, states that the owners of property abutting on such portion are to pay a specified percentage of the cost of the improvement, will not invalidate the assessment thereafter made, on the ground that it was left to the people to define the assessment district, where such district was afterwards established by the council, in accordance with How. St. § 2644.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 191. Under Act No. 136, Pub. Acts 1899, the statute leaves it to the council, and not to the courts, to establish and fix special assessment districts for such improvements, and to assess, if they so determine, the whole of the compensation awarded upon the owners of the property included in the district; and in the absence of fraud or bad faith, their judgment is conclusive.—Roberts v. City of Sandusky, 158 Mich. 521.

¶ 192. Where the charter of the city of Flint, as amended by Local Acts 1907, Act No. 554, provides that the cost of constructing a trunkline intercepting sewer "or of such part thereof as shall be designed primarily for the benefit of the health of the whole city" shall be borne absolutely by the city, and the common council determines the special assessment district benefited thereby, it will be presumed that it acted in good faith, where mistake or abuse of discretion is not manifest or demonstrable.—Berston v. City of Flint, 176 Mich. 266.

¶ 193. The determination of a city council of the territory benefited by a local improvement is final and conclusive in the absence of fraud, or unless the absence of benefit makes it manifest that the burden amounts to spoliation and not taxation.—City of Detroit v. Weil, 180 Mich. 593.

¶ 194. The determination of the common council in establishing an assessment district in proceedings for the opening of a street, will not be set aside as an abuse of discretion, in the absence of a showing of fraud, bad faith, or demonstrable abuse, though the district established was 300 feet on each side of the whole length of the street as opened, and complainants claimed that because of the peculiar position of the street, large areas outside of the district were substantially benefited.—Power v. City of Detroit, 139 Mich. 30.

C. AMOUNT TO BE ASSESSED AND ITEMS INCLUDED.

§ 64. In general; limitations on amount or rate.

Cost of improvement as limit, see post § 65.
Items, expenses and charges to be included, see post § 66.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Procedure to levy and spread assessments for drains, see Drains, II, C.
Injunction against assessment because of excessive rate, see post ¶ 402.

¶ 195. Comp. L. 1897, § 3196, limiting special assessments to 25 per cent of the valuation as set in the last preceding ward tax roll refers to the assessment contained in the

last completed roll upon which, state, county and school taxes have been spread, rather than to the roll of the current year.—Nowlen v. City of Benton Harbor, 134 Mich. 401.

¶ 196. A paving assessment which is divided into five annual instalments, under How. St., § 2658, none of which exceeds five per cent of the assessed valuation of the property within the assessment district, is not in violation of section 2699, limiting the amount to be raised in any one year, in any special assessment district, to five per cent of the assessed valuation of the property included therein.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 197. Pub. Acts 1899, No. 39, requiring special assessment rolls to pay for street pavings in villages to be made in five parts with an election to pay by installments, did not repeal Comp. L. 1897, § 2856, providing that a village council could raise by special assessment upon lands the cost and expense of grading and paving streets and for making other local improvements, but limiting such assessments in any one year not to exceed five per cent of the assessed valuation of the property in the district chargeable with such expense.—Corliss v. Village of Highland Park, 146 Mich. 597.

¶ 198. A special paving assessment made by a village incorporated under the general village act under Pub. Acts 1899, No. 39, made in five parts payable one each year is but a single assessment, and where made for a larger amount than the five per cent of the assessed valuation of the property in the district chargeable with the expense as provided for by Comp. L. 1897, § 2856, is illegal and invalid as to the designated excess.—Corliss v. Village of Highland Park, 146 Mich. 597.

¶ 199. Under Comp. L. 1897, § 3196, the annual tax for paving two intersecting streets as assessed against a corner lot included as an entire parcel in two assessment districts, must be restricted to five per cent of the assessed value.—Nowlen v. City of Benton Harbor, 134 Mich. 401.

¶ 200. Under a provision in a charter that no improvement to be paid for by special assessment, costing more than $3,000, shall be made unless the intention to make such improvement shall have been set forth in the last preceding appropriation bill, the fact that an improvement costs more than was set out in the appropriation bill, does not render the tax void.—Auditor General v. Chase, 132 Mich. 630.

¶ 201. Under Comp. L. 1897, § 2856, providing that assessments in sewer districts, etc., shall not exceed, in any one year, five per cent of the assessed value of the property, and section 2835 providing that in no case shall the whole amount levied by special assessment exceed 25 per cent of the value of the property, and any cost exceeding that per cent shall be paid from the funds of the village, an assessment of 12½ per cent in one year against a lot is void as to the excess over 5 per cent, the balance being assessable against the general funds.—Corliss v. Village of Highland Park, 132 Mich. 152.

§ 65. Cost of improvement as limit.

¶ 202. Under Local Acts 1907, No. 546, City of Mt. Clemens has no right to assess abutting property for a greater sum than the cost of the construction of a sewer.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 203. Special assessments on abutting property benefited by the construction of a sewer must conform to the cost of the improvement, and an assessment for a sum in excess of the cost cannot be collected.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

§ 66. Items, expenses, and charges to be included.

Information, data and details on which to base assessment, see ante § 49.

¶ 204. A city may impose on abutting property as a part of a special assessment for the construction of a pavement, a charge for its maintenance for the ensuing ten years.—Newberry v. City of Detroit, 184 Mich. 188.

¶ 205. A city may not impose as a part of a special assessment for the construction of a pavement, a profit charge for the benefit of the general road fund of the municipality.—Newberry v. City of Detroit, 184 Mich. 188.

¶ 206. The cost of engineering and printing are legitimate expenses incident to a public improvement, and are properly included in the assessment therefor.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 207. Cost of advertising for bids, superintendence, etc., is properly included in an assessment for street paving.—Beniteau v. Detroit, 41 Mich. 116.

¶ 208. The expenses of the board of review, the cost of making the estimates, plans and assessments, of printing, abstracts of title, and books for making the assessment rolls, are required to be included in the expense of a public improvement in Grand Rapids under its charter, title 6, § 3 (Local Acts 1883, No. 258).—Thayer v. City of Grand Rapids, 82 Mich. 298.

¶ 209. There is no constitutional objection to adding a percentage of the estimated cost of a public improvement to cover contingent expenses as provided under Comp. L. 1897, § 4354.—Auditor General v. Melze, 124 Mich. 285.

D. VALUING AND APPORTIONING ASSESSMENTS; FRONT FOOT METHOD.

§ 67. Officer or body to make assessments.

Relation of benefits to assessment, see post § 68.
Relation of damages to assessment, see post § 69.
Basis for computing and apportioning benefits and assessments, see post §§ 70-73.
Assessment in parcels or in gross, see post § 74.
Computation of amount and method of valuing land, see post § 75.
Dividing and combining parcels, see post § 76.
Apportioning cost between local assessment and general fund, see ante § 12.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Procedure to levy and spread assessments for drains, see Drains, II, C.

¶ 210. The measure of the benefit, if any, acquired by a parcel of land by a public improvement is, under the charter of the city of Grand Rapids, for the common council, and board of review and equalization, who are by the charter constituted commissioners to make the assessment, to determine.—Powers v. City of Grand Rapids, 98 Mich. 393.

¶ 211. Where by a city charter the common council is to determine the proportion of the expense of an improvement which is to be assessed upon the owners of the premises benefited, they cannot delegate this authority to commissioners.—Scofield v. City of Lansing, 17 Mich. 437.

¶ 212. The apportionment of a sewer tax among individuals or between lots with reference to benefits may, under the charter of Grand Haven, be lawfully devolved upon one or more assessors chosen by the council; such a duty, requiring for its proper performance an examination of the several premises in detail, and involving merely administrative functions, does not properly belong to the council.—Warren v. City of Grand Haven, 30 Mich. 24.

¶ 213. The legislature may authorize the apportionment of the tax, after the district benefited has been defined by the common council of the municipality, to be made by commissioners.—Hoyt v. City of East Saginaw, 19 Mich. 39.

¶ 214. A resolution of the Detroit Common Council that the property within an assessment district is benefited by a proposed street opening, followed by a direction that there should be levied upon the lands included in the assessment, the amount of the benefit in proportion to the advantage to each parcel, and a direction to the assessors in making the roll, to assess and levy the amount in question, each lot to be assessed in ratable proportion; was a substantial compliance with the statute requiring a determination by the proper authority of the actual benefit received.—Goodrich v. City of Detroit, 123 Mich. 559. Affirmed in 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

¶ 215. The City of Port Huron directed its city engineer to make out a special assessment roll for a sewer improvement. The engineer in his certificate stated that he had apportioned the amounts assessed against each parcel of land according to benefits, etc., and in so doing had taken into account the area of the same. The council confirmed the roll submitted by the engineer. Held, that, leaving out of consideration the question of the validity of an assessment levied according to area, the steps taken were sufficient to exclude the objection that the engineer, and not the council, had made the assessment of benefits.—Auditor General v. Bishop, 161 Mich. 117.

§ 68. Relation of benefits to assessment.

See also ante ¶ 147.
Relation of damages to assessment, see post § 69.
Basis for computing and apportioning benefits and assessments, see post §§ 70-73.
Assessments in parcels or in gross, see post § 74.
Computation of amount and method of valuing lands, see post § 75.
Dividing and combining parcels, see post § 76.
Showing on assessment roll that benefit equals assessment, see post § 78.
Persons liable for assessment in general, see ante § 51.
Beneficial character of work or improvement, see ante § 44.

¶ 216. An assessment for sewer improvements cannot exceed the benefit to be derived from the improvements.—Kuick v. City of Grand Rapids, 200 Mich. 582.

¶ 217. The benefit accruing to an owner of property when a sewer is constructed in the street upon which the property abuts does not necessarily depend upon the use to which the property is devoted, and an owner of vacant property is benefited, perhaps quite as much as the owner of an apartment housing a large number of people, since with the sewer once laid his property

may be devoted to a like purpose.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 218. On a bill to enjoin a special assessment to pay the cost of a sewer, it was held that the assessment was not improper on the ground that it was in excess of the jurisdiction of the Board of Assessors as conferring no benefit upon plaintiff's property different from benefits conferred upon other property in the community; that plaintiff's property was not benefited in such a special and peculiar way as to warrant its inclusion in a special assessment district, and that the fact that the property was within the drainage area of the sewer, did not warrant the imposition of a special assessment so long as the drainage area of the property was not improved and so long as actual connection with the sewer was not furnished.—Graham v. City of Grand Rapids, 179 Mich. 378.

¶ 219. In rural highway improvement assessment proceedings under Pub. Acts 1915, No. 59, it must be presumed, in absence of proof, that the benefits to be received by those who pay for them, both individuals and townships, equal the costs assessed against them.—Loomis v. Rogers, 197 Mich. 265.

§ 69. Relation of damages to assessment.

Liability to assessment of property awarded damages for injury from improvement, see ante § 54.

Injury to property and compensation to owners, see ante V.

Impropriety of deducting street assessments paid in reckoning damages for change of grades, see Highways ¶ 421.

¶ 220. The matter of the award of damages for the taking cannot be considered in making the assessment for benefits of a street opening.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

¶ 221. Where the assessment in street opening proceedings upon an owner by a city council for benefits from improvements is made equal to the damages awarded to such owner for land taken, this assessment, though manifestly unfair, will not of itself constitute fraud so as to make it reviewable by the courts.—Roberts v. City of Sandusky, 158 Mich. 521.

¶ 222. It is necessary that there be separate finding of damages and benefits.—City of Detroit v. Daly, 68 Mich. 503; City of Detroit v. Chaffee, 68 Mich. 635; City of Detroit v. Beecher, 69 Mich. 15; City of Detroit v. Sauer, 69 Mich. 164.

§ 70. Basis for computing and apportioning benefits and assessments.

On basis of superficial area of property, see post § 71.

On basis of foot frontage, see post § 72.

On basis of land values, see post § 73.

Apportioning cost between local assessment and general fund, see ante § 12.

Liability for costs and funds, appropriations and provisions to meet same, see ante II.

Conclusiveness of confirmation of roll as to apportionment of benefits, see post ¶¶ 290, 291.

Proceedings by fence viewers to apportion cost of fences, see Fences § 7.

¶ 223. Assessments, whether based on benefits from the opening of a public way or on any other legal burden, must be spread over the taxing district according to some uniformly applied rule, and in such a way as to show a compliance with that rule.—City of Detroit v. Daly, 68 Mich. 503.

¶ 224. Under How. St. § 3064o, the apportionment of street opening benefits cannot be made upon any uniform rule, but should be in proportion to the benefits resulting to each parcel; and not values alone, but needs, necessities and advantages, must be considered.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

¶ 225. The legislature cannot authorize the governing body of a municipality to fix an arbitrary basis for an assessment to be imposed upon property without regard to benefits.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 226. Local Acts of 1899, No. 408, § 6, assessing the cost of laying a water pipe in front of each lot, the proportion to be ascertained "by finding the ratio which the narrowest frontage of said lot bears to the entire frontage on both sides of the street or alley in the block," is void.—Blades v. Board of Water Com'rs of Detroit, 122 Mich. 366.

¶ 227. Comp. L. 1897, § 3406, providing that "the amount of the benefit (from a street opening) thus ascertained shall be assessed" upon the owners "in proportion as nearly as may be to the advantage" derived from the improvement, impliedly limits the assessment to the amount of benefits.—Voight v. City of Detroit, 123 Mich. 547. Affirmed in 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

¶ 228. In apportioning benefits of a street opening there need not be a separate finding of the increased values of all the pieces of property in the assessed district.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

¶ 229. The fact that a lot was inclosed and was part of an orchard does not make it occupied land if the owner or his agent

did not gather fruit from it; and the land must be assessed as vacant.—Hill v. Warrell, 87 Mich. 185.

§ 71. ——On basis of superficial area of property.

¶ 230. A statute authorizing an assessment, according to superficial area, upon such lots as the common council shall determine are increased in market value by a municipal improvement, whether such lots are contiguous or not, or whether city lots or outlots, is unconstitutional.—Thomas v. Gain, 35 Mich. 155.

¶ 231. Assessments for sewers levied according to the superficial area of lots, without regard to actual or probable benefits, are unlawful; and though the legislature can prescribe the rule for apportioning benefits in levying such assessments, the rule must at least be one which it is legally possible may be just and equal as between the parties assessed.—Thomas v. Gain, 35 Mich. 155.

¶ 232. Assessments for sewers cannot be levied according to the superficial area of lots, without regard to actual or probable benefits.—Thomas v. Gain, 35 Mich. 155.

¶ 233. An apportionment of benefits in levying a special assessment for a sewer should not be based solely on area of property.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 234. Where from the record itself it appears that an assessment upon city lots for a sewer improvement has been made upon a flat rate according to area, instead of according to benefits, the assessment is invalid.—Auditor General v. Bishop, 161 Mich. 117.

¶ 235. In an action to contest a tax assessed for the construction of a sewer, the cost being assessed upon the basis of square feet, the assessment of all the lots in a certain block the same amount per square foot, the lots being along one side of the block, is not an equal assessment in proportion to the benefits derived, even though the sewer was intended to take the surface water from the entire block; nevertheless, the sewer was also designed to furnish and does furnish drainage for the lots fronting the street and as necessary to those lots as to contestant's lot, while none of the lots on the opposite side of the street can be drained into the sewer.—Auditor General v. O'Neill, 143 Mich. 343.

§ 72. ——On basis of foot frontage.

Method of determining frontage of abutting real estate, see ante ¶ 41.

¶ 236. It is competent for the legislature to authorize the cost of paving a street to be assessed upon the abutting property according to frontage.—City of Kalamazoo v. Francoise, 115 Mich. 554.

¶ 237. For local improvements, such as street paving, assessments may be apportioned according to frontage under legislation which permits that method to be followed.—Williams v. City of Detroit, 2 Mich. 560; Mots v. City of Detroit, 18 Mich. 495; Hoyt v. City of East Saginaw, 19 Mich. 39; Sheley v. City of Detroit, 45 Mich. 431.

¶ 238. By section 5, c. 17 of the Charter of Port Huron, paving assessments based on frontage may be validly levied on abutting owners.—Auditor General v. Wellman, 160 Mich. 512.

¶ 239. A paving assessment based upon lot frontage is valid.—Palmer v. City of Port Huron, 139 Mich. 471.

¶ 240. Special paving assessments according to street frontage are constitutional.—Cote v. Village of Highland Park, 173 Mich. 201.

¶ 241. Where a special assessment, purporting to be levied according to frontage, puts a greater proportionate burden on improved property than on adjoining unimproved property by reason of the former having a greater assessed value on account of buildings thereon and reduces the estimated foot front tax on the latter because it exceeds twenty-five per cent of the assessed valuation, such assessment is invalid.—Cote v. Village of Highland Park, 173 Mich. 201.

¶ 242. The uniform frontage rule in special assessment proceedings contemplates a uniform system of improvement within the assessment district, and if the municipal authorities decide it expedient to build pavements of materially different width or quality in different localities they should provide different assessment rolls in different assessment districts therefor, such a proceeding being authorized by Comp. L. 1897, § 2786, How. Ann. St., 2nd Ed., § 6005.—Corby v. City of Detroit, 180 Mich. 208.

¶ 243. Where a pavement several thousand feet in length varied in width at different points from sixty feet to forty-six feet, a property owner whose land abutted upon the narrowest portion cannot be assessed at the same rate per front foot as owners abutting upon widest portion, and where so assessed is entitled to recover payments made under protest.—Corby v. City of Detroit, 180 Mich. 208.

¶ 244. Assessments may be apportioned according to frontage in respect to local improvements such as repaving.—Sheley v. City of Detroit, 45 Mich. 431.

¶ 245. Water-pipe assessments on vacant lots must be uniform and are not apportionable by frontage.—Jones v. Detroit Water Com'rs, 84 Mich. 273.

§ 73. ——On basis of land values.

Assessment of inclosed orchard as vacant land, see also ante ¶ 229.

¶ 246. A local improvement assessment made on a basis of the value of land exclusive of improvements erected thereon is void and unauthorized where the statute (Local Acts 1895, No. 313, § 2) provides for a levy by foot frontage according to benefits, or by land values.—Walker v. City of Ann Arbor, 118 Mich. 251.

§ 74. Assessment in parcels or in gross.

Apportioning cost between local assessment and general fund, see ante § 12.

¶ 247. It is no objection to an assessment for street improvements that land was assessed as one parcel, though the owner in fact held different estates in two parcels occupied as one, one of which abutted on the street.—Parsons v. City of Grand Rapids, 141 Mich. 467.

§ 75. Computation of amount and method of valuing lands.

Apportioning cost between local assessment and general fund, see ante § 12.

¶ 248. In a suit to restrain the collection of a paving tax, the complainant seeking equitable relief will be compelled to do equity; and an assessed value of $3,000 for two lots will be enforced notwithstanding three lots were assessed at $2,500 in the last preceding ward tax roll, and one lot was since sold off for $1,800, where the testimony shows $3,000 to be a fair assessment for the two remaining lots.—Nowlen v. City of Benton Harbor, 134 Mich. 401.

¶ 249. A computation of the value of the part of a parcel of land which is within a special assessment district may be presumed to be just to the city where the value is computed from the assessed value of the parcel according to the area though the part is vacant and the portion outside the district is improved.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

¶ 250. Where an assessment for the opening of a street is made without deducting from the cost the amount received from the sale of a building on the land taken as required by Comp. L. 1897, § 3414, the assessment is not void but such amount may be deducted pro rata from the assessment as made.—Power v. City of Detroit, 139 Mich. 30.

§ 76. Dividing and combining parcels.

¶ 251. Under How. St. § 2649, requiring the board of assessors to enter upon a special assessment roll the valuation of each parcel within the district (as shown by the last preceding general assessment roll), the valuation of a parcel lying partly within and partly without the district may be apportioned, where it was assessed as one tract upon the general roll.—Boehme v. City of Monroe, 106 Mich. 401.

E. ASSESSMENT LIST, REPORT, OR RETURN AND ACTION THEREON.

§ 77. Assessment rolls and descriptions of parcels.

Showing as to benefit equaling assessment, see post § 78.

Effect of clerical errors, see post § 79.

Certificate of board or officer making assessment, see post § 80.

Effect and conclusiveness of certificate, see post § 81.

Notice of assessment and opportunity for inspection, see post §§ 82, 83.

Hearing and review on return of assessment, see post § 84.

Change or revision on return of assessment, see post § 85.

Confirmation of assessment, see post § 86.

Presumption and evidence of confirmation, see post § 87.

Conclusiveness of confirmation, see post § 88.

Irregularities in assessment roll or return and in proceedings thereon, see post § 108.

Procedure to levy and spread assessments for drains, see Drains, II, C.

Assessment rolls for taxes in general, see Taxes, V, B.

¶ 252. It was not material in 1852, under the charter of Detroit, that the assessment roll did not distinguish those who were residents from those who were not, as no rights were thereby affected.—Williams v. City of Detroit, 2 Mich. 560.

¶ 253. An assessment upon "St. Peter's and St. Paul's Cathedral," the roll neither describing the lots nor naming the owners or occupants, was held void under the charter and ordinances of Detroit.—Lefevre v. City of Detroit, 2 Mich. 586.

¶ 254. Where a charter (East Saginaw—Laws 1861, Act No. 56) requires commissioners who are appointed to assess the expenses of public improvements to "make out an assessment roll in which shall be entered the names of the persons assessed, the value of the property for which they are assessed, the amount assessed," etc., the provision must be regarded as mandatory, and an assessment roll which omits to state the value of the property assessed cannot be sustained.—Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 255. A paving assessment under the Muskegon charter (Local Laws of 1875, Act

No. 298, § 139) is void if the assessment roll does not show the valuation of the property assessed.—Beidler Mfg. Co. v. City of Muskgeon, 63 Mich. 44.

¶ 256. A special assessment roll was not defective as failing to state either the width of the intersections, the length of the pavement nor how the amount chargeable against the city was arrived at, where the entire frontage appeared upon the roll itself and was easy of computation.—Walker v. City of Detroit, 136 Mich. 6.

¶ 257. Section 17 of the charter of Bay City requires that the lots and premises specially benefited by the construction of a sewer or sidewalk shall be assessed according to the benefits derived from such improvements, while section 50 of the charter requires that the comptroller shall set down in the tax-roll the description of all the lands and premises he deems to be specially benefited by the proposed work, the amount assessed against each description, which shall include the contract price of construction and the amount, as estimated by the board of public works, for surveying, superintending, construction and advertising. Held, that if the assessing officer should, under the two sections, assess the whole cost of the work as commanded by section 50, and yet show that such assessment did not exceed the whole amount of benefits derived by the property assessed from the improvement, there would be no conflict between the two sections.—Adams v. Bay City, 78 Mich. 211.

§ 78. ——Showing as to benefit equaling assessment.

¶ 258. Under a charter providing that the lots and premises specially benefited thereby shall be assessed according to the benefits derived from the construction of any sewer or sidewalk, the roll must show expressly that the assessment was made on the basis fixed by the charter, and it should also appear of record somewhere that the benefits to the whole property included in the taxing district will equal the whole cost of the proposed work.—Adams v. Bay City, 78 Mich. 211.

¶ 259. Under a charter provision requiring the board of public works to certify upon an assessment roll for the cost of a public improvement that each parcel of land so assessed "is benefited specially by such improvement to the amount of the assessment thereon," a certificate showing the entire amount assessed, the amount assessed on each lot deemed to be benefited by the improvement, that the lots upon the roll are all that are benefited, and that the assessment is made in proportion to the benefits deemed to have been received, is sufficient.—Nelson v. City of Saginaw, 106 Mich. 659.

¶ 260. It is unnecessary that there be a specific indorsement upon the assessment roll of the City of Sault Ste. Marie that the tax only equals the amount of the improvement where every charter requirement is fulfilled by the council, board of public works, assessor and board of review, and where the city assessor and board of review have by certificates duly approved the roll in compliance with the city charter, chap. 21, § 6.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 Mich. 65.

§ 79. ——Effect of clerical errors.

¶ 261. Clerical errors in a benefit assessment roll, such as placing figures in the wrong column and omitting a small piece of land belonging to complainant, are not prejudicial.—Beecher v. City of Detroit, 92 Mich. 268.

§ 80. ——Certificate of board or officer making assessment.

See also ante ¶ 259.
Effect and conclusiveness of certificate, see post § 81.

¶ 262. Where, in pursuance of an ordinance requiring the assessments to be in proportion to the benefits, a resolution of the common council of Grand Haven directed a tax for the construction of a sewer to be assessed against the owners or occupants of the premises whose value was increased thereby, a recital in the assessor's certificate merely that he had made the assessment roll "pursuant to the resolution" was insufficient; such a certificate is ambiguous, and does not necessarily import anything more than that he has made assessment in obedience to the resolution; it is not equivalent to a distinct statement that he has levied the tax upon the basis established by the ordinance. Being a jurisdictional document in proceedings under which titles may be divested, the certificate must not speak in doubtful terms, and the reasons requiring it to be distinct are even more imperative with special and exceptional than with general taxes. Where thus ambiguous, it was held that the fact that the tax had been laid apparently without regard to the value or use of the property, but strictly in proportion to the frontage on the street, raised a strong inference that the requirements of the ordinance had not been observed.—Warren v. City of Grand Haven, 30 Mich. 24.

¶ 263. An assessor's certificate which contained no reference to the contract under which the work was done, nor to the plat of the assessment district prepared by the city engineer, did not render the assessment void.—Walker v. City of Detroit, 136 Mich. 6.

¶ 264. A defect, if any existed, in the certificate of the special assessors on the assessment roll required by Comp. L. 1897, § 3200, was not a fatal defect rendering the assessment void.—Auditor General v. Calkins, 136 Mich. 1.

¶ 265. In a suit brought ten years after sale for taxes, a special assessment will not be set aside on the ground that the board of assessors returned the roll to the common council without a certificate showing the assessment was made in accordance with the provisions of the charter.—Tuller v. City of Detroit, 126 Mich. 605.

§ 81. ——Effect and conclusiveness of certificate.

See also post ¶ 292.

Certificate as evidence that assessment is approved by board of review, see also post ¶ 287.

Certificate as evidence that personal notice has been served on persons named in roll, see post ¶ 276.

¶ 266. The certificate of the city engineer who apportioned the benefits to the effect that he has included in the assessment roll all the real estate in the assessment district as fixed and determined by the common council the just proportion of the amount directed according to the benefits resulting to each of said lots is subject to review and is not conclusive as to the benefits where it actually appears that the apportionment does not correspond to the benefits.—Auditor General v. O'Neill, 143 Mich. 343.

¶ 267. The city engineer's certificate attached to the assessment roll stating that an assessment for a sewer is made in proportion to the benefits derived by the several lots is conclusive upon the question of whether the assessments were laid according to area only or according to area and benefits.—Walker v. City of Detroit, 138 Mich. 639.

§ 82. Notice of assessment and opportunity for inspection.

Evidence or proof of service, see post § 83.

Waiver of irregularities in service of notice, see post ¶ 355.

Cure of defective notice by reassessment, see post ¶ 304.

¶ 268. Under the Detroit charter in 1852 notice of making the assessment was not required to be given personally, but was sufficient if published in a city paper as required by the ordinances.—Williams v. City of Detroit, 2 Mich. 560.

¶ 269. Where notice of the time and place fixed for the hearing of appeals from assessments for street improvements is given by publication as required by the city charter, such notice must be held sufficient.—Brown v. City of Grand Rapids, 83 Mich. 101.

¶ 270. Under the charter of Detroit, ch. 11, § 37, providing that when a special assessment roll is completed the board of assessors shall give notice that the roll is completed and will remain for inspection, etc., it cannot be claimed that those taxed have no opportunity to be heard where such notice and time were given.—Beecher v. City of Detroit, 92 Mich. 268.

¶ 271. A notice for property holders to appear and present objections to a proposed street improvement does not invalidate the proceedings by reason that the date of the hearing therein fixed happens, by inadvertence of the clerk, to fall on Sunday, if the persons affected waive the point by taking extensions for payment or paying their assessments voluntarily.—Louden v. East Saginaw, 41 Mich. 18.

¶ 272. Under a charter provision that the city engineer shall give notice that a paving assessment has been completed and will remain in his office for ten days from the first publication for inspection, a notice by publication addressed to "all owners and other persons interested" in the described lands, is sufficient, it not being required to address the notice to named individual owners.—Palmer v. City of Port Huron, 139 Mich. 471.

¶ 273. Where notice according to law is given to an owner of several lots that only one thereof was placed within an assessment district, such owner has a right to assume that in making the assessment roll such lot only will be taxed.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

¶ 274. How. St. § 3064o, which provides that an assessment for street opening benefits shall be made in the same manner as is provided in the municipal charter for assessing the expenses of street grading, sufficiently prescribes the notice of assessment, where the charter provides for notice in such latter case.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

¶ 275. A charter provision for notice of special assessments by two weeks' publication in the official newspaper of the city and giving two weeks from the first publication for filing objections, is sufficient as providing reasonable notice and adequate hearing to persons affected by the assessment.—Auditor General v. Hoffman, 132 Mich. 198.

§ 83. ——Evidence or proof of service.

¶ 276. A city treasurer's certificate attached to an assessment roll that "personal

notice has been served on all persons named in the within roll as required" by the charter, citing the particular section and title prescribing the manner of such notice, is evidence of proper service of such notice.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

¶ 277. Under a provision of a city charter that "all of the proceedings of the common council (in the matter of the making of public improvements) shall be matters of record in its proceedings, and shall not fail on account of any technical or clerical error made by any officer of the city, nor because of any act not being done at the time or in the manner required, unless the party complaining of such failure shall show affirmatively that he has been injured thereby," a failure to have before the council, at the time of its confirmation of the assessment roll, proof of the publication of notice of the hearing of objections to said roll, will not operate to defeat the assessment, where the proof shows that such notice was in fact given.—Shimmons v. City of Saginaw, 104 Mich. 511.

§ 84. Hearing and review on return of assessment.

Change or revision of assessment roll, see post § 85.
Confirmation of assessment, see post § 86.
Presumptions and evidence of confirmation, see post § 87.
Conclusiveness of confirmation, see post § 88.
Conclusiveness of action as to property benefited and limits of assessment district, see ante § 68.
Failure to appear on review of tax officers as waiver of judicial review, see post ¶ 380.
Judicial review, see post VII, B.

¶ 278. Where a charter provides that the common council shall review a special assessment roll and consider objections, it is competent for the legislature to leave to the council to determine when and where objections will be heard.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 279. The action of a majority of a city board of equalization and review in making an assessment for the improvement of a street is legal if all the members of the board were notified of the meeting at which it was taken under Comp. L. 1871, § 2.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 280. A municipal corporation does not possess the power to decide that a landowner is benefited by an improvement, without giving him an opportunity to be heard upon the question of benefits, unless such power be granted in clear and unmistakable terms by the legislature.—Stevens v. City of Port Huron, 149 Mich. 536. (Separate opinion of Carpenter, J.)

¶ 281. Parties whose property is to be taken by summary tax proceedings for sewer assessment are entitled as of right to be heard at some stage of the proceedings before the tax becomes an established charge against them or their property.—Thomas v. Gain, 35 Mich. 155.

§ 85. Change or revision of assessment roll.

Change or variation on reassessment, see post § 90.

¶ 282. On a special assessment roll for paving a street, submitted by the board of special assessors to a city council, the assessment figures demanded by one of the said assessors were placed under the head of "Remarks." The city council in passing upon same ordered the city clerk to enter in the assessment column the figures suggested by said dissenting assessor in place of the figures submitted by the majority of the board. Held, under Comp. Laws 1897, §§ 3193, 3198, 3200, 3205, the city council exceeded its powers since a revision of the roll or a new roll must be made by the board of assessors, and the provisions relating to revision and annulment of the roll limited the council to the corrections of mathematical errors in computing amounts of errors in the description of property.—Johnson v. City of Escanaba, 168 Mich. 276.

§ 86. Confirmation of assessment.

Presumptions and evidence of confirmation, see post § 87.
Conclusiveness of confirmation, see post § 88.

¶ 283. The objections made to the confirmation of a special assessment roll for a street opening having been read before the council, the matter was referred to a committee, to afford the parties an opportunity to be heard. After hearing the parties, the committee reported in favor of the confirmation of the roll, and it was thereupon confirmed by the council. Held, that the action of the committee, when adopted, became the action of the council.—Brown v. City of Saginaw, 107 Mich. 643.

¶ 284. Under a charter provision requiring that the common council shall review a special assessment roll and when satisfied with same shall by resolution confirm the same, a resolution that an assessment roll "be and the same is hereby accepted and adopted" is sufficient as confirmation thereof.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 285. Under a provision of the Detroit Charter of 1893, chap. 11, § 37, that in cases of street improvements the board of assessors should, after correcting the assessment roll, "sign the same and report it to the common council," which body might then confirm it, the council had no authority to confirm an unsigned roll.—Thompson v. City of Detroit, 114 Mich. 502.

§ 87. Presumptions and evidence of confirmation.

Conclusiveness of confirmation, see post § 88.

¶ 286. Where a city charter requires that a common council, before confirmation of an assessment roll, shall review and examine it, and it appears by the records that it was confirmed, it will be presumed that the council did its duty and reviewed the roll as required.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 287. Approval of a special assessment roll by the board of review of the City of Sault Ste. Marie is established where the certificate of the assessor required by the city charter, chap. 21, § 6 that the roll was so approved is attached thereto.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 Mich. 65.

¶ 288. A certificate of the board of review of the City of Sault Ste. Marie appointed by the council to review a special assessment roll which states that the board having been appointed by the city council to review the assessment roll at a regular meeting for such purpose certify that they have reviewed such roll, as assessed by the city assessor, and that the assessments therein are according to benefits and in accordance with a resolution of the council, constitutes an approval of the roll.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 Mich. 65.

¶ 289. The fact that the evidence shows that there are unpaid assessments against land for which it has not been sold is sufficient reason for denying the certificate provided for in Local Acts 1901, No. 472, as to the payment of city taxes and assessments, unless the land is not liable to the assessments.—Galinski v. City of Detroit, 193 Mich. 184.

§ 88. Conclusiveness of confirmation.

¶ 290. The apportionment of benefits for a street opening by the assessing officers is not subject to attack after the roll has been confirmed by the council pursuant to the charter.—Brown v. City of Saginaw, 107 Mich. 643.

¶ 291. The resolution of a city council fixing an assessment and declaring the amount to be assessed thereon for a special improvement is a legal determination that the benefits conferred upon said district are equal to such amount; and by confirming the assessment roll the council determines how much each parcel of land is benefited; and in the absence of fraud or mistake these determinations are conclusive.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 292. The facts that the certificate of the assessors recites that an assessment for a sewer in accordance with benefits was made and that the city council finally confirmed the roll, are not conclusive.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 293. Confirmation by council of any special assessment roll which in its application to proposed improvements violates the fundamental principles of the statute upon which its validity depends, is not final and conclusive upon that question under Comp. L. 1897, § 2840, How. Ann. St., 2nd Ed., § 6061.—Corby v. City of Detroit, 180 Mich. 208.

¶ 294. Under the charter of the city of Flint, as amended by Local Acts 1907, Act No. 554, which provides that the cost of constructing a trunkline intercepting sewer "or of such part thereof as shall be designed primarily for the benefit of the health of the whole city" shall be borne absolutely by the city, the common council is vested with a discretion to determine what part thereof is so designed, and its exercise of discretion, in the absence of fraud or bad faith, cannot be reviewed.—Berston v. City of Flint, 176 Mich. 266.

F. REASSESSMENTS AND ADDITIONAL ASSESSMENTS.

§ 89. In general; power to levy.

Variation from original plans, see post § 90.
Defects in original assessment curable by reassessment, see post § 91.
Persons entitled to require or object to reassessment, see post § 92.
Equalizing and adjustment of former assessments and payments, see post § 93.
Authority for reassessment after assessment declared void, see post ¶ 341.
Reassessment of drain taxes, see Drains § 76.
Procedure to levy and spread assessments for drains, see Drains, II, C.

¶ 295. The legislature can authorize a reassessment of a paving tax to pay for work done in good faith where a previous assessment therefor has been held void.—Byram v. City of Detroit, 50 Mich. 56.

¶ 296. Where an assessment for paving has failed because no apportionment was provided for by the act under which it was made, the legislature may authorize a reassessment.—Brevoort v. City of Detroit, 24 Mich. 322.

¶ 297. Under a city charter providing that whenever a special assessment shall be deemed invalid by the common council by reason of any irregularity or informality in the proceedings, or if it shall be adjudged illegal by any competent court, the council may make a new assessment, a reassessment may be made where the assessment is judicially declared illegal on jurisdictional grounds as well as when it is so declared for mere irregularity or informality.—Thayer Lumber Co. v. City of Muskegon, 157 Mich. 424.

¶ 298. The levy of a special assessment for the construction of a sewer, under the provisions of a city charter permitting a reassessment where a former assessment has been declared invalid, is not void for failure to provide for plans and diagrams of the sewer district, or estimates of cost, where these were properly defined in the original assessment, to which reference is made.—Thayer Lumber Co. v. City of Muskegon, 157 Mich. 424.

¶ 299. A clause in a city charter provided that whenever any special assessment shall for certain specified reasons be invalid, the council shall, whether the improvement has been made or not, have power to cause a new assessment to be made. Held, that a reassessment thereunder was not invalid because the resolution of the council failed to state that it was a reassessment, reference being made to the former proceedings, nor because the improvement for which the assessment was made had been partially completed under the former resolution.—Thayer Lumber Co. v. City of Muskegon, 157 Mich. 424.

¶ 300. The authority of the common council of Lansing under the revised charter (3 Sess. L. 1869, p. 1359, § 26) to levy a second assessment upon the setting aside as invalid of the original assessment to pay valid claims under a grading contract is sustained; and the proviso in such charter that nothing therein shall be construed to repeal or in any manner interfere with the provisions of a special act (3 Sess. L. 1869, p. 680) for a reassessment on the basis of a new survey and estimate to be made of the amount of work done under such grading contract does not affect this authority as to obligations arising out of said contract which had become fixed before such special act was passed, and to which, therefore, it could have no application.—People ex rel. French v. Lansing, 30 Mich. 378.

¶ 301. Laws 1869, Act No. 486 of 1869 (3 Sess. L. 1869, p. 1689), amending the charter of Detroit, and providing for a new assessment in certain cases where a former assessment has been vacated or held invalid, requires the reassessment to be made in accordance with the law in force at the time, without reference to the law as it stood when the original assessment was made. The act confers a continuing power, which is not exhausted by a single reassessment, nor until an assessment is made which can be enforced. A reassessment under this act, varying from the original assessment only to avoid the former errors, but whose purpose is the same, will not be held void for variations which are purely technical. The case of a reassessment under this act stands on its own reasons, and is not within the intent of the provision of chapter 7, § 39 of the amended charter (Laws 1869, Act No. 486; 3 Sess. L. 1869, p. 1724), prohibiting the making of a new assessment district after the bids for paving are received. The want of an assessment district originally might have been the very difficulty requiring new proceedings.—Brevoort v. City of Detroit, 124 Mich. 322.

¶ 302. The charter of Lansing provided that, when more money had been expended upon a public contract than was estimated in making the assessment for it, a further assessment to supply the deficiency might be made; also, that new assessments might be made in lieu of invalid ones. Where, therefore, the work contracted for had been done, and the orders issued on the estimates remained unpaid because the assessment was declared invalid, it was held that Laws 1869, Act No. 338, authorizing a reassessment to pay for the specific work under a resurvey and re-estimate, and not providing for paying the amount of the orders or estimates already made, could not conclude the contractor, who did not assent to the new estimate, which was less than the old one. Such a statute would be authority for the new assessment, but as no legislation is valid which impairs the obligation of a contract, it could not cut off the right to further payment if it before existed.—People ex rel. Whitly v. Lansing Common Council, 27 Mich. 131.

§ 90. Variations from original plans.

Revision of assessment roll in general, see ante § 85.

¶ 303. On a reassessment made after a former assessment has been declared void, relatively unimportant changes as to plans and specifications of the work are immaterial.—Thayer Lumber Co. v. City of Muskegon, 157 Mich. 424.

§ 91. Defects in original assessment curable by reassessment.

¶ 304. Where a special assessment is set aside by a city council and the taxes reassessed upon the same district, the landowners cannot, in a suit to enjoin the collection of the reassessed taxes, complain of a want of notice of the original assessment.—Townsend v. City of Manistee, 88 Mich. 408.

¶ 305. The fact that an assessment in street opening proceedings had been declared invalid for the want of a sufficient resolution, does not preclude the common council from adopting a new resolution similar to the first but including the matter previously omitted and making a new assessment thereunder as prescribed by Detroit Charter, ch. 7, sec. 61, as amended by Loc. Acts 1895, No. 463, providing for a new assessment when any special assessment shall be held invalid.—Smith v. City of Detroit, 120 Mich. 572.

¶ 306. A village, prior to its annexation to the City of Detroit, took steps to construct certain lateral sewers, but failed to give

notice of its purpose in accordance with Comp. L. 1897, §§ 2795, 2833. Subsequent to the annexation the City Council of Detroit passed a resolution ordering a reassessment. Held, said resolution did not cure the defects in the village proceedings, since said failure to give notice was a jurisdictional defect vitiating the entire proceedings.—Crawford v. City of Detroit, 169 Mich. 293.

¶ 307. Under Comp. L. 1897, § 2833 authorizing the council to determine what proportion of the cost of a sewer shall be levied as special assessment and what shall be paid from the general funds, and section 2543 authorizing the council, where a special assessment is invalid because of irregularity in the proceedings, or because illegal, to make a new assessment, the council has power to correct the irregularity where it has levied a sewer assessment of 12½ per cent against property, by assessing 5 per cent against the property as limited by statute and the balance against the general funds.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 307a. A village, before its annexation, took steps to construct certain sewers. It failed to give notice of its purpose as required by Comp. L. 1897, §§ 2795, 2833. A bill for injunction being filed by a property holder, the circuit court sustained the same on the ground that said failure to give notice constituted a jurisdictional defect in said proceedings. No appeal was taken from said decision. Subsequent to the annexation to Detroit, the council of said city passed a resolution for a reassessment of said sewers. Held, no appeal having been taken from the decision of the circuit court, the decree of said court was final.—Crawford v. City of Detroit, 169 Mich. 293.

§ 92. Persons entitled to require or object to reassessment.

¶ 308. Where a sewer has been constructed under an assessment improperly levied, and the council has power to correct the error and levy a new assessment, it will be required to do so at the instance of one who has furnished the money for the improvement.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 309. Property owners cannot complain that a reassessment of property reduced the amount of the original assessment.—Thayer Lumber Co. v. City of Muskegon, 157 Mich. 590.

§ 93. Equalizing and adjustment of former assessments and payments.

¶ 310. Where a sewer assessment, made upon the basis that the property benefited should pay one-half of the expense and the city half, which it paid, was declared invalid, a subsequent assessment made on a two-thirds basis, and exempting those who had fully paid their former assessment, is unequal and void.—White v. City of Saginaw, 67 Mich. 33.

G. OBLIGATION, LIEN AND ENFORCEMENT OF ASSESSMENTS.

§ 94. Nature of obligation and time and manner of payment.

Lien or charge in general, see post § 95.
Extinguishment, merger or loss, see post §§ 96, 97.
Collection and enforcement of assessment, see post § 98.
Property subject to sale for assessments, see post § 99.
Enforcement against personalty, see post § 100.
Defenses, bar or reductions of amount due, see post § 101.
Costs and expenses of collection, see post § 102.
Liability for expenses of illegal assessment, see post § 103.
Adjustment of payments under original assessment where reassessment has been made, see ante § 93.
Apportioning cost between local assessment and general fund, see ante § 12.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Lien and obligation of taxes in general, see Taxes, IX.
Assessments as incumbrances on land, see also Covenants for Title § 18.
Procedure to levy and spread assessments for drains, see Drains, II, C.

¶ 311. Act No. 489, Local Acts 1887, provided that special paving assessments should be payable in four parts and at such times as the city council should provide by ordinance. Held, that an ordinance specifying the times for the payments did not apply to assessments made previous to its enactment where it did not expressly so stipulate.—City of Detroit v. Weber, 158 Mich. 590.

¶ 311a. Act No. 489, Local Acts 1887, provided that special paving assessments should be payable in four parts and at such times as the city council should provide by ordinance. Held, this provision in the local act was not self-executing and an assessment made under it before said ordinance had been passed was invalid.—City of Detroit v. Weber, 158 Mich. 590.

¶ 312. An assessment for the opening of a street in the City of Detroit is properly made payable in one sum though Comp. L. 1897, § 3406, governing the opening of streets, provides that the assessments shall be levied and collected in the same manner as for street grading, and Loc. Acts 1887, No. 489, sec. 44, provides that assessments for street grading shall be made in four parts running through four years, since the charter provides that in street grading proceedings

bonds shall be issued payable in one, two, three, and four years, while in street opening proceedings there is no such provision —Power v. City of Detroit, 139 Mich. 30.

§ 95. Lien or charge in general.

Interest on unpaid drain assessments, see Drains § 77.

Lien and obligation of taxes, see Taxes IX.

¶ 313. Laws 1883, Act No. 124, providing for the taking of private property by a city for public use, the assessment for benefits, being made a lien on the premises, is not to be regarded as imposing a personal tax, but a tax upon the land.—Beecher v. City of Detroit, 92 Mich. 268.

§ 96. Extinguishment, merger or loss.

Effect of adverse possession and limitations, see post § 97.

¶ 314. Where a city buys at the tax sale land sold for special assessments, such purchase extinguishes both the lien and liability. —Klatt v. City of Detroit, 162 Mich. 186.

¶ 315. The purchase by the City of Detroit of land sold for special assessments gives it a title in which the lien is merged, although no deed and possibly no certificate of sale is issued.—Klatt v. City of Detroit, 162 Mich. 186.

§ 97. ——Effect of adverse possession and limitations.

Adverse possession against city buying in for assessments, see Adverse Possession § 3, ¶ 10.

¶ 316. Act No. 383, Local Acts 1899, provides that the statute of limitations shall not run against a debt for unpaid special assessments. Held, this act does not prevent the statute from running so as to keep a party from ridding himself of the lien by adverse possession, where the city has bought the land at tax sale.—Klatt v. City of Detroit, 162 Mich. 186.

¶ 317. Where land is sold to a city for an unpaid special assessment, it is not necessary that the city have color of title to enable a party to devest the tax lien by adverse possession.—Klatt v. City of Detroit, 162 Mich. 186.

§ 98. Collection and enforcement of assessment.

Injunction against collection of assessment, see post § 121.

¶ 318. Both the Saginaw city charter (Local Acts 1885, No. 355, tit. 6, § 26) and the General Tax Law of 1889 contemplate that collection of special city assessments may be enforced in the circuit court in chancery at the instance of the state "in the same manner as the annual taxes of said city."—Auditor General v. Maier, 95 Mich. 127.

¶ 319. Under the charter of Grand Rapids the city marshal is not entitled to the collection fees upon local assessments, when, after the expiration of the tax-warrants attached to the assessment rolls, he has returned the rolls to the city clerk as uncollected, and the clerk has himself collected the assessments together with the "marshal's fee for collection prescribed in the warrant." —Lyon v. City of Grand Rapids, 30 Mich. 258.

¶ 320. Inasmuch as Comp. L. 1897, § 2841 provides that all special assessments shall from the date of the confirmation thereof constitute a lien upon the respective lots or lands assessed, where several such assessments have been made, the total of which exceeds the limits fixed by the statutes, payment must be made and is enforceable on that assessment which was first confirmed because that became the prior lien.—Corliss v. Village of Highland Park, 146 Mich. 597.

§ 99. Property subject to sale for assessments.

¶ 321. An assessment for benefits upon a part of the right of way and road-bed of complainant's road, including a freight house on said right of way, occasioned by the paving of the street upon which said assessed property abuts, otherwise valid will not be set aside because the property cannot be sold to pay the assessment, but the sale of the property to satisfy said assessment may be set aside, without prejudice to the city's right to proceed to the enforcement of the assessment in such mode as it should deem best.—Lake Shore & M. S. R. Co. v. City of Grand Rapids, 102 Mich. 374.

¶ 322. Property of a railroad company that is necessary to the enjoyment of its franchise, such as a part of the road-bed, cannot be sold under proceedings to collect an assessment levied thereon for a municipal improvement.—Detroit, G. H. & M. R. Co. v. City of Grand Rapids, 106 Mich. 13.

§ 100. Enforcement against personalty.

Effect of personalty on jurisdiction of equity to enjoin assessment, see post ¶ 396.

¶ 323. Under Local Acts 1889, No. 374, § 9, requiring the treasurer to return a special assessment, together with a statement of lands upon which the assessments have not been paid and Local Acts 1891, No. 346, § 13, providing for the assessment of both general taxes and delinquent special assessments and the adding together of all taxes and assessments and that they shall become a debt to the city from the person to whom they are assessed and section 14 of the same act authorizing a levy by distress, the treasurer is authorized by his warrant to seize personal property for the collection of both general taxes and special assessments, and this notwithstanding the present owner did not own the lands at the time of the original assessment.—Michigan Lake Superior Power Co. v. Atwood, 126 Mich. 651.

§ 101. Defenses, bar or reductions of amount due.

Defenses and bar to recovery of excessive or improper payment, see post § 132.
Defect in petition as defense in action to collect assessment, see also ante ¶ 96.
Estoppel to collect interest after settlement remitting interest, see Taxes, VIII.

¶ 324. It is no defense to the enforcement of an assessment for a public improvement that the work and material were not such as the contract called for; e. g., that the construction of a pavement was grossly defective.—Dixon v. City of Detroit, 86 Mich. 516.

¶ 325. In an action by a city to recover from a property owner a special assessment for repaving a street, held that the defendant was not injured by the failure of the city council to require a street car company to at once repave a space between its tracks, in accordance with its contract to do so whenever required by the city council, where there was a verbal agreement between the city and the company that it should do so soon.—City of Kalamazoo v. Perrin, 194 Mich. 484.

¶ 326. A lot owner who refuses to pay an assessment for a street opening is liable for the penalties provided by statute and for interest on the amount found due, though the assessment was reduced because of failure to deduct therefrom the amount received for a building on the land taken for the street.—Power v. City of Detroit, 139 Mich. 30.

¶ 327. The clause of a contract letting paving work, providing for a penalty for delay in completing the work, has no relation whatever to the assessment, and abutting owners cannot object to the assessment on the ground that they did not receive the benefit of a deduction for the penalty in question, and that the board had no power to waive it.—Cass Farm Co. v. City of Detroit, 124 Mich. 433, aff'd in 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

§ 102. Costs and expenses of collection.

¶ 328. Where an assessment was made for the construction of a sewer, an objection that the warrant attached to the tax-roll permitted the collector to add two per cent for his services was held to be without force; the cost of collection is a necessary part of the expense, and may be either included in the original sum ordered to be levied, or, perhaps, added afterward.—Warren v. City of Grand Haven, 30 Mich. 24.

¶ 329. Under the Detroit city charter, as in force in 1852, the warrant issued for the collection of a street assessment might lawfully authorize the marshal to collect five per cent in addition for his fees.—Williams v. City of Detroit, 2 Mich. 560.

§ 103. Liability for expenses of illegal assessment.

¶ 330. After an assessment for a public sewer has been set aside as illegal, the city cannot maintain a suit against a property owner for his share of the expense, even though a provision of the city charter authorizes the court, in case an assessment on which a suit is brought proves to be irregular or informal, to render judgment against defendant or the premises for the amount of the expense incurred properly chargeable.—City of Manistee v. Harley, 79 Mich. 288.

VII. ILLEGAL AND EXCESSIVE ASSESSMENTS AND RELIEF FROM SAME.

A. DEFECTS AND IRREGULARITIES AND EFFECT OF SAME.

§ 104. In general; materiality of particular defects.

Irregularities in bids and contracts, see post § 105.
Vices in the assessments themselves, see post §§ 106, 107.
Irregularities in assessment roll or return and in proceedings thereon, see post § 108.
Cure of defects, see post § 109.
Persons entitled to question or object, see post § 110.
Estoppel, waiver and bar of objections, see post §§ 111-113.
Defenses, bar or reductions of amount due, see ante § 101.
Conclusiveness of confirmation, see ante § 88.
Power to make assessments in general, see ante § 46.
Conclusiveness of proceedings preliminary to improvement, see ante § 32.
Presumption as to validity of assessment, see ante § 50.
Liability for costs and funds, appropriations and provisions to meet same, see ante II.
Disability to combine dissimilar improvements in one proceeding, see ante § 9, ¶ 19.
Claims for damage for injury caused by improvement, see ante V.
Relief against invalid ordinances and resolutions of municipal corporations in general, see Municipal Corporations, VII.
Defective and illegal municipal or public bonds, see Municipal Bonds, III.

¶ 331. Proceedings to condemn private lands for a public highway are to be considered as an entirety, and if as to any of the parties the street laid was not valid for want of proper notice to any of the landowners, it cannot be regarded as lawfully established as against those who were properly served, so as to compel them to pay assessments laid upon them for benefits from its establishment.—Brush v. City of Detroit, 32 Mich. 43.

¶ 332. An assessment of damages in proceedings to condemn lands for street opening is void if the land is not lawfully condemned.—Detroit, M. & T. R. Co. v. City of Detroit, 49 Mich. 47.

¶ 333. One of the jurors impaneled and sworn in a street opening case failed to appear on the adjourned day, whereupon counsel representing the city and the owners of the property sought to be condemned stipulated to proceed with the eleven remaining jurors, who found that a public necessity existed for opening the street, and fixed the amount of compensation to be paid to the property owners. A bill was filed by several taxpayers, whose lands had been assessed to pay the compensation awarded, to restrain the collection of the tax, their contention being that the condemnation proceedings were void because less than twelve jurors sat in the case, and determined the questions of public necessity and the amount of damages to be awarded. Held, that complainants were not prejudiced by the action complained of, and that it did not invalidate the tax levy.—Borgman v. City of Detroit, 102 Mich. 261.

¶ 334. Where a city council has declared the paving of a street to be a necessary public improvement, the assessment therefor is not invalidated by a subsequent change in the plan thereof, as by ordering tile drains put under the curbs.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 335. The omission to appoint an officer to superintend the paving of a street in Detroit, as provided by the city ordinances, would not invalidate an assessment for the paving, when the paving was done under a contract which the common council had a right to make.—Williams v. City of Detroit, 2 Mich. 560.

¶ 336. Failure to give the notice of a proposed public improvement, required by Comp. L. 1897, § 3195, is a defect of substance within section 3922, providing that no tax shall be invalidated for irregularities or informalities in any proceeding not prejudicial to the property rights of the taxpayer.—Auditor General v. Calkins, 136 Mich. 1.

§ 105. Irregularities in bids and contracts.

See also ante ¶ 105.

Necessity for letting contract to lowest bidder, see ante § 35.

Proposals and contracts in general, see ante IV.

¶ 337. An assessment upon a city lot for the expense of paving the street is not invalid from the paving having been contracted for before the assessment was made.—Le Fevre v. City of Detroit, 2 Mich. 586.

¶ 338. A paving assessment will not be set aside on the ground that the advertisement for bids failed to comply with the ordinance requiring the time for the opening of the bids to be fixed in the advertisement, where it appears that the paving is entirely completed, that the owners have been benefited, that no one has been harmed, and that the bids were opened in the office of the board of public works in the presence of those who tendered bids, at the time mentioned in the advertisement, as the time up to which bids would be received.—Cass Farm Co. v. City of Detroit, 124 Mich. 433. Affirmed in 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

§ 106. Vices in the assessments themselves.

Assessments exceeding cost of improvement, see ante § 65.

Power to make assessments, see ante § 46.

Interest of persons making or officiating in assessment, see post § 107.

Invalidity of assessment made on basis of superficial area of property, see ante § 71.

Inclusion in assessment of improper items, see ante ¶ 205.

Invalidity of assessment from illegal or excessive rate, see ante ¶¶ 198, 201.

¶ 339. Special assessments requiring discrimination between properties of persons taxed cannot be sustained.—White v. City of Saginaw, 67 Mich. 33.

¶ 340. A special assessment for grading and graveling a street will be set aside where it includes the cost of a sewer constructed without authority.—Peck v. City of Grand Rapids, 125 Mich. 416.

¶ 341. Where in levying a special assessment under Comp. L. 1897, § 2837, the assessors failed to make a valuation of complainant's property, the assessment must be declared void, with leave to make a proper reassessment.—Weber v. City of Detroit, 158 Mich. 149.

¶ 342. Where a part of a parcel of land owned by complainant lies within a special assessment district, but the value of such part is not computed and an assessment is spread against the whole parcel, such assessment is illegal.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

§ 107. ——Interest of persons making or officiating in assessment.

¶ 343. A sewer assessment is not void because two of the members of the council own land within the assessment district and their votes were necessary to make the two-thirds vote required under Comp. L. 1897, § 2752, to impose such assessment.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 344. The objection to an assessment of benefits for a public improvement (a street opening) that the members of the council which determined the assessment district were taxpayers within the city, and were therefore interested, has no force.—Brown v. City of Saginaw, 107 Mich. 643.

¶ 344a. That the members of a common council which determined the assessment district were taxpayers in the city and therefore interested, was held no objection to an assessment of benefits for a public improvement.—Brown v. City of Saginaw, 107 Mich. 643.

§ 108. Irregularities in assessment roll or return and in proceedings thereon.

See also ante ¶¶ 253, 277.

Effect of clerical errors on assessment roll, see ante § 79.

Effect of setting hearing on assessment for Sunday, see also ante ¶ 271.

Invalidity of assessment where roll does not show valuation of property assessed, see also ante ¶ 255.

Assessment roll and return in general, see ante VI, E.

¶ 345. Under the charter of Grand Rapids, providing that assessments upon any unoccupied lot of a non-resident owner shall be made in his name and entered in a list of non-resident owners, etc., an assessment made and entered on the resident owners' list is void as against such non-resident.—Hill v. Warrell, 87 Mich. 135.

¶ 346. Where the record shows that lands alone have been assessed for the benefits of a public improvement, and that no personal assessments have been made, it is immaterial that some of those whose names appear on the roll as owners were not in fact owners.—Auditor General v. Maier, 95 Mich. 127.

¶ 347. The objection that the certificate of the assessor does not show the basis on which the assessment was made does not invalidate it where the council has acted on it and approved it.—Gregory v. City of Ann Arbor, 127 Mich. 454.

§ 109. Cure of defects.

Legislative power to cure defective proceedings or assessments, see Constitutional Law § 250.

¶ 348. The several ordinances established by the common council of Detroit, prescribing the several steps to be taken to perfect assessments and enforce their collection, are binding upon the common council and its officers, as well as upon individuals. When the provisions of those ordinances affecting the substantial rights of individuals are not complied with, the common council have no authority to cure the irregularity by resolution.—Williams v. City of Detroit, 2 Mich. 560.

§ 110. Persons entitled to question or object.

Persons entitled to petition for improvement, see ante § 17.

Persons entitled to object to reassessment, see ante § 92.

Conclusiveness of confirmation, see ante § 88.

Right of person assessed for cost of street opening to attack proceedings collaterally, see Highways ¶ 305.

Right of bidder on contract for local improvement to enjoin making of contract by city, see Public Contracts, VI.

Estoppel of person establishing invalidity of assessment to enforce payment of warrant issued in payment for improvement, see also Mandamus ¶ 64.

¶ 349. An assessment for benefits in street opening proceedings is not invalidated by irregularities not shown to be prejudicial to those objecting.—Boussneur v. City of Detroit, 153 Mich. 585.

¶ 350. The fact that a part of a complaining party's land was also assessed to another party will not avoid the assessment to the owner where the other party paid without objection.—Gregory v. City of Ann Arbor, 127 Mich. 454.

¶ 351. One whose property is assessed for benefits in street opening proceedings is not entitled to object to the proceedings upon the ground that the necessity of the opening was determined by one jury and the valuation of property taken by another, where the city and those whose property was taken had not objected.—Boussneur v. City of Detroit, 153 Mich. 585. (Grant, C. J., and Blair, J., dissenting.)

¶ 352. Where a small portion of an assessment district for the construction of a sewer had also been included in an assessment for pavement, but the owners of such portion made no objection, the amount of such pavement assessment need not be deducted in arriving at the total amount of assessment permitted in the year, where the question is raised by an owner whose land was not included in the paving assessment.—Corliss v. Village of Highland Park, 132 Mich. 152.

¶ 353. A city charter provided that the board of public works should annually report to the common council such public sewers as they should deem necessary to be built during the ensuing year, and that the council should determine what sewers of those so reported should be built. Held, that a sewer assessment would not be set aside on the ground that the construction of the sewer was not embraced within such

report, at the suit of one who did not avail himself of the right to be heard thereon before the common council, which by the charter was constituted a board of review, with power to correct, set aside, or confirm the assessment.—Nelson v. City of Saginaw, 106 Mich. 659.

§ 111. Estoppel, waiver and bar of objections.

Effect of petitioning for improvement, see post § 112.

Knowledge of progress or completion of work without objection, see post § 113.

Conclusiveness of confirmation, see ante § 88.

Effect on right to equitable relief of delay until improvement completed, see post § 119.

Estoppel to assert claim for damages arising from improvement, see ante § 42.

General principles of estoppel, see Estoppel.

¶ 354. Where irregularities in the taking of property for a street have been waived by the act of the owners of such property in accepting the award made to them, such waiver will prevent the urging of the irregularities in defense to an assessment upon other persons, even though made after a suit has been instituted by such persons to enjoin the collection of the assessment.—Boussneur v. City of Detroit, 153 Mich. 585.

¶ 355. Interested parties appearing and objecting in writing to the proceedings for other reasons going to the merits waive any irregularities in the service of notice of the session of the board of review to consider the special assessment roll.—Gregory v. City of Ann Arbor, 127 Mich. 454.

¶ 356. A property owner who has made no objections to a special assessment is in no position to complain of provisions as to time and place for hearing such objections.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 357. One is estopped from objecting in equity to an assessment substantially authorized by and made in reliance upon his own agreement.—Jackson v. City of Detroit, 10 Mich. 248.

¶ 358. The citizen has a right to assume that the law is being obeyed, instead of violated, by the public authorities, and is not bound at his peril to take notice of illegal action on their part; he is therefore not estopped from complaining of illegalities in the proceedings by which they have authorized a work of public improvement, and in the absence of any evidence of previous knowledge on his part of their unlawful action, he is in time with his protest when they proceed to deprive him of his rights under such proceedings.—Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 359. Where a sewer-tax was assessed against one who was a member of the common council at the time the proceedings for levying it were taken, but is not shown to have done anything toward recognizing the tax-roll as valid or to have participated in any action on it other than to move that a certain day be assigned for hearing appeals upon objections to it, he was held not estopped from taking exceptions to the assessment-roll.—Warren v. City of Grand Haven, 30 Mich. 24.

¶ 360. The failure of property owners to object to proceedings to build a street and storm sewer and to assess for their cost will preclude their setting aside the proceedings after the improvement is completed.—Gates v. City of Grand Rapids, 134 Mich. 96.

¶ 361. Where, in proceedings to enjoin an assessment for benefits in street opening proceedings, it is contended that irregularities in the taking of property for such street were consented to and waived by the parties interested therein, it is immaterial that a payment and acceptance of the award for the property taken occur after suit was instituted since that would not affect their waiver.—Boussneur v. City of Detroit, 153 Mich. 585.

§ 112. ——Effect of petitioning for improvement.

Effect of petitioning for improvement on right to recover excessive or illegal assessment involuntarily paid, see post ¶ 443.

¶ 362. Petitioners for a public improvement are estopped in equity from denying power to grant their petition and assess them therefor.—Steckert v. City of East Saginaw, 22 Mich. 104; Byram v. City of Detroit, 50 Mich. 56.

¶ 363. Petitioners for public improvements are not estopped from objecting that the proceedings upon their petition have been conducted in disregard of law.—Steckert v. City of East Saginaw, 22 Mich. 104; Taylor v. Burnap, 39 Mich. 739.

¶ 364. Parties who petition for a local improvement that is provided for by the city charter and ordinances must be understood as requesting that it be done under such charter and ordinances, and if these turn out to be invalid the petitioners cannot set up such invalidity as a basis for equitable relief against the action which they have requested.—Motz v. City of Detroit, 18 Mich. 495.

¶ 365. Property owners who petition for a pavement are not estopped by reason of having made such petition from questioning a special assessment made under a law

which has been declared unconstitutional. —Auditor General v. Johns, 190 Mich. 601.

¶ 366. The signing of a petition for a street improvement by a property owner does not estop his grantee from questioning the jurisdiction of the common council to make the improvement and levy the tax because of the fact that it is not signed by a majority of the owners of the frontage.—Auditor General v. Woodard, 191 Mich. 496.

§ 113. ——Knowledge of progress or completion of work without objection.

Effect on right to equitable relief of delay until improvement completed, see post § 119.

¶ 367. Knowledge of the progress of a work of public improvement in a city will not estop a party from complaining of illegalities in the proceedings by which the work was authorized.—Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 368. An abutting owner though he remonstrates against a street improvement is nevertheless estopped to set up irregularities as defense to his liability for special assessments therefor where he has full knowledge of the irregularities and stands by and permits the improvement to be made and the city to obligate itself for the cost. —Stewart v. City of Detroit, 137 Mich. 381.

¶ 369. A court of equity will refuse to grant relief from the assessment to a complainant who has stood by and permitted a special improvement to be made, knowing that such improvement is to be compensated by a special assessment upon the district in which the property is located.—W. F. Stewart Co. v. City of Flint, 147 Mich. 697.

¶ 370. Those who stand by and knowingly permit public improvements to be made and money expended thereupon without raising objection will be estopped from asserting the invalidity of the proceedings.—Goodwillie v. City of Detroit, 103 Mich. 283; Atwell v. Barnes, 109 Mich. 10; Moore v. McIntyre, 110 Mich. 237; Baudistel v. Recorder and Common Council of City of Jackson, 110 Mich. 357; Smith v. Carlow, 114 Mich. 67; Lanning v. Palmer, 117 Mich. 529.

¶ 371. A property owner is estopped from questioning his liability for special assessment where he knows the work of paving the street is being done and makes no objection.—Nowlen v. City of Benton Harbor, 134 Mich. 401.

¶ 372. A taxpayer, who knows that a pavement is being laid and raises no protest or objection for four years, cannot then complain in objection to the tax that the petition did not specifically ask that the street be macadamized, where the charter does not require that such petition be signed by any specified number or class of inhabitants, nor expressly denies the council authority to collect special assessments except when made in pursuance of a petition.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 373. Property owners who do not sign a petition for a pavement are not estopped from questioning a special assessment made under a law which has been declared unconstitutional because they stood by and saw the improvement made.—Auditor General v. Johns, 190 Mich. 601.

¶ 374. Where the statute permits an owner to resist an invalid assessment for a special improvement upon a proceeding for the sale of his land to pay the tax, he is not barred by laches from setting up such invalidity by the fact that he made no objection to the assessment and permitted the improvement to be constructed.—Auditor General v. Bishop, 161 Mich. 117.

¶ 375. Where the owner of property had full knowledge that improvements were being made he cannot after such improvements have been completed restrain the collection of the tax assessed therefor even though the common council may have disregarded and ignored many essential provisions of the charter, although he may have succeeded had he raised his objections while the work was in process of construction.—Shaw v. City of Ypsilanti, 146 Mich. 712.

B. APPEAL OR DIRECT JUDICIAL REVIEW.

§ 114. In general.

Review on certiorari, see post § 115.
Waiver or loss of right, see post § 116.
Review by assessing body, see ante § 84.
Power to review exercise of discretion of city council in determination as to part of cost of improvement to be borne by entire city, see ante ¶ 294.
Conclusiveness of proceedings preliminary to improvement, see ante § 32.
Costs in both courts on appeal from judgment based on illegal assessment, see Costs ¶¶ 412, 413.
Right of person assessed for cost of street opening to appeal from judgment therein, see Highways ¶ 313.
Judicial review of highway construction and improvement proceedings, see Highways § 114.

¶ 376. Municipal officers who are charged with the duty of determining the district benefited by a public improvement, and making the assessment thereon, will be presumed to have acted in good faith, and to have exercised correctly the discretion reposed in them; and, where mistake or abuse of discretion is not manifest or demonstra-

ble, their determination is not reviewable by the courts.—Powers v. City of Grand Rapids, 98 Mich. 393.

¶ 377. With reference to the power of the courts to review the acts of a city council, the assessment of benefits for improvements in street opening proceedings is an entirely distinct matter from the awarding of damages for land taken.—Roberts v. City of Sandusky, 158 Mich. 521.

§ 115. Review on certiorari.

Right to review or attack preliminary proceedings for improvement, see ante § 32.
General law of certiorari, see Certiorari.
Delay as objection to certiorari, see Certiorari § 28.

¶ 378. Certiorari does not lie to review the validity of a village paving tax.—Hudson Common Council v. Whitney, 53 Mich. 158.

¶ 379. Certiorari will not lie to bring tax proceedings before the supreme court for review.—Whitbeck v. Village of Hudson, 50 Mich. 86.

§ 116. Waiver or loss of right.

¶ 380. Failure after due notice to appear before the board of review of street-improvement assessments (the city council in this case), and to ask therefrom the correction of an alleged error, precludes appeal to the courts in the absence of fraud or mistake.—Brown v. City of Grand Rapids, 83 Mich. 101; Baisch v. City of Grand Rapids, 84 Mich. 666.

C. RELIEF BY COLLATERAL SUIT OR ATTACK; INJUNCTION, VACATING OR QUIETING TITLE.

§ 117. Collateral attack or impeachment in general.

Persons entitled to equitable relief, see post §§ 118, 119.
Grounds and propriety of injunction against work or assessment, see post §§ 120-122.
Necessary and proper parties to injunction, see post § 123.
Pleading in injunction suits, see post § 124.
Cross-bill to enforce assessment or share of cost, see post § 125.
Suit in equity to set aside proceedings, see post §§ 126, 127.
Actions to quiet title, see post § 128.
Conclusiveness of proceedings preliminary to improvement, see ante § 32.
Recovery of excessive or improper payment, see post VII, D.
General law as to suits to quiet title, see Quieting Title.
Amount of assessment as test for jurisdiction of equity to entertain bill for relief or injunction, see Equity ¶ 78.
Actions by and against contractor, see Public Contracts, VI.
Remedies against improper collection of taxes, see Taxes, X, C.

¶ 381. An assessment for a street opening is not subject to collateral attack, for mere inaccuracies in the petition, by owners whose lands were not taken, but who were in the assessment district; such errors not being jurisdictional.—Goodrich v. City of Detroit, 123 Mich. 559, aff'd in 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

¶ 382. In a suit to quiet title by the owner of land against which an illegal special assessment is spread where it is alleged that the tax is in excess of the amount allowed by Comp. L. 1897, § 3196, providing that the amount levied on any lot for any one improvement shall not exceed 25 per cent of its value as valued and assessed for state and county taxation in the last preceding ward tax roll, the admission and consideration of oral testimony as to the value of the land is improper, since the statute prescribes the last tax roll as the criterion of value.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

§ 118. Persons entitled to equitable relief.

Delay until improvement completed, see post § 119.
Necessary and proper parties to injunction, see post § 123.
Necessary and proper parties to suit in equity to set aside proceedings, see post § 127.

¶ 383. Equity will not interfere to relieve a party on the ground that assessments are irregular and unauthorized by the strict provisions of law, where they are substantially authorized and made in reliance upon his own express agreement.—Jackson v. City of Detroit, 10 Mich. 248.

¶ 384. The fact that property is improperly exempted from assessment in street opening proceedings will not entitle persons assessed to enjoin the collection of the assessment where the complainants did not tender their proportionate share of the taxes and point out the reduction to which they are entitled in case all of the property subject to the assessment should be assessed.—Boussneur v. City of Detroit, 153 Mich. 585.

¶ 385. A certificate attached to a special assessment roll required to be made by the board of public works was signed by the president, but not by members of the board, and attested by the secretary of the board, they being authorized thereto by resolution spread upon its records. Held, that, even if such a certification were insufficient under the charter (Local Laws 1891, title 6, § 6, p. 402), which provided that the board of public works should certify to the roll, equity would not, for this reason, enjoin the collection of the assessment, at the suit of one who made no objection to the subsequent con-

firmation of the roll by the common council, though afforded an opportunity by title 6, § 28 to be heard thereon.—Duffy v. City of Saginaw, 106 Mich. 335.

¶ 386. When a plank road company is authorized by its charter to take possession of a street in the city and construct a plank road thereon, and is required to keep the road in repair, and the road is constructed, a toll-gate erected and tolls exacted of travelers, the city is thereby divested only of so much of its power over the street as would conflict with the rights of the company; and if the city authorities proceed to tear up the plank and cause the street to be paved, the company alone can complain. A bill by one who is assessed for the paving, to restrain the assessment, cannot be sustained.—Bagg v. City of Detroit, 5 Mich. 336.

¶ 387. The objection that the oath prescribed for the jurors in street opening cases by How. St. § 3064g, was not taken, is open to defendants in the petition, but is not open to owners whose lands were not taken but who were in the assessment district, and who seek to restrain the collection of the assessment by injunction.—Goodrich v. City of Detroit, 123 Mich. 559, aff'd in 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

¶ 388. One who has full knowledge of the facts is presumed to know that an assessment laid under an unconstitutional statute cannot be made the basis of a sale that could create any cloud upon his title, and therefore that he cannot be injured by it.—City of Detroit v. Martin, 34 Mich. 170.

§ 119. ——Delay until improvement completed.

Estoppel or waiver of objections generally by knowledge of progress of work or completion of work without objection, see ante §§ 111-113.

¶ 389. One who, knowing that a street is to be paved and that his lands are to be assessed therefor, allows without objection the paving to be done and the contractor to be paid out of the proceeds of bonds issued by the city in anticipation of the collection of the assessment, will not be granted an injunction to restrain for irregularities the collection of the assessment.—Fitzhugh v. City of Bay City, 109 Mich. 581.

¶ 390. Injunction to restrain the collection of a paving tax will not issue where the parties seeking it have unreasonably delayed to ask relief, and are presumably benefited by the work done, and where a reassessment can be ordered, and a remedy exists at law against the tax if void.—Byram v. City of Detroit, 50 Mich. 56.

¶ 391. Complainants in a bill to enjoin the collection of a special assessment for a sewer are not estopped on account of their failure to act until after the sewer was completed where they do not own property abutting on the sewer, and where, though aware of its construction, they receive no notice of the special assessment district until after the completion of the improvement.—Lawrence v. City of Grand Rapids, 166 Mich. 134.

¶ 392. Relief will not be granted in equity to restrain the collection of a special paving assessment and to remove a cloud on title of property caused by the levying of such assessment where the property owner had failed to proceed until after the improvement had been made, and a statute legalizing the proceedings had been passed, and two of the five installments had already become due and payable.—Constantine v. City of Albion, 148 Mich. 403.

¶ 393. Complainants who have contented themselves with making protests, and then have stood by without bringing any proceedings to enjoin the work, while the city proceeded to make extensive and costly improvements, have estopped themselves to any remedy by injunction to compel the city to undo its work.—McKee v. City of Grand Rapids, 137 Mich. 200.

¶ 394. Before the letting of a contract for paving a city street some, at least, of the complainants filed with the common council a remonstrance against paving the street, objecting solely upon the ground of depression in business, and asking that the paving be deferred until the next season. Upon a bill subsequently filed to restrain the collection of an assessment for the paving, it was held that relief should be denied, upon the ground that all of the objections made in the bill were available when the remonstrance was filed, and that complainants, notwithstanding their knowledge of the fact that the council was proceeding in the matter, had stood by until the pavement was completed and the bills issued.—Goodwillie v. City of Detroit, 103 Mich. 283.

¶ 395. An owner whose property was benefited by the improvement in question, to the extent of the assessment, and who stood by and permitted the work being done, was denied relief in equity to restrain the collection of the tax, although he purchased his land after the completion of the proceedings, and after partial completion of the work, and though it was not shown that his grantor had knowledge of the proceedings, and the bill set up the jurisdictional objection that the petition presented to the council did not have a majority of the frontage, and that the contract was void.—Farr v. City of Detroit, 136 Mich. 200.

§ 120. Grounds and propriety of injunction against work or assessment.

Against collection of assessment, see post § 121.

Against payment of bonds for improvement, see post § 122.

Necessary and proper parties to injunction, see post § 123.
Pleading in injunction suits, see post § 124.
Cross-bill to enforce assessment or share of cost, see post § 125.
Occasions for injunction in general, see Injunction, II.
Injunction against tax sales, see Taxes, X, C.
Injunctions as remedy for illegal public improvements in general, see Municipal Corporations, XVI, A.

¶ 396. The jurisdiction of equity goes to enjoining assessments for local improvements in cities, without reference to the question whether there was or was not personalty from which collection might be made.—Scofield v. City of Lansing, 17 Mich. 437; Hoyt v. City of East Saginaw, 19 Mich. 39.

¶ 397. In a suit by taxpayers to enjoin the construction of a public improvement, the mere fact that one of the contractors upon whom service of process may be made is absent from the state and cannot be served, neither prevents the issuance of the injunction nor is reason for its dissolution.—Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204.

§ 121. ——Against collection of assessment.

Collection and enforcement of assessment in general, see ante § 98.
Res adjudicata effect of a decree restraining the collection of a special assessment, see Former Adjudication ¶ 447.

¶ 398. The common council of Detroit having authority by law to make an assessment for paving streets, an injunction will not be granted to restrain the collection of such assessment by warrant against the goods and chattels of complainant; but he will be left to his remedy at law.—Williams v. City of Detroit, 2 Mich. 560.

¶ 399. The circuit court on an injunction bill to restrain the collection of a local assessment alleged to be void cannot review the assessments, that not being a judicial function and a claim of fraud not being sustained by the proofs.—Parsons v. City of Grand Rapids, 141 Mich. 467.

¶ 400. An injunction to restrain collection of assessments for repaving is unnecessary where the city has admitted the invalidity of such assessments and where a statute has been passed requiring reassessment.—Byram v. City of Detroit, 50 Mich. 56.

¶ 401. An assessment for the cost of opening a street under the general condemnation law applicable (How. St., chap. 83), being not collaterally assailable on the ground that the proceedings were improperly instituted because the judgment in condemnation settled that question, will not be enjoined at the suit of one who is assessed to pay the cost of such opening.—Scotten v. City of Detroit, 106 Mich. 564.

¶ 402. The collection of a special assessment exceeding five per cent of the value of the land on which it is levied, the limit fixed by law, will be enjoined.—Harris v. Village of Highland Park, 183 Mich. 573.

¶ 403. An injunction to enjoin the collection of a tax on a street assessment was denied where it was charged that the improvements were not performed according to the plans and specifications and that the construction of the pavement was grossly defective, such facts not being a defense to the enforcement of the assessment.—Dixon v. City of Detroit, 86 Mich. 516.

¶ 404. Where property owners, whose lands are liable to assessment for a public improvement, fail to agree with the contractor as to the quality of the work being done, and at their request examinations are made from time to time by order of the common council, which, after a final investigation, accepts and pays for the work, its action, in the absence of fraud, is final, and an assessment will not be enjoined.—Harper v. City of Grand Rapids, 105 Mich. 551.

§ 122. ——Against payment of bonds for improvement.

¶ 405. An abutting owner, assessed for the paving of a street, cannot maintain a bill to enjoin the payment of bonds issued by the city to defray its proportion of the expense of the improvement, pursuant to a vote of the electors, on the ground that the city in fact paid a larger percentage of the cost than was specified to be paid by it in the resolution submitting to the electors the question of issuing the paving bonds.—Boehme v. City of Monroe, 106 Mich. 401.

§ 123. Necessary and proper parties to injunction.

Parties to suit in equity to set aside proceedings, see post § 127.
Demurrability of bill by numerous assessment payers to invalidate assessment, see also Equity ¶ 374.

¶ 406. Parties owning distinct parcels of land fronting upon a street may join in a bill to restrain collection of a tax upon their several parcels for grading the street, if the illegality of the tax proceedings or other common cause is alleged as the ground of relief.—Scofield v. City of Lansing, 17 Mich. 437.

¶ 407. Where the objection to an assessment is that each parcel of land separately owned was assessed an aliquot part of a general charge instead of for the particular benefits conferred upon it, it seems that the different owners cannot, their interests being hostile, join in a bill to restrain collection.—Brunner v. City of Bay City, 46 Mich. 236.

¶ 408. The city is a necessary defendant to a bill to enjoin the collection of a sewer

tax; but where this objection was not seasonably made to a bill filed against the city marshal alone, it was obviated by amendment at the hearing.—Thomas v. Gain, 35 Mich. 155.

¶ 409. To a bill against a city to enjoin enforcement of a paving tax the contractor for the paving was held not a necessary party defendant.—Wilkins v. City of Detroit, 46 Mich. 120.

§ 124. Pleading in injunction suits.

Rules of pleading in general, see Pleading; Equity, VII.

General principles governing injunction, see Injunction.

Injunction against tax sales, see Taxes, X, C.

¶ 410. A bill to enjoin the paving of a street does not sufficiently show that the petition for paving same was not signed by the owners of a majority of the frontage, where it simply states the number of feet owned by the signers of the petition, but does not indicate the total length of the portion of the street to be paved or the number of feet to be deducted therefrom on account of intersecting streets and alleys.—Brady v. City of Detroit, 166 Mich. 252.

¶ 411. A bill seeking to have the collection of an assessment for improving a street restrained because the estimate of its cost as submitted to the council was in gross cannot be aided by any presumption against the correctness of official action, and should clearly negative the submission also of detailed information.—Cuming v. City of Grand Rapids, 46 Mich. 150.

§ 125. Cross-bill to enforce assessment or share of cost.

Pleading as to cross-bills in general, see Equity, VII.

¶ 412. In an action to restrain the collection of a special assessment for a sewer tax on the ground that the sewer was constructed in the interests of the public health of the entire community, and where the defendant filed a cross-bill for a decree for the amount of the assessment, where it appeared that the original contract, as let, was later modified, reducing the price because of making the sewer six feet less in depth, and the city council had failed to readvertise and let the contract as modified, the question of the actual lawful cost of the sewer is not susceptible of determination, and therefore the prayer of the cross-bill cannot be granted. The property affected is still subject to a new assessment, if there can be found or provided legislative authority for ascertaining the actual benefits to the property within the assessment district.—W. F. Stewart Co. v. City of Flint, 147 Mich. 697.

§ 126. Suit in equity to set aside proceedings.

Necessary and proper parties, see post § 127.

¶ 413. Where a complainant contends that he is assessed for a special improvement under void proceedings establishing the assessment, he need not wait until an actual levy to file his bill to set aside the proceedings, but he is bound to act with diligence or lose his rights.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

¶ 414. The council of defendant city directed the assessors to levy a special assessment for a sewer system. Plaintiff was assessed, and appealed to the board of review, contending that all the proceedings with reference to the construction of the sewer were void for failure to serve proper notice. Without waiting for a decision from the board of review, plaintiff instituted suit in equity to set aside the proceedings. Held, the suit was not premature, since the board of review had authority only to review the assessment, not to set aside the whole proceedings.—Thayer Lumber Co. v. City of Muskegon, 152 Mich. 59.

¶ 415. Even though property owners assessed for a sewer improvement have the right, in a suit to declare void the proceedings for the assessment and collection of taxes for such improvement and to enjoin further effort to collect the same, to contest the amount of the assessment, they must at least point out either that the method of assessment adopted was all wrong, or that, applying a proper method, a wrong result is apparent.—Kuick v. City of Grand Rapids, 200 Mich. 582.

§ 127. ——Necessary and proper parties.

Demurrability of bill by numerous assessment payers to invalidate assessment, see also Equity ¶ 374.

¶ 416. Where the objection underlying a bill to set aside a sewer assessment by the several owners of land in the district is that the assessment was not and could not lawfully be made upon any uniform and general system of apportionment, but that each lot should be assessed as benefited by the work, and not an aliquot part of a general charge, the complainants' interests are hostile, and there is no community of interest, and it is very doubtful whether they should have joined in the suit.—Brunner v. City of Bay City, 46 Mich. 236.

¶ 417. Parties complaining of tax proceedings that do not affect all alike must sue severally or not at all; so, where drain charges have become individual assessments on the roll for sale, owners of lands several-

ly affected cannot join in a bill to set them aside.—Barker v. Township of Vernon, 68 Mich. 516.

¶ 418. In a suit against the auditor general and the county treasurer to set aside special assessments on certain property the city in which the assessment is made is a necessary party to the suit.—Maxwell v. Auditor General, 125 Mich. 621.

§ 128. Actions to quiet title.

General law as to quieting title, see Quieting Title.

¶ 419. The owner of land against which a special assessment is illegally spread is not guilty of laches though he failed to appear and object to the confirmation of the assessment roll where he seasonably filed his bill to quiet title before an attempt was made to enforce the tax.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

¶ 420. Failure of the owner of land, part of which is outside a special assessment district, to appear before the board of review or to file objections to a special assessment against the whole parcel does not preclude him from seeking relief by bill to quiet title as provided by Comp. L. 1897, § 448, as amended by Act 256, P. A. 1909.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

¶ 421. A decree should be granted as prayed by a bill to quiet title to realty by removing a cloud arising from a special assessment where it is undisputed that a special assessment was spread against an entire parcel of complainant's land and became a lien thereon, though only one lot thereof was within the assessment district and where liability for a tax of 25 per cent of the value of the lot within the district as allowed by statute is admitted.—Grand Haven Basket Factory v. City of Grand Haven, 174 Mich. 279.

¶ 422. On bill to quiet title to land against which a special assessment was illegally spread when only a part thereof was within the assessment district, all the land may be discharged from the tax lien on payment of the proper amount with interest.—Van Zanten v. City of Grand Haven, 174 Mich. 282.

D. RECOVERY OF EXCESSIVE OR IMPROPER PAYMENT.

§ 129. In general; actions for recovery.

Involuntary payment and protest as condition precedent, see post § 130.

Measure and amount of recovery, see post § 131.

Defenses and bar to recovery, see post §§ 132, 133.

Presumptions and evidence, see post § 134.

Recovery of illegal or mistaken payments in general, see Payment, VI.

Recovery of overpayment of taxes, see Taxes, VIII.

¶ 423. Action lies against a city to recover back illegal assessments paid under compulsion.—Nickodemus v. City of East Saginaw, 25 Mich. 456; People ex rel. Gebhart v. City of East Saginaw, 40 Mich. 336; Louden v. City of East Saginaw, 41 Mich. 18.

¶ 424. Under Comp. L. 1897, § 3212, How. Ann. St., 2nd Ed., § 5784, where a sum in excess of the amount required to pay for an improvement is collected from the abutting property owners benefited under a special assessment, such excess must be returned.—German Luth. Church Soc. v. City of Mt. Clemens, 179 Mich. 35.

¶ 425. The City of Detroit and the Village of Grosse Pointe Park are jointly liable to a property owner for the repayment of an excessive assessment paid under protest on an improvement initiated by the village of Fairview whose property they acquired.—Corby v. City of Detroit, 180 Mich. 208.

¶ 426. Where suit is brought to recover money involuntarily paid upon an assessment illegal for want of jurisdiction, it is of no importance that the warrant upon the assessment roll had expired when payment was made, and that the action of the common council in extending it was irregular; one may submit to the illegal exaction for the time being to avoid the seizure and sale of his property, and trust to a civil action to recover it back.—Nickodemus v. City of East Saginaw, 25 Mich. 456.

¶ 426a. Action sustained against a city for surplus above expenses of public improvement, which surplus charter requires to be apportioned and paid over to property owners assessed.—Thayer v. City of Grand Rapids, 82 Mich. 298.

§ 130. Involuntary payment and protest as condition precedent.

¶ 427. The provision of the general tax law Pub. Acts 1893, No. 206, § 53, concerning payment of taxes under protest, does not apply to assessments for local improvements.—Thompson v. City of Detroit, 114 Mich. 502.

¶ 428. Payment of an assessment under threat of the immediate seizure and sale of the property to satisfy the same is not voluntary.—Nickodemus v. City of East Saginaw, 25 Mich. 456; People ex rel. Gebhart v. City of East Saginaw, 40 Mich. 336.

¶ 429. The payment without protest of a special assessment, after it has become a lien

on one's property, is not a voluntary payment but one made under legal duress.—Newberry v. City of Detroit, 184 Mich. 188.

¶ 430. To prevent threatened sale of his land which had been assessed—under a charter provision afterwards declared unconstitutional—for a street opening, the owner made payment under protest. Held, that sale would not have clouded the title, and that the payment was voluntary and not recoverable back.—City of Detroit v. Martin, 84 Mich. 170.

¶ 431. Where a taxpayer claims that the whole proceedings for the grading and paving of a street are void for want of jurisdiction, and on paying the taxes assessed against him on account of such improvement indorses on the receipt a statement that the payment is made under protest, to protect the property from being sold, and on account of taxes being illegal, the protest is sufficiently specific.—Whitney v. City of Port Huron, 88 Mich. 268.

¶ 432. While the Detroit Charter of 1893, chap. 11, § 37, provided that after confirmation an assessment for a street improvement should constitute a lien upon the realty until paid, and should be collected as authorized by law, such an assessment, though invalid for the assessor's failure to sign the roll before confirmation, was paid under protest after demand. Held, that such payment, being necessary to relieve the property from a prima facie lien, was recoverable as involuntary, though no proceedings to sell for the tax had been instituted.—Thompson v. City of Detroit, 114 Mich. 502.

§ 131. Measure and amount of recovery.

¶ 433. Where a special assessment in excess of the amount authorized by law to be collected is paid under protest, the plaintiff in assumpsit for money had and received can recover back only the excess and not the whole amount.—Long v. Village of Dundee, 159 Mich. 320.

¶ 434. A plaintiff was assessed for a special paving tax an amount in excess of the limit fixed by statute. He paid the tax under protest, and sued in assumpsit to recover back the same. Held, upon his failure to prove that the costs and expenses of the levy were actually turned over to the village by the collector, he could not recover these items in this suit.—Long v. Village of Dundee, 159 Mich. 320.

¶ 435. In an action by a property owner to recover an unjust assessment paid under protest, the plaintiff is not entitled to recover interest, penalties and fees paid by him where the assessment was not paid when it was due.—Corby v. City of Detroit, 180 Mich. 208.

¶ 436. In an action of assumpsit by a property owner to recover an unjust assessment paid under protest, the court may adjust the equities in plaintiff's favor by rendering judgment for the amount of the excess together with the penalties, interest and fees relating thereto collected.—Corby v. City of Detroit, 180 Mich. 208.

§ 132. Defenses and bar to recovery.

Estoppel, waiver or loss of right, see post § 133.

¶ 437. A city cannot escape liability for the amount of a tax illegally exacted for a street improvement, on the ground that the money was not to be used for municipal purposes.—City of Grand Rapids v. Blakely, 40 Mich. 367.

¶ 438. Plaintiff was assessed $22 as a first instalment on a special paving tax. Plaintiff paid the tax under protest. This tax was in excess of the five per cent limit fixed by law. The defendant village tendered back the excess before suit by the plaintiff in assumpsit for money had and received, to recover back the tax paid. Held, the plaintiff could recover nothing.—Long v. Village of Dundee, 159 Mich. 320.

§ 133. ——Estoppel, waiver or loss of right.

General law of estoppel, see Estoppel.

¶ 439. A property owner who consented to an improvement but objected to an unjust assessment is not estopped after receiving the benefit of the improvement to bring suit to defeat the assessment as to the amount in which the assessment was excessive and unjust.—Corby v. City of Detroit, 180 Mich. 208.

¶ 440. One is precluded from seeking to recover back the amount of a tax which as a member of the board of supervisors he voted to impose without objecting to its levy.—Wood v. Township of Norwood, 52 Mich. 32.

¶ 441. Where a strict improvement is undertaken after irregular proceedings looking thereto an owner of abutting property, assessable had the proceedings been regular, must protest at once; he cannot stand aloof, accept the benefit of the improvement, and then evade the assessment because of the irregularity.—Lundbom v. City of Manistee, 93 Mich. 170.

¶ 442. Appearance by a property owner before the board of assessors and council urging his objections to an assessment sufficiently protects his rights so as to enable him to recover an excessive assessment paid under protest.—Corby v. City of Detroit, 180 Mich. 208.

¶ 443. One is not equitably estopped from suing to recover money involuntarily paid upon an illegal assessment by the fact that he himself had petitioned for the improvement for which the assessment was laid, where it appears that the common council, in ordering the improvement, directed a larger part of the cost to be assessed upon the property benefited than was asked by the petition, and the work was unsatisfactorily performed.—Nickodemus v. City of East Saginaw, 25 Mich. 456.

§ 134. Presumptions and evidence.

General law of evidence, see Evidence.

¶ 444. In an action brought to recover money involuntarily paid upon an assessment payment by the city marshal to the city treasurer, as required by law, of all moneys collected by him upon an assessment put into his hands for collection, will be presumed, in the absence of proof to the contrary.—Nickodemus v. City of Saginaw, 25 Mich. 456.

¶ 465. In an action of assumpsit by the City of Sault Ste. Marie under its charter to recover the amount of a special assessment tax, where it is not claimed that the tax was paid or otherwise satisfied, evidence as to whether any delinquent return was made of the defendant's land is immaterial, as the charter authorizes suit after a special assessment has become payable.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 Mich. 65.

¶ 446. Where the supreme court on appeal of an action by a taxpayer against a city to recover special assessments for paving purposes paid under protest determines that plaintiff has been overcharged in a certain sum, and remands the case to the trial court with instructions to compute the tax as indicated, and, when the matter comes on again in the circuit court, following the filing of a remittitur, a dispute arises between counsel as to the correct method of computation, and, after the supreme court denies an application for a writ of mandamus to compel the circuit judge to enter a judgment according to the contentions of plaintiff's counsel, the parties proceed to trial in the circuit court, evidence consisting of a resolution by a city council remitting the interest on such taxes for a certain period is admissible.—Corby v. City of Detroit, 191 Mich. 308.

LOCATING to MALICIOUS MISCHIEF.

Cross-References.

Locating Boundaries—
See Boundaries.
Location of Easements—
See Easements.
Location of Highways—
See Highways, II.
Location of Railroads—
See Railroads, II.
Locomotives—
Duty and negligence in management and equipment, see Carriers; Master and Servant, III; Railroads.
Fires from operation, see Railroads, VIII, G.
Lodges—
See Associations; Fraternal Associations.
Lodging Houses—
See Inns, Restaurants and Lodging Houses.
Logs and Logging—
See Forestry.
Loiterers—
As disorderly persons, see Crimes, II; Indictment.
Lord Campbell's Act—
See Death by Wrongful Act.
Loss—
In the sense of damage suffered, see Damages; Insurance; Indemnity.
Accountability and contribution for loss, see Indemnity and Contribution; Agency § 96; Partnership, V, VII; Corporations § 157; Joint Adventures § 4; Estates of Decedents § 279 et seq.; Trusts, VII.
Of profits, services, support, time, or use of property as damages, see Damages.
Lost Goods—
See Property; Abandonment.
Lost Heirs—
Furnishing information to "secure" estate as valid contract, see Attorneys ¶ 113.
Lost Wills—
See Wills, V.
Lost Writings—
Secondary proof of contents and foundation for such proof, see Evidence, IV, B.
Proceedings to restore papers, see Restoration of Papers.
Actions on lost bills and notes, see Negotiable Instruments, XIV.
Jury question as to bar by limitations, see Limitations § 113.
Lots and Blocks—
See Boundaries; Deeds, III; Taxes; Local Improvements.
Lotteries—
See Crimes, II; Indictment.
Love and Affection—
Consideration for gift, see Gifts § 2.
Fraudulency of conveyances to relatives of insolvent grantor, see Fraudulent Conveyances, I, D.
Lowest Bidders—
In bidding for public or private contracts, see Public Contracts, II; Contracts, III.
Low Water Mark—
Boundary line on rivers and lakes, see Boundaries §§ 13, 18 et seq.

Rights of riparian owners and the public, see Navigable Waters; Waters, IV.
Lucid Intervals—
Intermittent or temporary insanity as destroying criminal responsibility, see Crimes § 13.
Competency in civil matters of person insane at times, see Insane Persons; Wills, II; Gifts, § 29.
Lumber and Lumbering—
See Forestry; Contracts; Sales; Vendors and Purchasers.
Liens under the Log Lien Act, see Forestry, III.
Lump Sums—
Acceptance of lump sum in satisfaction, see Accord § 8.
Sale or offer in gross on execution or judicial sale, see Executions §§ 64, 65; Foreclosure § 35 et seq., § 113 et seq.; and see also Judicial Sales, II; Partition, III.
Lunatics—
See Insane Persons.
Macadamized Roads—
Good roads system, see Highways, IV.
Machinery—
As Fixtures, see Fixtures § 9.
Contracts for installation, sale, and warranty, see Sales.
Chattel mortgages, see Chattel Mortgages.
Duty and liability of master to servant operating machinery, see Master and Servant, III.
Opinion evidence concerning machinery and mechanics, see Evidence, VI.
Magistrates—
Offices of justices of the peace and police judges, see Justices of the Peace, I, II; Municipal Courts, I; and see Courts; Constitutional Law, II.
Jurisdiction, powers, and practice in arrest, bail, and prosecution for crime, see Arrest; Indictment, III, XVIII.
Prosecutions for violations of municipal ordinances, see Municipal Corporations, XVI, B.
Mail—
Postal matters in general, see Postal Law.
Letters as admissible evidence, see Evidence, VII, VIII, A; Indictment, VIII, B.
Copies as secondary evidence, see Evidence, IV; Indictment, VIII, B, 2.
Mailing—
Of notices, see Notices.
Of notice of presentment and dishonor, see Negotiable Instruments, VIII.
Of depositions to court in which they are to be used, see Depositions § 21.
Mode of communication offer, countermand or acceptance of contract, see Contracts §§ 16, 32.
Mail Orders—
As interstate commerce by foreign corporation, see Foreign Corporations § 15.
Maiming—
As crime, see Crimes, II; Indictment.
Maintaining Nuisances—
See Nuisances.
Maintenance—
Of litigation, see Champerty and Maintenance.
Of persons, see Husband and Wife; Parent and Child; Infants; Insane Persons; Poor Persons; Contracts; Wills; Deeds; and see also Rescission; Specific Performance.
Majority—
Number of votes required for election, see Elections § 51.
Number required to concur in action by board or committee or joint trustees, see Officers, VI; Municipal Corporations, IV; Corporations § 117; Estates of Decedents § 50; Trusts, VI.
In the sense of full legal age, see Infants.
Limitations on attainment of majority, see Wills, VI; Life Estates.
Malfeasance—
In the general sense of tort, see Torts, and also specific tort topics.
By public officers, see Officers, VI; Sheriffs, IV.
Malice—
See generally specific topic treating of the act or wrong of which malice is questioned, e. g., Libel; Malicious Prosecution; Trespass; Assault, II.
Element in crime, see Crimes; Indictment; Homicide § 4.
As factor in aggravation of damages, see Damages § 159 et seq.
Declarations evincive of malicious mind, see Evidence § 332; Indictment § 219 et seq.
Malicious Mischief—
As crime, see Crimes §§ 105, 106; Indictment.

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

TREATS of the wrong of instituting a criminal or civil prosecution against another without probable cause and with malice, and of the wrong of abusing the process of courts for an ulterior and illegal purpose. It excludes the wrong of false imprisonment, which does not depend on the baselessness or maliciousness of the prosecution or on the

existence of any prosecution (see False Imprisonment). The crimes of blackmail and threats to extort money are treated in Crimes, II; Indictment. Actionable defamation by means of legal proceedings is treated in Libel and Slander.

Analysis.

I. In general; elements of the tort.

A. MALICIOUS PROSECUTION.

§ 1. In general; concurrent elements.
§ 2. Responsibility and participation in the wrong.

B. ABUSE OF PROCESS.

§ 3. In general.

II. The prosecution.

§ 4. In general; prosecution for crime.
§ 5. Civil actions; attachments and seizures of property.
§ 6. ——Actions without arrest or seizure.

III. Want of probable cause, ulterior object, and advice of counsel.

§ 7. In general.
§ 8. Probability of cause and grounds of belief.
§ 9. ——Existence or appearance of particular offenses.
§ 10. Advice of counsel or magistrate.
§ 11. Sufficiency of disclosure of facts.
§ 12. ——Effect of malice to destroy protection.
§ 13. ——For civil prosecution or attachment.

IV. Malice.

§ 14. In general; express and implied malice.

V. Termination of the prosecution in favor of plaintiff.

§ 15. In general; necessity and sufficiency of termination.
§ 16. Favorableness to present plaintiff.
§ 17. ——Compromises and settlements.

VI. Pleading, evidence and trial.

§ 18. Nature and form of action.
§ 19. Pleading the cause and defenses.
§ 20. Issues, necessary proofs, and variance.
§ 21. Burden of proof and presumptions.
§ 22. Admissibility of evidence.
§ 23. ——Files and documents as evidence.
§ 24. ——As to belief or probability of cause.
§ 25. ——As to advice of counsel or magistrate.
§ 26. ——As to malice.
§ 27. ——As to injury and gravity thereof.
§ 28. ——As to responsibility or participation.
§ 29. Explanation and rebuttal.
§ 30. Weight and sufficiency of evidence.
§ 31. ——As to probability of cause.

§ 32. ——Conclusiveness and effect of decision rendered in the prosecution.
§ 33. ——As to malice.
§ 34. ——Of abuse of process.
§ 35. Questions for court and jury.
§ 36. ——Belief and probability of cause.
§ 37. ——Advice of counsel and sufficiency of disclosure.
§ 38. ——Malice.
§ 39. Directing verdicts.
§ 40. ——On proofs as to advice of counsel.
§ 41. ——For one of several coparties.
§ 42. Instructions.
§ 43. ——As to belief, probable cause, and advice of counsel.
§ 44. ——Malicious civil prosecutions.

VII. Damages.

§ 45. In general.

I. IN GENERAL; ELEMENTS OF THE TORT.

A. MALICIOUS PROSECUTION.

§ 1. In general; concurrent elements.

Concurrent facts to be proved, see post § 30.
One element present and other absent, see also post § 7.
Element of malice, see post § 14.
Element of want of probable cause, see post § 7 et seq.
Element of termination in plaintiff's favor, see post § 15 et seq.
Sufficiency of the prosecution to make out the tort, see post § 4 et seq.
Actionable abuse of legal process, see post § 8.
Elements of actionable false imprisonment, see False Imprisonment.
Justification for illegal arrest, see False Imprisonment §§ 4-14.
Liability for malicious prosecution when arrest is justified, see also False Imprisonment ¶ 49.
Statutory liability for instituting malicious or vexatious litigation in another's name, see Jud. Act, chap. XX, § 4; Comp. L. 1915, § 12740.

¶ 1. Action for malicious prosecution will not lie unless defendant acted from malicious motives and without probable cause.—Hamilton v. Smith, 89 Mich. 222; Spalding v. Lowe, 56 Mich. 366.

¶ 2. Want of probable cause and malice must concur, to entitle the plaintiff to recover in a suit for the malicious prosecution of a writ of attachment.—Le Clear v. Perkins, 103 Mich. 131.

§ 2. Responsibility and participation in the wrong.

Liability of magistrate proceeding on defective papers, see also post ¶ 16.
Evidence as to responsibility for or participation in the tort, see post § 28.
Weight and sufficiency of evidence, see post § 30.
Questions for jury, see post § 35.
Sufficiency of instruction for aiding, see post ¶ 231.
Instructions on complicity and responsibility of parties, see post ¶ 225.
Directing verdict for one of coparties, see post § 41.
Submission of facts to and reception of advice of counsel as making out probable cause, see post § 10 et seq.
Responsibility of master for servant's acts and of principal for agent's acts, see Master and Servant, IV; Agency, II, B.
Coliability of agent with principal, see Agency §§ 52, 85.
Liability of assignor as responsible superior of assignee collecting debt, see also Assignments ¶ 80.

¶ 3. All concerned in originating and carrying on a malicious prosecution are jointly and severally responsible.—Cascarella v. National Grocer Co., 151 Mich. 15.

¶ 4. An action for malicious prosecution cannot be maintained against the complainant in a criminal proceeding who, after fully and fairly disclosing to the prosecuting officer everything within his knowledge which would tend to cause or to exclude belief in plaintiff's criminality, left him to determine on his sole responsibility whether the proceeding should be instituted, even though the case were not a proper one for prosecution.—Smith v. Austin, 49 Mich. 286.

¶ 5. A justice's mistake in filling out a complaint as one for assault and battery, when the actual complaint on which the warrant was issued was for an assault only, cannot in an action for malicious prosecution prejudice the person making the complaint.—Carter v. Sutherland, 52 Mich. 597.

¶ 6. Where a party goes before a magistrate to make a criminal complaint, accompanied by counsel, expecting to make complaint in writing, and that a warrant will issue in the usual way, and is in no manner at fault that it does not so issue, he cannot be held liable for the act of the magistrate in directing the arrest of respondent without a warrant.—Poupard v. Dumas, 105 Mich. 326.

¶ 7. Where a defendant citizen does nothing more than cause a sample of plaintiff milk dealers' milk to be secured and analyzed by the dairy inspector, and has no other connection with a prosecution for selling adulterated milk, he is not guilty of malicious prosecution, even though animated by spite.—Birdsall v. Smith, 158 Mich. 390.

¶ 8. Where a prosecuting attorney refuses to act on a complaint when first made, and makes an independent investigation for himself, the prosecuting witness, in signing such complaint after the investigation, is entitled to assume that the prosecutor is instituting the prosecution on behalf of the public.—Christy v. Rice, 152 Mich. 563.

B. ABUSE OF PROCESS.

§ 3. In general.

Sufficiency of allegations, see post § 19, ¶ 77.
Sufficiency of proofs of abuse of the process, see post § 34.
Assumpsit or case as proper action for abuse of process to extort money, see post ¶ 71.
Liability in damages or on bond for wrongfully suing out writs, see also Attachment, XIII; Injunctions § 155; Replevin, V.
Wrongful taking of goods under color of process as tort, see Conversion, I; Trespass, I; Executions, XII; Attachment, XIII.
Arrest on capias illegally as false imprisonment, see False Imprisonment, I.
Abuse of process or legal procedure as constructive fraud, see Fraud § 69.
Abuse of process as wrong depriving doer of standing in equity, see Equity ¶ 16.
Mandamus as remedy for abuse of process, see Mandamus ¶ 197.
Statutory liability for vexatious litigation, see Jud. Act, chap. XX, § 4; Comp. L. 1915, § 12740.

¶ 8a. Action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.—Spear v. Pendill, 164 Mich. 620.

¶ 8b. Two elements are necessary to an action for the malicious abuse of legal process: (1) the existence of an ulterior purpose; and, (2) an act in the use of the process not proper in the regular prosecution of the proceeding.—Spear v. Pendill, 164 Mich. 620.

¶ 8c. Defendant in dealing with plaintiff, a bucket shop keeper, suffered a loss of seven hundred dollars. Defendant instituted a suit in assumpsit and by writ of garnishment impounded in a local bank $5,000 of money and securities belonging to plaintiff. Defendant swore out a criminal complaint against plaintiff who pleaded guilty and was fined five hundred dollars. Defendant did nothing but swear out the complaint and exercised no control over the warrant or the prosecution. In a suit for malicious abuse of process, held, defendant was not liable.—Spear v. Pendill, 164 Mich. 620.

¶ 8d. There is no abuse of process where no steps are taken under it which are not in accordance with the law.—Barlow v. Lincoln-Williams Twist Drill Co., 186 Mich. 46.

¶ 9. Obtaining a judgment by fraud and perjury without any valid demand to base it upon, and suing out an execution upon such judgment with knowledge of its false and fraudulent character, and extorting money under such execution, is an abuse of process for which an action will lie.—Antcliff v. June, 81 Mich. 477.

¶ 10. The wrong committed by extorting money from the owner by means of an abuse of criminal process is a tort not different in character from extorting by the same means any other property of his.—Marlatte v. Weickgenant, 147 Mich. 266.

¶ 11. A plaintiff may recover in a case of abuse of criminal process where the testimony showed a use of a warrant charging a criminal offense as a means, which, when accompanied by threats of an arrest under it, resulted in frightening the plaintiff into paying over to agents of the defendant a sum of money in excess of any demand of defendant.—Marlatte v. Weickgenant, 147 Mich. 266.

¶ 12. In an action for malicious prosecution of a criminal case for stealing an article from defendant's tenant which plaintiff claimed to own, where all that he did was, on the advice of the prosecuting attorney, to demand a return of the property which he and his tenants had bought and paid for and which he honestly believed belonged to them, and he did not attempt to extort any money from the defendant in the criminal case there was no abuse of criminal process.—Thomas v. Bush, 200 Mich. 224.

¶ 13. A judgment in justice's court, based upon the service of summons by a private person not properly designated for that purpose, was affirmed in the circuit court upon special appeal, but reversed in the supreme

court, with costs to defendant, who, being unable to collect them, brought an action on the case against the person who had served the summons. Held, that the latter was not liable either for such costs or for having testified in justice's court knowing that there was no jurisdiction.—Stimer v. Bryant, 84 Mich. 466.

II. THE PROSECUTION.

§ 4. In general; prosecution for crime.

Civil proceedings and seizures regarded as "prosecutions," see post §§ 5, 6.

Presumptions, burden of proof, and evidence, see post §§ 21-34.

¶ 14. A proceeding under Comp. L. 1871, § 7826, How. St., ch. 331, to compel a person to find security to keep the peace, is a prosecution, though the magistrate fails to examine the complainant.—Sweet v. Negus, 30 Mich. 406.

¶ 15. Proceedings before a justice under Comp. L. 1871, § 1998, to enforce a penalty for keeping billiard-tables, cards or dice for gaming, were criminal in character. The judgment provided for, being for fine and security for good behavior, was an entirety. There could be no separate prosecution for the fine only. The judgment was of a class peculiar to criminal remedies, and not one which, under sections 5268 or 6843, could be recovered in a civil suit; and a complaint and warrant based upon said section 1998 were to be construed as preliminary steps in a criminal procedure, looking to an examination as provided by chapter 259, and not to a trial before a justice, and the intervention of the prosecuting attorney was not essential to their validity.—Pardee v. Smith, 27 Mich. 33.

¶ 16. On complaint under Comp. L. 1871, § 7826, How. St. § 9436, an examination in writing and on oath, subscribed by complainant, should be made by the magistrate before issuing the warrant; but whether a failure to make such complaint will deprive a magistrate of his jurisdiction, quære; it certainly is not an error that complainant can take advantage of.—Sweet v. Negus, 30 Mich. 406.

§ 5. Civil actions; attachments and seizures of property.

Necessity of arrest or seizure of property to make out tort, see post § 6.

Necessity and sufficiency of termination of civil action, see post § 15.

Effect of advice of counsel to commence suit at law, see post § 13.

Instructions, necessity and sufficiency, see post § 44.

¶ 17. If wrong and injury are done by a malicious suit, it is immaterial whether the court had jurisdiction or not to entertain such suit.—Antcliff v. June, 81 Mich. 477.

¶ 18. An action for malicious prosecution of a suit in chancery was entertained, apparently without question that such was actionable.—Pawlowski v. Jenks, 115 Mich. 275.

¶ 19. Plaintiff was on the point of holding an auction sale of personal property at his farm. Defendant filed a bill to enjoin such sale, acting maliciously and without setting out an equitable ground for the injunction. The writ was issued, served on the plaintiff, and the sale stopped. Held, plaintiff might recover in an action on the case for malicious prosecution of a civil action.—Krzyszke v. Kamin, 163 Mich. 290.

¶ 20. Whether the mere swearing out of a false attachment without probable cause is not actionable, if damage results, even though there is no service or seizure of the property, quære.—Brand v. Hinchman, 68 Mich. 590.

§ 6. ——Actions without arrest or seizure.

¶ 21. An action on the case for malicious prosecution lies where plaintiff has been injured by a suit instituted against him maliciously and without probable cause, even though his person may not have been molested nor his property seized.—Antcliff v. June, 81 Mich. 477.

¶ 22. The plaintiff had been a defendant in a replevin suit for some sheep. The plaintiff, five days before the seizure of the sheep, had sold them and passed title, but not possession, to another. In a suit for the malicious prosecution of the replevin suit, held, the action would not lie where the only interference with property was the taking from plaintiff's possession of property belonging to another.—Powers v. Houghton, 159 Mich. 372.

III. WANT OF PROBABLE CAUSE, ULTERIOR OBJECT, AND ADVICE OF COUNSEL.

§ 7. In general.

Necessity of concurrence of want of probable cause with other elements of the tort, see ante § 1.

Presumptions, burden of proof, and evidence, see post §§ 21-34.

Sufficiency of proofs of abuse of process of attachment, see post ¶ 187.

¶ 23. Good faith and honest motives, unless there is probable cause for making a criminal complaint, are not a defense to an action for malicious prosecution.—Wilson v. Bowen, 64 Mich. 133.

¶ 24. An action for malicious prosecution cannot be maintained against the complainant in a criminal proceeding for which there was probable cause, no matter how evil or malicious his motives may have been in making complaint.—Smith v. Austin, 49 Mich. 286.

¶ 25. The motive with which a prosecution is undertaken is wholly immaterial, if there

was in fact probable cause.—Goode v. Eslow, 151 Mich. 48.

§ 8. Probability of cause and grounds of belief.

Appearances warranting belief and showing probable cause, see post § 9.
Advice of counsel, magistrate, or other officer as justification for instituting prosecution, see post § 10 et seq.
Noninference of want of probable cause from fact of malice, see post § 21.
Evidence as to probability, see post § 24.
Evidence to show honest belief, see post § 24.
Admissibility of documents as evidence, see post § 23.
Effect and conclusiveness of decision in the prosecution, see also post § 32.
Questions for court and jury, see post § 36.
Instruction on belief and probable cause, see post § 43.
Instructions in action for malicious civil prosecution, see post § 44.

¶ 26. "Probable cause" for prosecution depends on the circumstances of the case, and exists where the generality of business men of ordinary care, prudence and discretion would prosecute under the same conditions.—Hamilton v. Smith, 39 Mich. 222; Brand v. Hinchman, 68 Mich. 590.

¶ 27. The true inquiry upon the subject of probable cause in an action for malicious prosecution is, not what the actual facts were as to plaintiff's guilt or innocence, but what defendant had reason to believe and did believe they were.—Gallaway v. Burr, 32 Mich. 332.

¶ 28. Probable cause cannot rest on mere conjecture, nor on an unreasonable interpretation of appearances, especially if the accuser knew of facts that would have explained them, or knew that they were contrived by conspiracy, or other corrupt means, to give a colorable basis for prosecution, or to entrap the accused into admitting guilt of other offenses.—Hamilton v. Smith, 39 Mich. 222.

¶ 29. To constitute probable cause for the arrest of a person there must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant an ordinarily cautious person in believing that the person arrested was guilty of the offense charged.—Gilecki v. Dolemba, 189 Mich. 107. (Ostrander, J., dissenting.)

¶ 30. The mere belief of a person making a criminal complaint, that it is true, does not alone justify a prosecution thereunder; it must rest on reasonable grounds and on such facts as would lead a person of ordinary caution to honestly suspect the accused of guilt.—Spalding v. Lowe, 56 Mich. 366; Wilson v. Bowen, 64 Mich. 133.

¶ 31. To sustain the good faith of a complaint for obtaining goods under false pretenses the plaintiff need not have actual personal knowledge of the facts, but may rely on such statements, received through the usual channels, as a business man of ordinary prudence would act upon, if he honestly believed them to be true.—Gallaway v. Burr, 32 Mich. 332.

§ 9. ——Existence or appearance of particular offenses.

Evidence as to probability of cause or appearance of crime, see also post § 24.
Weight and sufficiency of evidence, see post § 31.
Sufficiency of evidence of incriminating behavior, see post § 31.
Sufficiency of showing for issuance of warrant for arrest, see Arrest § 9 et seq.
Necessary elements of the various crimes, see Crimes, II.

¶ 32. A husband who before the expiration of the time to obtain a reconveyance, removed doors, etc., from a house owned by his wife situate upon the property as to which a tax deed was outstanding, was not guilty of the crime of willfully and maliciously destroying or injuring a house, etc., under Comp. L. 1897, § 11584, as it was assumed that what the husband did was authorized by his wife, and the holder of the tax deed was not then the owner of the property, the period for redemption not having expired.—Adkin v. Pillen, 136 Mich. 682.

¶ 33. A threat to stop one with cold lead is a threat to shoot him, and will sustain proceedings to keep the peace on a charge of threatening to shoot.—Thurkettle v. Frost, 137 Mich. 115.

¶ 34. Under Comp. L. 1897, § 11424, a certificate from the dairy commissioner that a sample of milk submitted by plaintiff milk dealer for analysis is adulterated, justifies an employee in signing a complaint against the plaintiff.—Birdsall v. Smith, 158 Mich. 390.

§ 10. Advice of counsel or magistrate.

Independent action by officer founded on information, see also ante § 2.
Demand of possession of property on advice of prosecuting attorney as abuse of criminal process, see ante ¶ 12.
Sufficiency of the disclosure of the facts to counsel, see post § 11.
Nonliability of person submitting facts on which officer or another person institutes prosecution, see also ante ¶ 4.
Effect of malice to destroy effect of advice, see post § 12.
Advice to commence civil prosecution, see post § 13.
Evidence as to advice of counsel, see post § 25.
Immateriality of counsel's or magistrate's personal belief, see post § 25.

Unjustified or erroneous advice, see also post ¶ 158.
Questions for court and jury, see post § 37.
Propriety and sufficiency of instructions on advice of counsel, see post § 43.
Directing verdict on proof of advice of counsel, see post § 40.
Direction of verdict on advice given after independent investigation, see post ¶¶ 209, 210.
Advice of counsel as justification for false imprisonment, see False Imprisonment § 8.

¶ 35. The advice of counsel, given after a full statement of the facts, to the effect that his client has a meritorious case, in the absence of testimony impugning the good faith of the latter, establishes probable cause for instituting suit, and will defeat an action for malicious prosecution.—Pawlowski v. Jenks, 115 Mich. 275.

¶ 36. While the advice of counsel fully informed of the facts may justify honest action taken in accordance with it, that of one who is not a qualified lawyer is not of itself an answer to a charge of malicious prosecution.—Stanton v. Hart, 27 Mich. 539.

¶ 37. The complainant in a criminal prosecution cannot be held liable for malicious prosecution, where, before the commencement of the prosecution, he placed all the material facts in the possession of his own counsel and of the prosecuting attorney, and acted upon their advice.—Wakely v. Johnson, 115 Mich. 285.

¶ 38. Where, in a suit for malicious prosecution in causing the arrest of plaintiff on a criminal charge, it appears that defendant fairly submitted to his counsel all the facts that he knew were capable of proof, and acted bona fide on the advice given in making the complaint, he negatives the want of probable cause, and is not liable even though the facts did not clearly warrant the advice and prosecution. To charge that he would not be "absolutely exonerated" is error.—Poupard v. Dumas, 105 Mich. 326.

¶ 39. It is a complete defense to an action for malicious prosecution that, before preferring the charge on which plaintiff was arrested, defendant fairly laid all of the material facts connected with the affair before the acting prosecuting attorney, a lawyer of eighteen years' experience, and acted entirely upon his advice; and this, although such attorney was at the time the local attorney for defendant, a railroad company.—Fletcher v. Chicago & N. W. R. Co., 109 Mich. 368.

¶ 40. The advice of the prosecuting attorney followed in good faith after a full and fair statement of all the material facts in the case is a defense to an action for malicious prosecution of a criminal action.—Whittemore v. Walter, 193 Mich. 365.

¶ 41. There is a complete defense to an action for malicious prosecution when it appears that the defendant actually submitted to his counsel all the facts, and acted in good faith on the advice given, irrespective of probable cause and absence of malice.—Slater v. Walter, 148 Mich. 650.

¶ 42. The advice of an attorney who had an interest in the net proceeds of the venture in controversy in a suit for malicious prosecution, afforded no protection to the defendant.—Adkin v. Pillen, 136 Mich. 682.

¶ 43. Advice of counsel, though erroneous as a matter of law, is a good defense to an action of malicious prosecution, where acted upon by the defendant.—Fleckinger v. Taffee, 149 Mich. 678.

¶ 44. Where the examining magistrate or counsel advises one that it is doubtful if, upon the facts stated, a party is guilty of any crime, the party procuring a warrant proceeds at his own risk.—Cascarella v. National Grocer Co., 151 Mich. 15.

¶ 45. In an action for malicious prosecution under an ordinance against a city and certain citizens, the fact that the city attorney advised that the ordinance requiring a license for transient traders and punishing a violation by fine and imprisonment was void is not evidence of malice or want of probable cause, where other competent counsel advised it was valid.—James v. Sweet, 125 Mich. 132.

¶ 46. Citizens and officers of a municipality are justified in proceeding to have the validity of an ordinance requiring transient traders to pay license fees determined in the courts notwithstanding the advice of the city attorney that it is unconstitutional; and so long as no malice is shown there is no liability.—James v. Sweet, 125 Mich. 132.

¶ 47. Where an attorney and client conspire to institute a malicious prosecution the latter cannot justify himself by the other's advice.—Hamilton v. Smith, 39 Mich. 222.

§ 11. ——Sufficiency of disclosure of facts.

Admissibility of facts learned independently as bearing on probable cause, see post § 24.
Evidence as to completeness of disclosure, see post § 25.
Questions for court and jury, see post § 37.
Directing verdict on sufficiency of disclosure, see post § 40.

¶ 48. In an action for malicious prosecution to make it a defense that defendant acted on the advice of counsel, the advice sought must have been acted upon in good faith and a full disclosure must have been made to counsel.—Davis v. McMillan, 142 Mich. 391.

¶ 49. Whether one is safe in acting upon the advice of the prosecuting attorney in making a criminal complaint, though he fails to acquaint him with every fact bearing upon the offense, quære.—Harris v. Woodford, 98 Mich. 147.

¶ 50. In an action for malicious prosecution where the prosecuting witness has in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting officer and acted on his advice, proof of the fact establishes a case of probable cause.—Thomas v. Bush, 200 Mich. 224.

¶ 51. The defense that defendant acted under advice of counsel, in an action for malicious prosecution, is not available where the facts as stated to counsel were that plaintiff had stated to one of the defendants that a named person had agreed to certain matters whereas the evidence showed plaintiff's statement to be that plaintiff's brother had told him that this particular person had agreed to the matter.—Davis v. McMillan, 142 Mich. 391.

§ 12. ——Effect of malice to destroy protection.

¶ 52. The advice of counsel is no protection in an action for malicious prosecution if defendant's motive was malicious.—Gallaway v. Burr, 32 Mich. 332.

¶ 53. A client cannot justify himself by his counsel's advice where both conspire to institute a malicious prosecution.—Hamilton v. Smith, 39 Mich. 222.

¶ 54. The malice of a party who fully and fairly states the facts bearing upon the charge to the prosecuting officer does not take away the defense of advice of counsel.—Huntington v. Gault, 81 Mich. 144.

§ 13. ——For civil prosecution or attachment.

¶ 55. In an action for the alleged malicious prosecution of an attachment, defendant may show that he acted under the advice of counsel, before whom he had placed all of the facts; and the jury may consider such advice in determining the questions of probable cause and malice. No distinction from criminal prosecutions exists in this respect.—Le Clear v. Perkins, 103 Mich. 131.

IV. MALICE.

§ 14. In general; express and implied malice.

Good faith and motive without probable cause, see also ante § 7.
Malice or bad motive with probable cause, see also ante § 7.
Necessity of concurrence of malice with other elements, see ante § 1.
Nonliability of informant actuated by spite, see also ante ¶ 7.
Effect of malice to destroy protection afforded by having taken advice of counsel, see ante § 12.
Presumptions, burden of proof, and evidence, see post §§ 21-34.
Inference of malice from want of probable cause, see post § 21.
Relevancy of evidence to show ill feeling or motive and provocation, see post § 22.
Evidence as to honesty of belief and good faith, see post § 24.
Necessity and sufficiency of proof of malice, see post § 33.
Questions for court and jury, see post § 38.
Instructions as to inference of malice, see post § 42.
Elements and indicia of malice in criminal cases, see Crimes, II; Indictment, VIII, B.

¶ 56. Malice, in cases of malicious prosecution, may lie only in its being wilful, wanton or reckless, or against the accuser's sense of duty, and for ends that he is bound to know are wrong and against public policy.—Hamilton v. Smith, 39 Mich. 222; Brand v. Hinchman, 68 Mich. 590.

¶ 57. On the question of whether a prosecution for an assault was malicious it is proper to make allowance for the prosecutor's state of excitement.—Carter v. Sutherland, 52 Mich. 597.

¶ 58. The fact that an act not declared unconstitutional, under which a prosecution is brought, is in fact so, cannot make the prosecution malicious in the absence of knowledge by the defendant of such unconstitutionality.—Birdsall v. Smith, 158 Mich. 390.

V. TERMINATION OF THE PROSECUTION IN FAVOR OF PLAINTIFF.

§ 15. In general; necessity and sufficiency of termination.

Favorableness of the termination to present plaintiff, see post §§ 16, 17.
Pleading the termination, see post § 19.
Mode of pleading termination of attachment action after suing for malicious attachment, see post ¶ 78.
Presumptions, burden of proof, and evidence, see post §§ 21-34.
Admissibility of files and records as proofs, see post § 23.
Weight and sufficiency of evidence of termination, see post § 30.
Immateriality of instruction on necessity for termination of civil prosecution, see post ¶ 246.

¶ 59. In an action for malicious prosecution of a criminal charge it appeared that through the negligence of the clerk of the court the judgment discharging plaintiff from arrest was not at once entered of record. Held, that an entry nunc pro tunc was admissible as evidence of plaintiff's discharge prior to the commencement of his action.—Holmes v. Horger, 96 Mich. 408.

¶ 60. Where, in an action for malicious prosecution, it appeared that after the information against plaintiff had been quashed the prosecuting attorney entered, by leave of court, a nolle prosequi before a writ of mandamus requiring the information to be reinstated had been formally served upon the circuit judge, it was held that plaintiff was not responsible for the nonservice of the writ, that the case could not again be revived, and that it could not be claimed that plaintiff had failed to show a determination thereof.—Thompson v. Price, 100 Mich. 558.

¶ 61. It seems that action for malicious prosecution may be allowed whenever the particular proceeding on which it is based has come to an end so that the prisoner can be no further pressed upon it.—Stanton v. Hart, 27 Mich. 539.

¶ 62. Whether an action for a malicious prosecution, based on an illegal civil arrest, must be postponed until judgment has been rendered in the proceedings on which it is founded, quære.—Josselyn v. McAllister, 22 Mich. 300.

¶ 63. As a general rule malicious prosecution cannot be grounded on the prosecution of a malicious civil suit until such suit has terminated in favor of the defendant therein; but this rule does not apply to the suing out of a false and malicious attachment.—Brand v. Hinchman, 68 Mich. 590.

¶ 64. Action for maliciously suing out attachment lies before attachment suit ends, but not pending dissolution proceedings.—Cadwell v. Corey, 91 Mich. 335.

§ 16. Favorableness to present plaintiff.

Compromise and settlement as a favorable termination, see post § 17.

¶ 65. Dismissal of a criminal charge for the prosecuting attorney's nonappearance is not an acquittal, and is not, in an action for malicious prosecution against the person who made the charge, sufficient evidence of want of probable cause.—Wakely v. Johnson, 115 Mich. 285.

¶ 66. An action for malicious prosecution lies against one who has caused the arrest of another on a criminal charge, even when the latter, after much delay, and an unsuccessful endeavor to obtain a trial, has been discharged on a nolle prosequi.—Stanton v. Hart, 27 Mich. 539.

¶ 67. An action for malicious prosecution will not lie if plaintiff was convicted before a justice of the peace, but was discharged on appeal, unless the conviction was procured by fraud, perjury or subornation, or was otherwise exceptional. And if any exception is relied on the plaintiff must allege the facts which create it.—Phillips v. Village of Kalamazoo, 53 Mich. 33.

(5 Mich. Dig. 52)

¶ 68. Where an accusation of felony is withdrawn and respondent is convicted of a misdemeanor included in it, but is acquitted on appeal, the conviction is not such evidence of probable cause as will defeat an action for malicious prosecution based on the charge of felony.—Labar v. Crane, 49 Mich. 561.

§ 17. ——Compromises and settlements.

¶ 69. To sustain an action for malicious prosecution of a criminal proceeding there must be an acquittal, or such proceedings as determine the case in favor of the accused person without any settlement by him of the criminal charges, or any connivance on his part to obtain his discharge.—Brand v. Hinchman, 68 Mich. 590.

¶ 70. An action for damages for falsely and maliciously bringing an attachment suit is not barred by settlement of suit by paying the indebtedness and costs.—Brand v. Hinchman, 68 Mich. 590.

VI. PLEADING, EVIDENCE AND TRIAL.

General law of trials, verdicts, findings and judgments, see Judgments; Trial; Verdicts and Findings.

Impropriety of judge's remarks in course of trial, see Trial, II.

Limitation of actions, see Limitations.

Costs in malicious prosecution actions, see Costs.

Prohibition and disqualification of prosecuting attorney to appear in action for malicious prosecution growing out of prosecution by him, see Comp. L. 1915, § 2410.

§ 18. Nature and form of action.

Parties liable for participating in the tort, see ante § 2.

Denial of jurisdiction to justices of the peace, see Jud. Act, chap. LXVI, § 4; Comp. L. 1915, § 14169.

¶ 71. An action for malicious prosecution is now an action on the case; and, as matter of pleading a charge of conspiracy in the declaration is mere surplusage and is only matter of aggravation, conspiracy could be proved even if not charged.—Hamilton v. Smith, 39 Mich. 222.

¶ 72. An action on the case will lie for redress of extortion of money by abuse of process; while the remedy most usually sought is assumpsit it is not an exclusive remedy.—Marlatte v. Weickgenant, 147 Mich. 266.

§ 19. Pleading the cause and defenses.

Necessary proofs made by the issues, see post § 20.

Defenses allowable under the general issue, see post § 20.

Variance of proofs from allegations, see post § 20.

General law of pleading, see Pleading.

¶ 73. A declaration for malicious prosecution is defective if it does not aver the termination of the suit in the last court to which it was carried. But the defect is formal, and would be cured by a verdict for plaintiff on the merits.—Sutton v. Van Akin, 51 Mich. 463.

¶ 74. A charge of conspiracy is mere surplusage in an action for malicious prosecution.—Hamilton v. Smith, 39 Mich. 222.

¶ 75. A count stating that defendant maliciously and falsely, without probable cause, "charged the said plaintiff with having committed a certain offense punishable by law, to wit, uttering and publishing as true a certain false, forged and counterfeit promissory note for the payment of money, knowing said note to be false, forged and counterfeited, with the intent to defraud and injure as aforesaid," and that defendant maliciously, and without reasonable or probable cause, and without investigation or inquiry, caused plaintiff to be arrested and imprisoned for thirteen days, at the expiration of which time he "was duly discharged and fully acquitted," etc., is a charge of malicious prosecution, not of illegal arrest and false imprisonment.—Haskins v. Ralston, 69 Mich. 63.

¶ 76. In an action of tort, a count in the declaration charging malicious prosecution construed and held to state a cause of action. —McDonald v. Hall, 193 Mich. 50.

¶ 77. A declaration alleged that an attorney, with full knowledge of the invalidity of a claim of $50 made by a client against a resident of an adjoining county, took out a justice's summons directed to any constable of the county where issued, and caused it to be served upon the defendant in the county where he resided by a deputy-sheriff of that county, and on the return-day, defendant not appearing, took a judgment for $300, which he removed by transcript to the circuit court, and caused an execution to be issued thereon, which he placed in the hands of the sheriff of the county in which defendant resided, and by threats of a levy upon defendant's property secured from him $240 in settlement of such void judgment. Held to state a cause of action in trespass on the case for abuse of process.—Antcliff v. June, 81 Mich. 477.

¶ 78. In action for malicious attachment, which does not need to await the termination of the attachment proceeding, if a motion to dissolve be made pending the malicious prosecution action and dissolution be ordered, plaintiff may show it; while if dissolution be denied, defendant may change his plea interposed in the malicious prosecution suit and set up the dissolution.—Cadwell v. Corey, 91 Mich. 335.

§ 20. Issues, necessary proofs, and variance.

Proofs of conspiracy, see also ante ¶ 71.

General law as to issues and variance, see Pleading, IX, X.

¶ 79. In an action for malicious prosecution for a specific offense, the plaintiff may, if he chooses, show that he did not commit it, although he need show no more than that there was no probable cause for the proceeding against him.—Patterson v. Garlock, 39 Mich. 447.

¶ 80. In a suit for malicious prosecution, a plea for the general issue is sufficient to raise the issue of probable cause.—Birdsall v. Smith, 158 Mich. 390.

¶ 81. The defense of probable cause in malicious prosecution may be shown under a plea of the general issue where the declaration sets out fully the affidavit, warrant, and the records of the prosecution.—Steadman v. Keets, 129 Mich. 669.

¶ 82. Where the declaration in an action for maliciously suing out a writ of attachment alleges that "the defendant caused the affidavit to be filed in the office of the clerk of the court, and caused a writ of attachment to be issued" thereon, plaintiff cannot be heard to say that the affidavit was not made and filed prior to the issue of the writ in the face of this allegation in the declaration.—Wiesinger v. First National Bank, 106 Mich. 291.

¶ 83. Where a declaration charging malicious prosecution averred that the plaintiff had been "acquitted and discharged," but also showed facts indicating that there had been a discontinuance instead, and not a trial and acquittal, it was not held such a variance from proof of a nolle prosequi as to invalidate the declaration, the context showing that the words did not refer to an acquittal on a trial.—Stanton v. Hart, 27 Mich. 539.

¶ 84. There was no variance between a declaration for malicious prosecution, which alleged that the "jury, having heard and considered the evidence against this plaintiff touching and concerning the said supposed offense, * * * rendered a verdict of not guilty; and * * * the said justice caused this deponent to be discharged out of custody, fully acquitted and discharged of the said supposed offense," and the record offered in evidence to show the criminal prosecution of plaintiff, which showed that defendant's objection to the admission of any evidence in the case, on the ground that the justice had no jurisdiction to try the offense charged in the warrant, was sustained, and the jury thereupon rendered a verdict of not guilty, and the defendant therein was discharged.—Peterson v. Toner, 80 Mich. 350.

¶ 84a. The variance was fatal in an action on the case for malicious prosecution, where the declaration alleged trespass without legal authority, and the proofs showed a seizure under a writ of replevin issued in due legal form, though without probable cause.—Harris v. Thomas, 140 Mich. 462.

§ 21. Burden of proof and presumptions.

Prima facie sufficiency of proofs, see post §§ 30-34.
Inferable malice, see post § 33.
Instructions as to burden and presumptions, see post § 42.
General presumptions and general rules as to burden of proof, see Evidence, II.
Presumption as to malice in action for wrongful attachment, see also Attachment ¶ 401.

¶ 85. The burden of proving the want of probable cause is on the plaintiff.—Hamilton v. Smith, 39 Mich. 222; Harris v. Woodford, 98 Mich. 147; Rankin v. Crane, 104 Mich. 6; Davis v. McMillan, 142 Mich. 391.

¶ 86. In malicious prosecution of an attachment it is incumbent on plaintiff to prove want of probable cause for the attachment, as distinguished from the attachment suit itself where the burden is on the attachment plaintiff to prove grounds for the attachment.—LeClear v. Perkins, 103 Mich. 131.

¶ 87. To support an action for malicious prosecution, the general rule is, that the plaintiff must establish the fact of the alleged prosecution, and that it has come to a legal termination in the plaintiff's favor, that the defendant had not probable cause, and that he acted from malicious motives.—Antcliff v. June, 81 Mich. 477.

¶ 88. In a suit for malicious prosecution plaintiff must show that the prosecution terminated favorably to himself.—Coveney v. Phiscator, 132 Mich. 258.

¶ 89. On a warrant reciting that prior to its issuance the justice examined on oath a witness other than the complainant, it will not be presumed that there was no positive evidence justifying issuance of the warrant, though the complaint was on information and belief.—Curnow v. Kessler, 110 Mich. 10.

¶ 90. Malice may be inferred from the want of probable cause.—Hamilton v. Smith, 39 Mich. 222; Carson v. Edgeworth, 43 Mich. 241; Brand v. Hinchman, 68 Mich. 590.

¶ 91. Malice in suing out attachment may be inferred from want of probable cause.—LeClear v. Perkins, 103 Mich. 131.

¶ 92. Malice is not implied from an unfounded prosecution.—Carson v. Edgeworth, 43 Mich. 241.

¶ 93. Want of probable cause can never be inferred from malice.—Hamilton v. Smith, 39 Mich. 222.

¶ 94. Where want of jurisdiction does not appear on the face of the warrant, but only by evidence aliunde, the party arrested and prosecuted may, when acquitted, maintain an action for malicious prosecution on a showing that it was malicious, and without probable cause or good faith.—Sweet v. Negus, 30 Mich. 406.

§ 22. Admissibility of evidence.

Evidence permissible under the pleadings and variance, see ante § 20.
To show particular elements of the tort, see post §§ 28-29.
Explanation and rebuttal, see post § 29.
Weight and sufficiency of the evidence, see post §§ 30-34.
General law as to admissibility of evidence, see Evidence, III et seq.
Admissibility of evidence in actions for false imprisonment, see False Imprisonment §§ 27, 28.
Attachment papers as admissible evidence in action for wrongful attachment, see Attachment § 144.
Separation of objectionable from admissible matter in making offer and receiving evidence, see Trial, V, A, C.
Striking out testimony as immaterial, see Trial, V, C.
Cross-examination of party, see Examination of Witnesses § 52.

¶ 95. One who sued for malicious prosecution showed that defendant had called him meddlesome and troublesome. Defendant's offer to justify the epithets by showing that plaintiff was reputed to be quarrelsome, meddlesome and vindictive was properly overruled, since the epithets were important only as showing his own feelings.—Labar v. Crane, 56 Mich. 585.

¶ 96. It is irrelevant in an action for malicious prosecution by one arrested for obstructing an alleged highway, that the arrested person had an arrangement with witness to do hauling over it and to be paid by orders on defendant who disputed the existence of the highway.—Thurston v. Wright, 77 Mich. 96.

¶ 97. In an action for malicious attachment subsequent attachments and a foreclosure may be shown, the jury being left to say whether they resulted from suing out the first writ.—Grimes v. Bowerman, 92 Mich. 258.

¶ 98. An unfounded prosecution cannot be justified, or the prosecutor's malice disproved, by evidence of offenses committed by the plaintiff other than those for which he was prosecuted by the defendant.—Carson v. Edgeworth, 43 Mich. 241.

¶ 99. Plaintiff occupied a house part in the highway and part on defendant's land. Upon being asked to move off because defendant desired to use the land for piling logs, he refused and when informed that men would be sent to grade the land, he stated that he would stop them "with cold lead," whereupon defendant caused his arrest for

the threat, but the proceedings were dropped because of some irregularity. Plaintiff sued for malicious prosecution. Held, that evidence that defendant had other land which he could use for piling the logs was inadmissible, since his right to evict was not dependent upon a necessity for immediate use of the premises.—Thurkettle v. Frost, 137 Mich. 115.

¶ 100. In an action for malicious prosecution for causing the arrest of plaintiff for the larceny of an organ, testimony by a witness that plaintiff had inquired of him what defendant could do if she moved the organ away, and that he replied that it could be replevined, has a tendency to prove, but did not constitute an express admission by plaintiff of want of title conclusive on that issue.—McClay v. Hicks, 119 Mich. 65.

¶ 101. Testimony of plaintiff in a suit for malicious prosecution, to the effect that he had had some dealings before with the defendant, and that he had owed defendant money, was properly admitted, but even if it were error to admit it, such error would be harmless.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 102. It is permissible to show whether defendant appeared to be pleased or displeased when the plaintiff was released on his own recognizance, but not to ask a witness for his conclusions as to whether defendant was pleased or not.—Fleckinger v. Taffee, 149 Mich. 678.

¶ 103. In an action for malicious prosecution it cannot be shown what the witnesses in the criminal case testified to, in order to show that the discharge of the plaintiff constituted a miscarriage of justice.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 104. The existence of probable cause being established, the defendant's motives in causing the arrest of plaintiff are immaterial, such as the fact that they offered to refrain from such prosecution if plaintiff would repay the money he had misappropriated.—Rankin v. Crane, 104 Mich. 6.

§ 23. ——Files and documents as evidence.

Nunc pro tunc entry as evidence of termination, see also ante ¶ 59.
Filing of second complaint as evidence of malice, see also post ¶ 144.
Admissibility of documents as such, see Evidence, VIII, C.
Files of criminal case as proper evidence and foundation for same, see also Evidence §§ 548, 549.

¶ 105. That the magistrate, after being advised of all the facts, so negligently drew the complaint and warrant upon which plaintiff's suit for malicious prosecution is founded that they were not in proper form, is no ground for rejecting them when offered in evidence.—Cooney v. Chase, 81 Mich. 203.

¶ 106. The files in an attachment suit brought against plaintiff by one of the defendants are inadmissible in an action for malicious prosecution and false imprisonment brought by the manager of a paper who had been arrested for embezzlement of the funds of the company drawn out in excess of his salary, the manager claiming that he was in fact the owner of the property, where such files throw no light upon the issues involved.—Bennett v. Eddy, 120 Mich. 300.

¶ 107. In an action for malicious prosecution, where it appeared that immediately upon the making of the complaint in question, the defendant transferred at a large discount, a note for $115 signed by plaintiff's father to one H, and that the defendant advised the father to call on H to aid him, and that H upon the father giving him a deed to his farm, promised to advance $200 to aid plaintiff in his trial, and that instead of giving the father the money, H gave him such note, it was not error to admit the note and deed in evidence, as it was a question for the jury to determine whether the complaint was made in good faith or for the purpose of collecting the note.—Brown v. Riggs, 123 Mich. 208.

¶ 108. In an action for malicious prosecution based upon violation of the local option law, the discharge of the plaintiff was admissible only to show the termination of the prosecution, and not for the purpose of showing the motives of the magistrate.—Hickey v. Shellenbarger, 180 Mich. 548.

§ 24. ——As to belief or probability of cause.

See also ante ¶¶ 27, 28, post ¶ 143.
Weight and sufficiency of evidence, see post § 31.
Conclusion of defendant that he stated "all he knew" to attorney, see Evidence ¶ 1362.

¶ 109. In an action for malicious prosecution based on an arrest for a threat to shoot, evidence of plaintiff's previous good reputation is admissible as bearing upon the question of probable cause.—Thurkettle v. Frost, 137 Mich. 115.

¶ 110. In an action for malicious prosecution against a father for aiding and supporting his son in instituting and maintaining a prosecution against plaintiff on a charge of adultery with the son's wife, the fact that the wife may have been a hard working woman did not bear upon the question of whether she was guilty of adultery.—Goode v. Eslow, 151 Mich. 48.

¶ 111. In an action for malicious prosecution, where the question of want of probable cause is left to the jury, evidence of all the

facts surrounding the transaction which was the cause of the prosecution may properly be admitted.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 112. In an action for malicious prosecution based upon a violation of the local option law, evidence as to other similar offenses is admissible only as bearing upon plaintiff's character and veracity and upon defendant's good faith.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 113. In an action for malicious prosecution for a specific theft it is not admissible to show that plaintiff had committed a different theft.—Patterson v. Garlock, 39 Mich. 447.

¶ 114. In an action for maliciously prosecuting a criminal charge it is proper to refuse to allow defendant to ask the prosecuting attorney whether before complaint was made he was satisfied there was good ground for it; the prosecuting attorney's good faith in the prosecution constitutes no defense in this action.—Peterson v. Toner, 80 Mich. 350.

¶ 115. In a suit for false imprisonment and malicious prosecution, a letter from the prosecuting attorney, authorizing the commencement of the prosecution, is admissible as tending to show motive, and probable cause that an offense has been committed, and that the usual course was taken in such cases.—Thurston v. Wright, 77 Mich. 96.

¶ 116. Evidence of what third persons had told the witness plaintiff had said to them about his purposes is hearsay, and in an action for malicious prosecution it is inadmissible, on the part of the defense, to excuse the arrest of the plaintiff.—Labar v. Crane, 56 Mich. 585.

¶ 117. Facts which came to the knowledge of defendant's counsel while investigating the alleged offense, and which were communicated to them before they caused plaintiff's arrest, may be given in evidence on the question of probable cause.—Gallaway v. Burr, 32 Mich. 332.

¶ 118. When a plaintiff in a suit for malicious prosecution is shown to have taken and appropriated to his own use property belonging to defendant, proof of an attempt by defendant to settle the matter and obtain his own does not of itself tend to show a want of criminal intent upon plaintiff's part, or a belief in his innocence upon defendant's part.—Harris v. Woodford, 98 Mich. 147.

¶ 119. In an action for malicious prosecution of an attachment the testimony of plaintiff's bookkeeper as to her knowledge of his business and financial affairs at the time of the attachment, and his efforts to borrow money, was admitted, she having previously communicated such facts to defendants, was competent and admissible as bearing upon the questions of probable cause and malice, and to enable the jury to say whether defendants did more than what careful and prudent men would have done under like circumstances.—LeClear v. Perkins, 108 Mich. 131.

¶ 120. Whether the mayor of a city was acting officially or in his private capacity in attempting to examine the books in a city office is a material inquiry in an action for malicious prosecution based upon the commencement by him of criminal proceedings for an alleged conspiracy to obstruct him in the exercise of his right, and evidence tending to show that he was merely seeking to aid a newspaper reporter in obtaining access to the records is relevant to this issue.—Tryon v. Pingree, 112 Mich. 338.

¶ 121. A company was formed to take over a newspaper, the former owner holding stock and being made manager at a weekly salary. After some years he was arrested at the instance of certain stockholders for embezzlement of funds of the company during a specified period. He claimed that he was really the owner and that the stock was issued to be held as security until debts guaranteed by the stockholders were paid, and that the money drawn out in excess of his salary was applied to those debts. Held, in an action for malicious prosecution and false imprisonment, that evidence was admissible on the issue of probable cause, showing the transactions since the company was organized, and was not limited to the time during which the embezzlement was alleged to have occurred.—Bennett v. Eddy, 120 Mich. 300.

¶ 122. In an action for malicious prosecution and false imprisonment by the manager of a paper who had been arrested for embezzlement of funds of the company drawn out in excess of his salary, where the manager claimed that he in fact owned the paper, and that the company, stockholders of which had caused his arrest, was organized simply to provide security for funds advanced, evidence of what was done with the property after plaintiff's connection therewith had ceased is inadmissible.—Bennett v. Eddy, 120 Mich. 300.

¶ 123. In an action for malicious prosecution for criminally prosecuting plaintiff who let a horse out of defendant's stable and took a basket therefrom while performing services as a hired man for defendant's tenant whose contract permitted the use of such horse and also farming tools, evidence as to the size of defendant's farm was proper as bearing upon the rights of the tenant, and of the plaintiff as his hired man, to handle the horse and use the basket in question.—Gould v. Gregory, 133 Mich. 382.

¶ 124. Where plaintiff, arrested for defending possession by force, had purchased certain buildings and admitted that he had no title to the land but claimed that the purchase included the right to occupy the land, a simple bill of sale of the property to his vendor with a chattel mortgage back for the purchase price is admissible to show no right and that plaintiff did not in good faith believe that he had a right to occupy the land and to defend it by force.—Thurkettle v. Frost, 137 Mich. 115.

¶ 124a. Evidence tending to show that after plaintiff's discharge from jail on a charge of larceny he sent underclothing to an alleged accomplice at the jail, is admissible in an action for false imprisonment and malicious prosecution, where plaintiff had testified that at the time of his arrest such alleged accomplice was a total stranger to him, and that he had had no dealings with him, since their relations were relevant and this tended to show what their relations were.—Lanaky v. Prettyman, 140 Mich. 40.

¶ 125. In an action for malicious prosecution resulting from the arrest of defendant for breaking a window in a church it is competent to show in order to discredit good faith that the justice of the peace endeavored to obtain protection for defendant against a possible action for malicious prosecution.—Gurden v. Stevens, 146 Mich. 489.

¶ 126. Evidence of the condition of plaintiff's business, and of his assets and credit when affidavit was made, may be admitted to show want of probable cause for attachment.—Grimes v. Bowerman, 92 Mich. 258.

§ 25. ——As to advice of counsel or magistrate.

Evidence as to what prosecuting attorney or magistrate believed, see also ante § 24.

¶ 127. In an action for false imprisonment and malicious prosecution, it is competent for the justice of the peace who issued the warrant to state fully what took place when the parties first appeared before him, and what proceedings were had; and he may be asked on cross-examination by defendant, "what conduct before him in the proceedings, or in his presence or hearing, on the part of the defendant, disclosed to him any maliciousness or overanxiety to prosecute the criminal case, if any."—Thurston v. Wright, 77 Mich. 96.

¶ 128. In an action for malicious prosecution resulting from the arrest of plaintiff from breaking a window in a church, the opinion of the justice of the peace who issued the warrant as to the plaintiff's guilt and of his opinions of defendant's statements were not material to the issue, but where it is claimed that he and defendant had conspired to extort money for the payment of the glass when both knew the breaking was not malicious, evidence of his good faith is admissible, and the defendant may negative the claim of conspiracy even though the justice's opinions necessarily appeared in the testimony.—Gurden v. Stevens, 146 Mich. 489.

¶ 129. In an action for malicious prosecution and false imprisonment where defendants set up that they had stated the facts to the prosecuting attorney and had no further connection with the arrest, it is error to exclude evidence by the prosecuting attorney as to directions given to the officer making the arrest, the plaintiff already having testified as to the place and particulars of the arrest.—Bennett v. Eddy, 120 Mich. 300.

¶ 130. In an action for malicious prosecution and false imprisonment, the defense being probable cause, the prosecuting attorney who was present and heard all the testimony, should be permitted to testify whether any testimony had been given relative to facts known to defendant, which had not been placed before him before the criminal prosecution was commenced.—Bennett v. Eddy, 120 Mich. 300.

¶ 131. In an action for malicious prosecution and false imprisonment, where the manager of a paper had been arrested at the instance of stockholders, for embezzlement, an expert who had been employed by defendants to examine the company's books after the matter had been laid before the prosecuting attorney should be permitted to testify as to what he had learned and what he reported to the prosecuting attorney, such evidence being admissible on the issue of probable cause.—Bennett v. Eddy, 120 Mich. 300.

¶ 132. In an action for malicious prosecution and false imprisonment, it is error to exclude evidence by defendant as to what he told the prosecuting attorney, such evidence being admissible to show whether or not the facts were fully laid before the prosecuting attorney.—Bennett v. Eddy, 120 Mich. 300.

¶ 133. In a suit for malicious prosecution, the testimony of the justice who issued the warrant for plaintiff's arrest as to whether or not he considered, from defendant's statement of the facts, that there was probable cause for making the complaint, is immaterial and inadmissible.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 134. In a suit for malicious prosecution, testimony of a witness who was present, as to what occurred when plaintiff obtained from defendant's wife the wheat which defendant prosecuted him for stealing, is ad-

missible as throwing light upon plaintiff's innocence, and as bearing on the state of facts necessary to be known by counsel who advised the prosecution, provided it shall appear that such facts came to the knowledge of defendant.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 135. In a suit for malicious prosecution, where probable cause based on advice of counsel is one of the defenses, it is proper to ask defendant on cross-examination if he paid his counsel, and the time and amount of such payment.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 136. In a suit for malicious prosecution of plaintiff for stealing wheat, one of the defenses being probable cause, based on advice of the prosecuting attorney, it is competent to prove on cross-examination of defendant, that he told the prosecuting attorney that he (defendant) and plaintiff had a talk about the wheat, whereupon the prosecuting attorney said that had he known this fact he would not have endorsed the complaint.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 137. In an action for malicious prosecution in establishing the defense that the prosecution was commenced by the advice and direction of the prosecuting attorney, quære whether the prosecuting attorney may testify as to what investigation he made for himself on his own motion in addition to the information obtained from the defendant. —McLeod v. Crosby, 128 Mich. 641.

§ 26. ——As to malice.

Mental excitement as factor for consideration on question of malice, see ante ¶ 57.
Evidence to show malice in action against sheriff for wrongful attachment, see Attachment ¶ 405.

¶ 138. In a suit for false imprisonment and malicious prosecution the plaintiff may show exhibition of feeling on the part of the defendant after the suit was brought, as having some tendency to show motive, if connected with the matter in controversy, but not otherwise.—Thurston v. Wright, 77 Mich. 96.

¶ 139. While it is true that every kind of ill feeling is not necessarily indicative of malice, yet malice may be proved by evidence of defendant's conduct and declarations; and if such conduct resulted in a wrong done to plaintiff, statements indicating ill feeling towards the plaintiff may be introduced in evidence, as bearing upon the intent with which the wrongful act was committed. Malice may be inferred by the jury from all the facts and circumstances given in evidence, and expressions of ill feeling are circumstances which are proper to be submitted to the jury. Mere expressions of dislike or ill-will by one towards another, unaccompanied by acts, do not constitute malice in the legal sense. But where an act has been done—such as instituting a prosecution—then such expressions become relevant upon the question of malice.—Thurston v. Wright, 77 Mich. 96.

¶ 140. In suit for malicious arrest and false imprisonment the statements made by the defendant, after his arrest, concerning his motives and doings in regard to the proceedings, are receivable as admissions against him to show the malice; so also are all of his conversations with and threats made to the party arrested before the arrest.—Josselyn v. McAllister, 22 Mich. 300; Josselyn v. McAllister, 25 Mich. 45.

¶ 141. In an action for malicious prosecution it is admissible as bearing upon the question of malice and probable cause to show the anterior personal relations of the parties, and that the defendant had said he was not personally cognizant of the matters on which he had based the prosecution.—Patterson v. Garlock, 39 Mich. 447.

¶ 142. In an action for malicious prosecution resulting from an arrest for breaking a church window the defendant may show that for months injuries to the church had been serious and frequent, as characterizing the intent and motives of defendant.—Gurden v. Stevens, 146 Mich. 489.

¶ 143. In an action for malicious prosecution, conversations between defendant and the prosecuting attorney concerning plaintiff's prior acts for which she had been arrested at defendant's instance upon a charge like that involved in the present suit, but distinct from it, and a magistrate's record of proceedings had before him three years before upon such charge, do not bear upon the questions of probable cause or malice, and are inadmissible in evidence.—Wilson v. Bowen, 64 Mich. 133.

¶ 144. A second complaint and warrant against plaintiff on the same charge, after he had been discharged because the first papers were defective, and after he had brought suit, were admissible in an action for malicious prosecution as tending to show malice.—Cooney v. Chase, 81 Mich. 208.

¶ 145. Evidence that defendant caused notice of plaintiff's arrest to be published in the newspapers was admissible in an action for malicious prosecution, not only as an element of damage but as tending to show malice.—Cooney v. Chase, 81 Mich. 208.

¶ 146. In an action for malicious prosecution, where for the purpose of establishing malice a witness for plaintiff had testified that defendant had stated that "somebody had been down to his cottages and had

broken into the boathouse and knocked holes into the boats," and that he thought that the plaintiff had done it; testimony as to the number of cottages owned by defendant was proper.—Gould v. Gregory, 133 Mich. 382.

§ 27. ——As to injury and gravity thereof.

Evidence as to damages, see Damages § 316.

¶ 147. Evidence that a notice of the attachment suit was published in a daily paper, and proof of that paper's circulation, are admissible, such publication tending to injure plaintiff's credit and business.—Brand v. Hinchman, 68 Mich. 590.

¶ 148. In action for malicious attachment it is proper to show that plaintiffs' business reputation was good before the issue of the attachment.—Brand v. Hinchman, 68 Mich. 590.

¶ 149. In an action for malicious attachment a third party's refusal, after issue of the attachment, to deliver an article of merchandise to plaintiff without payment before delivery is admissible; whether such refusal was the result of the attachment proceedings or was attributable to other causes is for the jury.—Brand v. Hinchman, 68 Mich. 590.

¶ 150. Under a declaration which avers that by reason of the malicious prosecution plaintiff's credit was impaired so that his creditors demanded security for their debts, and consequently he was obliged to mortgage his property, it is competent for him to show that he was a merchant, that he bought goods in a certain city, that he was indebted to several parties for goods, that said parties, on hearing of the pendency of the charge, refused him further credit, and required a chattel mortgage, which he was obliged to give in order to avoid suit.—Fine v. Navarre, 104 Mich. 93.

§ 28. ——As to responsibility or participation.

As to scope of agency or service, see Agency, II; Master and Servant, IV.

Evidence as to conspiracy to prosecute, see Conspiracy § 6.

¶ 151. Advising persons not to become sureties for one who has been arrested does not tend to show that those who give such advice have conspired with the person who caused the arrest, and are therefore liable with him to an action for malicious prosecution. Nor does their enmity toward the person arrested, nor their wish to drive him out of town.—Labar v. Batt, 56 Mich. 589.

¶ 152. In an action for malicious prosecution for criminally prosecuting plaintiff who let a horse out of defendant's stable and took a basket therefrom, while performing services as a hired man for defendant's tenant whose contract permitted the use of such horse and also farming tools, evidence as to such tenant's contract was proper, even though plaintiff was not acting under the tenant's orders at the time in question, as the jury might properly have inferred that plaintiff entered the barn and did the acts complained of, because of his obligations as such hired man.—Gould v. Gregory, 133 Mich. 382.

§ 29. Explanation and rebuttal.

¶ 153. The admission of testimony in a malicious prosecution case, to show that defendant did not explain the entire transactions in question to the prosecuting attorney at the time of making the complaint which led to plaintiff's arrest, offered in rebuttal after it was apparent that defendant did not rely upon the advice of such attorney was error; although defendant had attached a notice to his plea that he would rely upon the advice of such attorney, defendant's counsel having stated in open court that he did not rely upon the advice.—McClay v. Hicks, 119 Mich. 65.

§ 30. Weight and sufficiency of evidence.

As to various elements of the tort, see post §§ 31-34.

Sufficiency of admission of want of title to goods charged to have been stolen, see also ante ¶ 100.

Sufficiency of case as jury question, see post §§ 35-38.

Admissibility of evidence, see ante §§ 22-29.

¶ 154. In an action for malicious prosecution there must be established the fact of the alleged prosecution and that it terminated in plaintiff's favor, that defendant had not probable cause, and that he acted from malicious motives.—Thomas v. Bush, 200 Mich. 224.

¶ 155. To entitle plaintiff to recover in an action for malicious prosecution it must be established by a preponderance of evidence that the prosecution was begun and came to a legal termination in plaintiff's favor, and that in doing so defendant was actuated by malicious motives.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 156. One is properly found guilty of having instituted a malicious prosecution for larceny, where his information was obtained from a discharged convict then under criminal accusation, where the source of information was not disclosed to the magistrate from whom the warrant was obtained, where the arrest was made in the nighttime, defendant being present, and where the prosecution was voluntarily abandoned.—Chapman v. Dunn, 56 Mich. 31.

¶ 157. In an action for malicious prosecution in procuring plaintiff's arrest upon a criminal charge, evidence of a statement made by the prosecuting attorney long sub-

sequent to the arrest, that he had told complaining witness, now the defendant, to investigate and withhold the warrant until the suspected person could be identified, is not substantive proof that defendant was so instructed, and accordingly was liable rather than the prosecuting attorney.—Eno v. Allen, 113 Mich. 399.

§ 31. ——As to probability of cause.

See also ante ¶ 156.
Effect of proof of advice of counsel sought and received, see ante § 10.
Decision or verdict in the prosecution as conclusive on question of probable cause, see post § 32.

¶ 158. Probable cause is shown where a defendant in an action for malicious prosecution of attachment fully and fairly placed the facts within his knowledge before counsel and acted upon his advice, although such advice may not have been justified by the facts stated.—Kompass v. Light, 122 Mich. 86.

¶ 159. Defendant in an action for malicious prosecution may testify whether, when he made the complaint upon which proceedings were instituted against the plaintiff, he believed it to be true. Such belief, however, is a question for the jury, and defendant's testimony has no more weight than that of any other witness.—Spalding v. Lowe, 56 Mich. 366.

¶ 160. Evidence that offer to refrain from prosecution was made on condition that misappropriated money be repaid does not establish want of probable cause otherwise appearing to have existed.—Rankin v. Crane, 104 Mich. 6.

¶ 161. Where an employee procured to be discounted at a bank outside of the state a note received from a customer of his employer, and appropriated part of the money in payment of his unearned salary for the rest of the year for which he was hired, it was held, in an action by him for malicious prosecution after his employer had caused his arrest for embezzlement, that the jury should have been instructed that the evidence did not establish want of probable cause, and that it did establish probable cause.—Rankin v. Crane, 104 Mich. 6.

¶ 162. In an action against a railroad company for malicious prosecution in causing the arrest of plaintiff for knowingly receiving stolen property, evidence that plaintiff was seen with one who stole the goods and then fled the country, that the same were afterwards found upon the train with parcels belonging to plaintiff, that they were taken to his house by one who accompanied him, and that defendant had suffered from numerous thefts along its line, sufficiently shows probable cause for instituting the prosecution.—Fletcher v. Chicago & N. W. R. Co., 109 Mich. 363.

¶ 163. In an action with a count for malicious prosecution, there was evidence that defendant aided in procuring the arrest of plaintiff upon a charge of larceny for taking wood from land to which he knew that she made a bona fide claim of title and possession; and that, when plaintiff was discharged by the justice, defendant said to her: "You beat me. I will take you before my justice, where you will be beaten." Held, sufficient evidence of want of probable cause.—Loranger v. Loranger, 115 Mich. 681.

¶ 164. In an action for malicious prosecution for obstructing a highway, evidence that the defendant, a highway commissioner acting under the advice of the prosecuting attorney, signed and swore to a complaint, that the circuit court had sustained the validity of the proceedings to lay out the highway, is sufficient to sustain a finding of probable cause, Comp. L. 1897, § 4157, making the unlawful obstruction of a highway a penal offense.—Fowles v. Hayden, 129 Mich. 586.

¶ 165. In an action for malicious prosecution, want of probable cause was shown, where, although plaintiff was charged with breaking and entering defendant's barn with intent to steal a horse and basket, it appeared that plaintiff was the hired man of defendant's tenant, and that under the latter's contract the defendant was to furnish two teams and tools, and that the horse in question was one of those furnished such tenant and had been used by plaintiff as such hired man, and where at the time in question the stable door was only lightly fastened, and the horse was loose in its stall, and plaintiff let the horse out into an adjoining pasture to get food and water, and where he took the basket to the tenant for use in loading potatoes, although in doing such acts, he acted without the tenant's orders.—Gould v. Gregory, 133 Mich. 382.

¶ 166. Defendant had plaintiff arrested for cutting trees in a highway. Plaintiff, before the arrest, refused to state to defendant by what authority he cut the trees. In a suit for malicious prosecution, held, the plaintiff's refusal could not be held to be an acknowledgment that he acted without authority.—De Boer v. Adams, 159 Mich. 560.

¶ 167. Defendant was employed by a dairy and food commissioner. An analysis made in the commissioner's office of a certain quantity of milk sold by plaintiff showed the same to be adulterated. Defendant, with this information, was sent to prosecute the plaintiff, and signed the complaint against him. There was no evidence of defendant's connection with any conspiracy or of any ill-will against plaintiff. Held, no lack of probable cause was shown.—Birdsall v. Smith, 158 Mich. 390.

¶ 168. In an action for damages for malicious prosecution, evidence held sufficient to show probable cause for making the arrest. —Gilecki v. Dolemba, 189 Mich. 107.

§ 32. ——Conclusiveness and effect of decision rendered in the prosecution.

Conviction for minor charge as conclusive on favorable termination of felony charge, see also ante ¶ 68.

General rule as to conclusiveness of judgment on prosecution in civil action by or against defendant, see Former Adjudication § 11.

Judgment of conviction as evidence of probable cause, see also Former Adjudication § 11.

Conclusiveness and effect of discharge on habeas corpus, see Habeas Corpus § 14.

¶ 169. The conclusion reached by a justice upon examination in a criminal proceeding as to whether there is probable cause for commitment is not final upon that question. —Spalding v. Lowe, 56 Mich. 366.

¶ 170. That plaintiff in an action for malicious prosecution was discharged upon examination is not conclusive evidence of want of probable cause on defendant's part in making complaint against him.—Perry v. Sulier, 92 Mich. 72.

¶ 171. In malicious prosecution the disagreement of the jury in the preceding prosecution and a subsequent nolle pros. do not conclusively show probable cause where the plaintiff's testimony is sufficient to show want of probable cause.—Burbanks v. Lepovsky, 134 Mich. 384.

¶ 172. Probable cause in malicious prosecution is not shown conclusively by the fact that the plaintiff was required to appear at circuit court, and that the jury disagreed.— Burbanks v. Lepovsky, 134 Mich. 384.

¶ 173. What is probable cause is not contingent upon the fact of the guilt of the accused, and his discharge upon examination is not of itself conclusive evidence of want of probable cause for arrest and prosecution.— Lansky v. Prettyman, 140 Mich. 40.

¶ 174. A prima facie case may be made by showing that plaintiff was discharged from the prosecution against him; but it is not conclusive.—Rankin v. Crane, 104 Mich. 6.

¶ 175. The weight of authority denies the rule that discharge by a magistrate upon the request of the prosecuting attorney is prima facie evidence of want of probable cause in a case of malicious prosecution.—Davis v. McMillan, 142 Mich. 391.

¶ 176. An acquittal in a criminal prosecution does not necessarily show want of probable cause in a malicious prosecution case.— Davis v. McMillan, 142 Mich. 391.

¶ 177. Where a plaintiff was arrested by a defendant officer for peddling meat without a license, and convicted by a justice of the peace, the conviction is conclusive proof of probable cause, and no action for malicious prosecution will lie in the absence of evidence that the conviction was secured by fraudulent means.—Schnider v. Montross, 158 Mich. 268.

§ 33. ——As to malice.

See also ante ¶ 155.

Inference of malice from entire facts, see also ante § 26.

Inference from want of probable cause, see also ante § 21.

Sufficiency of proofs as jury question, see post § 38.

¶ 178. In malicious prosecution proof of malice is essential, and want of probable cause is not alone sufficient to base a verdict upon.—Davis v. McMillan, 142 Mich. 391.

¶ 179. Malice may be proved by direct or circumstantial evidence.—Hamilton v. Smith, 39 Mich. 222; Hickey v. Shellenbarger, 180 Mich. 548.

¶ 180. In a case of malicious prosecution proof of malice is necessary, but it may be deducible from the facts and circumstances surrounding the transaction, and is inferable from absence of probable cause.—Davis v. McMillan, 142 Mich. 391.

¶ 181. Evidence held to be such as to permit an inference of malice in an action for malicious prosecution.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 182. In an action for damages for malicious prosecution, evidence held sufficient to show lack of malice.—Gilecki v. Dolemba, 189 Mich. 107. (Ostrander, J., dissenting.)

¶ 183. When one resorts to the best means in his power for information before instituting legal proceedings against another it will be such a proof of honesty as would disprove malice and operate as a defense in proportion to his diligence.—Stanton v. Hart, 27 Mich. 539.

¶ 184. Malice in making an affidavit for an arrest cannot be disproved by evidence of acts of the person arrested which were unknown to the affiant, nor by showing additional facts having no bearing on the facts set forth in the affidavit as grounds of arrest, nor by matters ex post facto.—Josselyn v. McAllister, 25 Mich. 45.

¶ 185. The institution of a criminal prosecution for the recovery of a private claim is strong, if not conclusive, evidence of malice. —Gallaway v. Burr, 32 Mich. 332.

¶ 186. Malice was inferred in a malicious prosecution case, where defendant had crim-

inally prosecuted plaintiff who let a horse out of defendant's stable and took a basket therefrom while performing services as hired man for a tenant of defendant, whose contract entitled him to use such horse and also farming tools; and where there was testimony that before the commission of the alleged crime, defendant had stated that plaintiff's "place was in Jackson, and that he would like to see him there."—Gould v. Gregory, 133 Mich. 382.

§ 34. ——Of abuse of process.

¶ 187. In an action for the malicious prosecution of an attachment suit, evidence that officers went to the debtors' store with the writ, showed it to one of the firm, and remained there for the purpose of preventing any goods going out of the store, shows a sufficient service of the writ or taking possession of the goods to maintain a charge of abuse of process.—Brand v. Hinchman, 68 Mich. 590.

§ 35. Questions for court and jury.

As to probability of cause and honest belief, see post § 36.
As to advice of counsel, see post § 37.
As to malice, see post § 38.
Propriety of directing verdict, see post §§ 39-41.
Construction of the testimony as jury function, see also Trial, VI.

¶ 188. In malicious prosecution, where two witnesses had testified that one of defendants had urged his brother and codefendant to cause the arrest, his connection with the transaction is for the jury, although it is urged that this occurred after the complaint was made, and before the arrest and subsequent proceedings.—Davis v. McMillan, 142 Mich. 391.

§ 36. ——Belief and probability of cause.

See also post ¶ 232.
Duty to instruct, see post § 43.
Propriety of directed verdict, see post § 39.

¶ 189. The question of probable cause is one of law where the facts are not disputed. —Huntington v. Gault, 81 Mich. 144; Perry v. Sulier, 92 Mich. 72; Rankin v. Crane, 104 Mich. 6; Fine v. Navarre, 104 Mich. 93; Rogers v. Olds, 117 Mich. 368; Kompass v. Light, 122 Mich. 86; Davis v. McMillan, 142 Mich. 391; Fleckinger v. Taffee, 149 Mich. 678; Thomas v. Bush, 200 Mich. 224.

¶ 190. Where the facts are conceded in an action for damages for malicious prosecution the question of want of probable cause is one of law for the court.—Gilecki v. Dolemba, 189 Mich. 107.

¶ 191. The existence of probable cause for an alleged malicious prosecution depends on the state of facts found by the jury under proper instructions as to the rule of law to be applied according as they find one state of facts or another.—Hamilton v. Smith, 39 Mich. 222.

¶ 192. In an action for malicious prosecution, where the parties themselves give contradictory testimony as to the acts which were the cause of the prosecution, the question of want of probable cause was properly left to the jury.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 193. The supervisor of a township was arrested on the charge of having wilfully neglected to require from a resident taxpayer a statement of his taxable property, and after the determination of the case he sued the complaining witness for malicious prosecution. The only witness, aside from plaintiff, who positively knew whether plaintiff had endeavored to procure such a statement, was the tax-payer himself, and he testified that he had no recollection of having had any conversation with defendant, prior to plaintiff's arrest, relative to plaintiff's having left a statement with him to make out, and that he did not think that he had such a conversation. Defendant offered testimony tending to show that the tax-payer had stated to one K that he was not required by plaintiff to furnish the statement. Held, that it was at least a question for the jury as to whether defendant was justified in making the complaint without making direct inquiry, of the only person other than plaintiff who was cognizant of the facts.—Thompson v. Price, 100 Mich. 558.

¶ 194. In a suit for malicious prosecution in causing plaintiff's arrest for engaging in the business of selling spirituous and intoxicating liquors without having paid tax and posted receipt and notice as required by law, the proof to sustain the complaint was that defendant had sent a third party to plaintiff to buy whisky, which he did, bringing it to defendant in a colored bottle furnished for that purpose, and that, on tasting the contents of the bottle the next day, it was found to be whisky. Plaintiff denied selling any whisky to said party, but admitted that he sold him light wine, made from native grapes, and claimed that, while he was not authorized to sell whisky, he had a "beer license." Held, that a request on defendant's part for an instruction that there was probable cause for making the complaint was properly refused, it being a question for the jury.—Fine v. Navarre, 104 Mich. 93.

¶ 195. Whether a mayor's demand for an examination of books of a department of the city government was in the line of his office or was prompted by a personal desire to obtain information for use by a newspaper, is a jury question where the facts stand disputed on the evidence, the action being one for malicious prosecution of a criminal charge against the persons who resisted such demand, accusing them of obstruction of a function of government.—Tryon v. Pingree, 112 Mich. 388.

¶ 196. Plaintiff, De Boer, under the authority of the overseer of highways, was engaged in cutting some trees in a highway. Defendant, an abutting owner, approached and objected. Plaintiff refused to answer all questions as to his authority and his name. There was evidence that the trees or grubs cut were in the middle of the road; that defendant knew they had been cut twice before; and that he had been previously told that a certain person other than the plaintiff had been requested by the overseer to cut the trees. Held, in a suit for malicious prosecution the question of probable cause was for the jury.—De Boer v. Adams, 159 Mich. 560.

¶ 197. Held, in an action for malicious prosecution, that it cannot be said as a matter of law from the evidence that plaintiff was guilty of forgery and uttering forged instruments, as charged, and that there was probable cause for prosecution in both cases. —Prine v. Singer Sew. Mach. Co., 176 Mich. 300.

§ 37. ——Advice of counsel and sufficiency of disclosure.

¶ 198. The advice and concurrence of a public prosecutor is not a good defense to an action for malicious prosecution unless it appears that defendant fully and fairly disclosed to such officer everything within his knowledge tending to cause or exclude belief in plaintiff's guilt; and whether such disclosure was made is a question for the jury to determine, and not for the court.—Webster v. Fowler, 89 Mich. 303.

¶ 199. One who, in making a criminal complaint, follows the advice of a magistrate before whom all the facts claimed to constitute the offense have been laid by police officers detailed to make an investigation, acts upon such probable cause as in matter of law when undisputed constitutes a defense to an action for malicious prosecution.—Rogers v. Olds, 117 Mich. 368.

¶ 200. Where, in an action for malicious prosecution, the evidence is conflicting as to whether defendant made a full and fair statement to the magistrate who issued the warrant of all the facts within his knowledge tending to cause or to exclude belief in plaintiff's guilt, the question whether he made such a disclosure should be submitted to the jury.—Govaski v. Downey, 100 Mich. 429.

¶ 201. Defendant testified that he talked with the tax-payer upon the subject, and was informed that plaintiff did not ask for any statement of the tax-payer's taxable property, and that he communicated this fact to the prosecuting attorney. Held, that, if this was true, it was the most important fact which was stated to the prosecuting attorney to form a basis for his judgment; that, the tax-payer having testified that, according to his recollection, he never made any such statement to defendant prior to the arrest of plaintiff, it would follow, if the jury accepted this testimony, that defendant did not fairly disclose the facts, and only the facts, within his knowledge, to the prosecuting attorney, and that it was a question for the jury as to whether he did or did not.—Thompson v. Price, 100 Mich. 558.

¶ 202. Plaintiff and defendant were members of the city common council. Defendant signed a criminal complaint against plaintiff, charging dishonesty in connection with a city paving contract. It appeared that defendant had brought to the prosecutor a witness who stated that plaintiff had told him he had made money out of the paving contract. Defendant in good faith disclosed all facts fairly to the prosecutor, and acted on his advice in signing the complaint. Held, in an action for malicious prosecution, that as a matter of law defendant had probable cause. —Smith v. Tolan, 158 Mich. 89.

¶ 203. The case was properly submitted to the jury both on the question of a full and fair disclosure to counsel and advice from him and on the question of probable cause, where the charge was for obtaining money by false pretenses consisting in selling clover seed by sample and delivering it in bags surfaced with good seed on top and bad seed below where it would not be found, and where defendant buyer shipped it away to a wholesaler and received back, as he claimed, the identical bags in the same condition as they came from plaintiff, but evidence on plaintiff's behalf tended to show that the bags delivered by him had been filled from the clover huller so that they could not have been surfaced or tampered with, and that the seed in the bags at time of trial was different from that he sold; since under such evidence the jury might find that the tampering was done by defendant, and since that if so found was inconsistent with any cause to prosecute plaintiff and with a full and fair statement to counsel.—Phiscator v. Rice, 147 Mich. 411.

§ 38. ——Malice.

¶ 204. The question of malice in an action for malicious prosecution is for the jury alone.—Hamilton v. Smith, 39 Mich. 222.

¶ 205. The question of malice in an action for malicious prosecution is always for the jury when there is any evidence tending to establish it.—Hickey v. Shellenbarger, 180 Mich. 548.

¶ 206. In an action for malicious prosecution based upon an arrest under the statute providing for recognizances to keep the peace, it being alleged that plaintiff had threatened to shoot defendant, it is for the jury to determine from all the circumstances whether defendant was actually in fear that plaintiff would execute his threat, since otherwise the complaint was malicious.—Thurkettle v. Frost, 137 Mich. 115.

¶ 207. In an action for false imprisonment and malicious prosecution where the facts show that the defendant police officer had arrested the plaintiff while making a public address in a public place in violation of a city ordinance, and he thereafter swore to a complaint charging plaintiff with the use of indecent and immoral language constituting disorderly conduct without having read such complaint, that plaintiff was later arrested under a warrant issued on the complaint, and on the trial the arresting officer testified that no indecent or immoral language had been used on the occasion of the original arrest whereupon the accused was discharged; if it cannot be said as a matter of law that there was an absence of testimony showing malice, it was error for the court to withdraw from the jury the proceedings taken after the original arrest, and the responsibility of the defendant for what actually occurred.—Meyer v. Lally, 143 Mich. 578.

§ 39. Directing verdicts.

Instruction limiting issues to damages, see also post ¶ 226.

Direction on proof of advice of counsel, see post § 40.

Direction for one of coparties, see post § 41.

General law as to occasion and propriety of directing verdict and practice on motion for same, see Directing Verdict.

¶ 208. Where after a conviction for assault and battery, the assaulted party began an action for damages and caused a capias to issue, in which there was a verdict of no cause of action, whereupon the defendant in the capias suit brought an action for malicious prosecution, in which latter suit the record conclusively established that an unjustifiable assault had been committed upon the defendant and where it also appeared that the defendant had acted upon the advice of his attorney to whom the facts were fully known, in suing out the capias; the court should have held as a matter of law that there was probable cause and should have directed a verdict for the defendant.—Davis v. McLaughlin, 122 Mich. 393.

¶ 209. In a suit for malicious prosecution, the prosecuting attorney made an independent investigation of the alleged perjury of the plaintiff in swearing to the value of property, in a saloon bond, before permitting the defendant to press the prosecution. On an occasion previous to making the complaint, defendant had expressed an opinion that the bond was all right. Held, that evidence of this admission by defendant was immaterial, and he was entitled to a directed verdict.—Christy v. Rice, 152 Mich. 563.

¶ 210. The defendant went to the prosecuting attorney and asked him to prosecute the present plaintiff for perjury in swearing falsely as to the value of his property, in presenting a saloon bond. The prosecutor refused to do so until he had made an independent investigation. The prosecutor then prosecuted the plaintiff, and he was acquitted. Plaintiff sued for malicious prosecution. Held, the court should have directed a verdict for defendant, despite the fact that the prosecutor could not name in his testimony any one whom he had questioned in his special investigation.—Christy v. Rice, 152 Mich. 563.

¶ 211. Plaintiff, De Boer, under the authority of the overseer of highways, was engaged in cutting some trees in a highway. Defendant, an abutting owner, approached and objected. Defendant then went to the prosecuting attorney and told him that plaintiff was cutting the highway trees; that defendant asked him who he was, and plaintiff told him that was for defendant to find out; and that when asked for his authority to cut the trees plaintiff told him that that was his (plaintiff's) business. The prosecuting attorney issued the warrant for plaintiff's arrest. In a suit for malicious prosecution, the court directed a verdict and refused to submit to the jury the question whether defendant made such a full and frank disclosure to the prosecuting attorney as to relieve him from liability. Held, this was error, in view of evidence that defendant previously had been told that another person had been requested by the overseer to cut the trees.—De Boer v. Adams, 159 Mich. 560.

§ 40. ——On proofs as to advice of counsel.

Direction of verdict on proof of independent investigation and action by prosecuting attorney, see ante ¶¶ 209, 210, 211.

¶ 212. In an action for malicious prosecution and false imprisonment, advice of counsel is not a conclusive defense so as to require a directed verdict where it is claimed that all the facts were not communicated to counsel and there is evidence bearing upon such claim.—Bennett v. Eddy, 120 Mich. 300.

¶ 213. Advice of counsel is not such conclusive defense to an action for malicious prosecution as to require a directed verdict for defendant, since it is for the jury to determine whether the facts were fully and truly stated to counsel, and especially where there is conflict as to what actually was stated.—Thurkettle v. Frost, 137 Mich. 115.

¶ 214. Verdict for defendant in malicious prosecution is properly directed where it appears that, having missed money apparently by stealing, defendant took an affidavit presented to a justice and submitted it to an experienced lawyer with a full statement of facts, was advised to investigate further and did so, reported further and was then advised to prosecute, and resubmitted the affidavit to the justice who issued a warrant to arrest plaintiff who on examination was discharged.—Perry v. Sulier, 92 Mich. 72.

¶ 215. Where in a suit for malicious prosecution the undisputed evidence showed that defendant, by himself and by disinterested witnesses, placed all of the facts upon which his compliant against plaintiff for perjury was predicated before the prosecuting attorney, who advised such criminal prosecution, and that defendant acted upon such advice in making the complaint, the jury should have been instructed that plaintiff had failed to show that there was a want of probable cause to make the complaint.—Huntington v. Gault, 81 Mich. 144.

¶ 216. A directed verdict for the defendant in an action for malicious prosecution and false imprisonment is erroneous where the testimony for the plaintiff shows that he was not guilty of the offense charged, that defendants had no reason for believing him guilty, that the prosecuting attorney was not informed of all the material facts, and that he would not have advised a prosecution if he had been; the truth of these matters is for the jury.—Burbanks v. Lepovsky, 134 Mich. 384.

¶ 217. Where, in a malicious prosecution suit, there is a conflict of evidence as to whether the defendant told the truth in disclosing his case to the prosecuting attorney for advice, the court properly refuses to direct a verdict for him.—Kelley v. Paulsen, 162 Mich. 169.

¶ 218. In an action for malicious prosecution, held, that it is proper to refuse to direct a verdict for defendant on the ground that the evidence shows that the prosecutions, which were for forgery and uttering forged instruments, were under the direction of the prosecuting attorney after defendant stated to him all the material facts in his knowledge, where it appears that certain facts were withheld by defendant.—Prine v. Singer Sew. Mach. Co., 176 Mich. 300.

¶ 219. In an action for the malicious prosecution of an attachment, proof that defendant placed all of the facts before his counsel, and acted upon his opinion, will establish probable cause; but where it appears that part of the indebtedness alleged in the affidavit for the writ to be due and payable consisted of a note which, to the knowledge of defendant, was not then due, and that defendant did not consult his counsel as to his right to include the same, it is error to direct a verdict for defendant.—Wiesinger v. First Nat. Bank, 106 Mich. 291.

§ 41. ——For one of several coparties.

¶ 220. Where, in an action for malicious prosecution against a railroad company and one of its employees for the arrest of plaintiff, on the complaint of such employee, for the alleged larceny of property belonging to the company, there is no evidence showing or tending to show that the employee was instructed by any officer or employee of the company to make the complaint, or that he was acting in the line of his duty to the company in making it, a verdict is properly directed in favor of the company.—Govaski v. Downey, 100 Mich. 429.

§ 42. Instructions.

Directing verdict, see ante §§ 39-41.
General law of instructions and requests, see Instructions.
Construction of portions of charge respecting applicability where declaration joins count for false imprisonment, see False Imprisonment ¶ 160.
Necessity of request for charge to save question for review, see Saving Questions.

¶ 221. It was assignable error for the court to refuse defendant's request to charge the jury, in an action on the case for malicious prosecution of a suit in replevin, that the burden of showing the existence of the want of probable cause in suing out such writ is upon the plaintiff, and such error was not cured by the less specific instruction given by the court that the burden of proof was upon the plaintiff, as in any suit, and it was for the jury to say from the testimony whether the evidence satisfied them that there was no probable cause on the part of the defendants in instituting the suit.—Harris v. Thomas, 140 Mich. 462.

¶ 222. In an action for maliciously prosecuting a charge of assault growing out of a threat to "break his (defendant's) head" with a wagon stake unless he replaced certain property which he had taken, a judge, in instructing as to the amount of force that might have been used in defense of property without constituting an assault, may, without usurping the jury's function, say that it would not be justifiable to strike over the head with a stick.—Carter v. Sutherland, 52 Mich. 597.

¶ 223. In an action for malicious prosecution by capias for trespass to land and removal of timber an instruction that "the wilful overstatement in the affidavit for capias of the amount of timber taken by the plaintiff off of the land, by plaintiff in former suit is competent evidence of malice on the part of the defendant in this action for malicious prosecution" is properly refused as involving a statement of fact which was not conclusively proven but should have been left for the jury.—Steadman v. Keets, 129 Mich. 669.

¶ 224. It was not error in an action for assault and battery and malicious prosecution, for the court to refuse to charge the jury that even if the defendant did commit an assault on the plaintiff after the latter discharged his revolver, that fact could not affect the plaintiff's guilt of assaulting defendant, or defendant's right to prosecute him therefor, where the court, after charging the jury as to what they must find in order to justify them in finding a verdict for

assault and battery, said: "Now, that is one part of the case. The other is for malicious prosecution"; and followed with a statement of the law applicable to that branch of the case.—Peterson v. Toner, 80 Mich. 350.

¶ 225. In an action for malicious prosecution brought against one charged to have aided and abetted another, an instruction upon the effect of knowledge not possessed by the prosecutor on the part of one who aids in a prosecution, should not be given where there is no evidence tending to show such knowledge.—Goode v. Eslow, 151 Mich. 48.

¶ 226. Plaintiff sued defendant for malicious prosecution in getting out an injunction against plaintiff without probable cause and serving the same on him to stop an auction sale of plaintiff's personal property. Held, that where it was clear defendant had no probable cause, and he introduced no evidence to rebut the presumption of malice, it was not error for the court to instruct the jury that the only question for them was one of damages.—Krzyszke v. Kamin, 168 Mich. 290.

§ 43. ——As to belief, probable cause, and advice of counsel.

See also ante ¶ 161.

¶ 227. Where the evidence as to the facts claimed by plaintiff to show want of probable cause is conflicting, the court should instruct the jury clearly what facts, when established, will justify a finding of want of probable cause, and a general charge is not sufficient.—Rankin v. Crane, 104 Mich. 6.

¶ 228. In an action for malicious prosecution the court must instruct the jury what facts in the case if found by them would constitute probable cause and general instructions on the subject are insufficient.—Slater v. Walter, 148 Mich. 650.

¶ 229. A charge in a malicious prosecution case which failed to point out what facts would constitute probable cause, but left the jury to determine the question according to their best judgment, was erroneous.—McClay v. Hicks, 119 Mich. 65.

¶ 230. An instruction, in a suit for malicious prosecution, that probable cause cannot exist where good faith is lacking, may be proper, if the case admits of the question. —Harris v. Woodford, 98 Mich. 147.

¶ 231. Where an action is brought against a father for aiding and abetting a malicious prosecution instituted by the son, an instruction is erroneous which is so worded as to render it doubtful whether language requiring plaintiff to so establish absence of probable cause and malice related to the son or to the father.—Goode v. Eslow, 151 Mich. 48.

¶ 232. The question of what constitutes probable cause is a mixed question of law and fact, and therefore it is proper for the court to direct the attention of the jury to a statement of what information, claimed to have been in the possession of the complaining witness, would be sufficient to constitute probable cause if the information was derived from reliable sources, and was acted upon in good faith and in belief of its truth. —Goode v. Eslow, 151 Mich. 48.

¶ 233. Where plaintiff had been discharged from arrest because the warrant against him was defective, a charge on the subject of probable cause that "if the discharge of the plaintiff from the first complaint was because the recorder, from the facts stated to him when the complaint was taken, afterwards concluded that there was no probable cause to suspect that plaintiff had been guilty of any offense, then you may consider this fact, with the other facts in the case, in determining whether there was or was not probable cause for the prosecution; but if you find that plaintiff was discharged from the first complaint because of the opinion of the recorder or prosecuting attorney that the complaint did not set forth the offense with legal accuracy, and could not be maintained for that reason, and that alone, then the discharge by the recorder does not in any way tend to prove either that there was or was not probable cause," was as favorable as defendant in an action for malicious prosecution could ask.—Cooney v. Chase, 81 Mich. 203.

¶ 234. Since a mayor's demand for inspection of books of a city department is not an official act or function of government, if made for the real purpose of furnishing information to a newspaper; a concerted obstruction of his access to the books is not an obstruction of a function of government by conspiracy. Accordingly in an action for maliciously prosecuting a charge of criminal obstruction, there being evidence putting the mayor's real motive in issue to the jury, it was error to refuse a charge that there was no probable cause if he had no official motive in seeking the books.—Tryon v. Pingree, 112 Mich. 338.

¶ 235. In an action for malicious prosecution where the prosecutions, which were for forgery and uttering forged instruments, were dismissed on motion of the prosecuting attorney, it is reversible error to instruct that the introduction of the records showing that plaintiff was discharged of the complaints in question prima facie established want of probable cause on the part of the man prosecuting, though a very full instruction is given in reference to what constitutes probable cause.—Prine v. Singer Sew. Mach. Co., 176 Mich. 300.

¶ 236. In a suit for malicious prosecution, an instruction that plaintiff's discharge has been sufficiently shown by the evidence is

not objectionable, where such discharge has been established by undisputed proof.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 237. An instruction, in a suit for malicious prosecution for the arrest of the plaintiff on a criminal charge, that if defendant acted upon the advice of counsel learned in the law, after placing all of the facts before him, no recovery could be had, is properly qualified by the statement that the jury might take into account the fact whether defendant paid the counsel anything, or employed him in any way as his counsel, or distinguished him from a magistrate; it appearing that he was a justice of the peace as well as an attorney at law.—Cooney v. Chase, 81 Mich. 208.

¶ 238. Defendant's requests to charge were properly refused, for the reason that two important elements were omitted necessary to be shown in an action for malicious prosecution for commencing a criminal suit, namely, that defendant made a full and fair statement of all the facts known to him to the prosecuting attorney, who authorized the issuance of the warrant, and to his private attorney, who advised him in the premises, and that he acted upon such advice in good faith.—Thurston v. Wright, 77 Mich. 96.

¶ 239. Where defendant alleges that he acted upon the advice of the magistrate who drew the warrant, it is proper to charge that he could not rely upon the magistrate's opinion.—Cooney v. Chase, 81 Mich. 203.

¶ 240. Where it appears that defendant in procuring a warrant for plaintiff's arrest on a criminal charge was actuated by hatred and vengeance and that he persistently urged that a warrant issue, though he must have known there was no intent to steal, it is proper to charge that if defendant stated to the justice all the facts within his knowledge, and merely followed the justice's advice, he was not liable, but that it must appear that the conclusion that plaintiff was liable to a criminal prosecution was the operation of the justice's mind based on a full statement by defendant, and not merely the operation of defendant's mind.—Holmes v. Horger, 96 Mich. 408.

¶ 241. An instruction to the jury in an action for malicious prosecution, as to defendant's statement to the prosecuting attorney that if the jury were satisfied, that plaintiff stated fairly to the prosecuting attorney all the material facts in the case, honestly and in good faith, and that the prosecuting attorney advised him to commence the prosecution, and that he acted under such advice, that would be a defense, was sustained; since, although as an abstract proposition, such an instruction might make it necessary for the defendant, who was unlearned in the law, to decide, at his peril, what facts it was material for him to disclose to the prosecuting attorney, whereas, the law only required him to disclose such facts as a man of ordinary intelligence was bound to know were material, in this case, defendant, being a party to such occurrences, need make no mistake as to the facts, or as to which of them were material, and as the story told by him in this case must be assumed to be the same as what he told the prosecuting attorney, the story told the prosecuting attorney was wilfully false, the jury finding that plaintiff's story and not that of defendant was true.—Peterson v. Toner, 80 Mich. 350.

¶ 242. A portion of the charge in a suit for malicious prosecution stating that defendant "has got to prosecute with knowledge that he obtains from the counsel whose advice he sought, without malice, or else it was no protection whatever," fairly construed in connection with words that preceded it calling for fairness and honesty, merely indicated that the defendant, to be protected by the advice of counsel, must act on that advice in good faith, and was therefore not error.—Adkin v. Pillen, 136 Mich. 682.

¶ 243. An instruction on advice of counsel given in an action for malicious prosecution held not to be open to the criticism that the court instructed that mere belief that plaintiff committed the offense charged was sufficient cause to make a defense in the action.—Gurden v. Stevens, 146 Mich. 489.

¶ 244. In an action for malicious prosecution an instruction that the advice of the prosecuting attorney followed in good faith after a full and fair statement of all the material facts in the case was a defense to an action for malicious prosecution of a criminal action, approved.—Whittemore v. Walter, 193 Mich. 365.

§ 44. ——Malicious civil prosecutions.

¶ 245. In an action for malicious prosecution of an attachment suit, instructions that probable cause for the attachment would be such cause as the generality of careful business men would act upon under like circumstances; that plaintiffs' neglect to pay the debt or mere carelessness in the conduct of their business would not be sufficient to justify the belief that they were about to dispose of or conceal their property with intent to defraud their creditors; that probable cause to believe this must have been based on competent evidence; that, unless the jury found that defendants did have probable cause to believe that plaintiffs intended to do what the affidavit charged, there was no probable cause for suing out the writ; and that not only want of probable cause but malicious motives must be found,—held to contain nothing of which defendants could complain.—Brand v. Hinchman, 68 Mich. 590.

¶ 246. A charge erroneously stating that the attachment suit was terminated in the

present plaintiff's favor is not prejudicial, plaintiff being entitled to maintain the action without such termination.—Brand v. Hinchman, 68 Mich. 590.

¶ 247. Where in an action for malicious prosecution of attachment, the facts upon which the defendant relied as a justification for suing out the writ did not establish probable cause, but the defendant relied upon the advice of counsel, it was error for the court in the charge to leave to the jury the question whether the facts established probable cause; as the court could not say that the jury did not rely upon that part of the charge in finding for the defendant, rather than upon the fact that the defendant relied upon advice of counsel.—Kompass v. Light, 122 Mich. 86.

VII. DAMAGES.

§ 45. In general.

Damages for the wrong including pleading and evidence of damages is fully treated in topic Damages.

MALINGERING to MANAGING AGENTS.

Cross-References.

Malingering—
Subject for expert testimony, see Evidence § 257.

Malpractice—
Liability of attorneys, see Attorneys, II, F.
By physicians and surgeons, see Medicine and Surgery.
Damages for malpractice, see Damages.

Malt Liquors—
See Intoxicating Liquors.

Malum Prohibitum—
Validity and effect of contracts, see Contracts, IV.

Management of Estates—
See Estates of Decedents, V; Trusts, VI; Receivers, IV.

Managing Agents—
See Agency § 34; Corporations, XVII; Process, II, B.

MANDAMUS.

TREATS of the prerogative writ to compel a natural person or corporation or an inferior court to perform a duty legally incumbent on such person, corporation or court. It differs from contempt proceedings to punish one for disobedience or contumacy (see Contempt) and from injunctions to command one to refrain from action (see Injunctions).

Analysis.

I. General nature, grounds and propriety of writ.

§ 1. In general.
§ 2. Original, supervisory or appellate nature.
§ 3. Discretion to grant or deny writ.
§ 4. Existence and certainty of duty.
§ 5. Pendency or bar of other proceedings.
§ 6. Existence and maturity of right in relator.
§ 7. Exigency and beneficial occasion for writ.
§ 8. Futility of writ.
§ 9. ——Want of power to obey or perform duty.
§ 10. Fairness, injustice or misconduct affecting propriety.
§ 11. Aiding or furthering illegality.
§ 12. Delay and change of conditions.
§ 13. Other adequate remedy as bar to mandamus.
§ 14. Availability of redress by nonjudicial action.
§ 15. Mandamus or other remedy as proper one.
§ 16. Compellable duties in general.
§ 17. ——Continuing or indeterminate duties.
§ 18. ——Duties resting in discretion.
§ 19. ——Duties of private nature.
§ 20. Trial of title to office, franchise, or corporate existence.

II. Compulsion of judicial duties and review of proceedings.

§ 21. In general.
§ 22. Motion, request, or demand on respondent to fix duty.

§ 23. Laches and delay or neglect of other redress as bar.
§ 24. Other existing remedy or recourse as reason against writ.
§ 25. ——Appeal or error as proper remedy.
§ 26. ——Certiorari as proper remedy.
§ 27. ——Remedy by amendment in lower court.
§ 28. Review of discretionary orders and acts.
§ 29. Review of decisions of fact.
§ 30. Issuance, regulation or quashal of process or writs.
§ 31. Setting aside or perfecting service.
§ 32. Regulation and settlement of pleadings and amendments.
§ 33. Hearing and disposal of motions.
§ 34. Hearing, taking proofs, and completion of trial.
§ 35. Reopening or rehearing of case.
§ 36. Grant or vacation of order for new trial.
§ 37. Correction or vacation of orders and decisions.
§ 38. ——Interlocutory orders and proceedings.
§ 39. ——Orders for or against change of venue or transfer.
§ 40. ——Continuances and refusals of continuances.
§ 41. ——Discovery and inspection, production of documents, and depositions.
§ 42. ——Reference orders and proceedings.
§ 43. ——Receivership orders and proceedings.
§ 44. ——Compelling granting or continuing of injunctions.
§ 45. ——Compelling dissolution or modification of injunctions.
§ 46. ——Discontinuance, dismissal or nonsuit orders.
§ 47. ——Default orders and judgments.
§ 48. ——Orders opening or refusing to open defaults and judgments.
§ 49. Allowance and adjustment of costs and fees or security for costs.
§ 50. Correction of records and journals.
§ 51. Regulation and control of executions and sales thereunder.
§ 52. Regulation of foreclosure and other judicial sales.
§ 53. Stay and supersedeas.
§ 54. Allowance of and procedure for civil appeal or error.
§ 55. Preparation and settlement of record for review.
§ 56. ——Extensions of time.
§ 57. Arrests and prosecutions for crime or penalty.
§ 58. Habeas corpus decisions and orders.
§ 59. Contempt orders and proceedings.
§ 60. Disbarment, suspension, and discipline of attorneys.
§ 61. Certiorari and appeal cases in circuit courts from inferior tribunals.
§ 62. ——From boards and quasi-judicial officers.
§ 63. ——Probate appeal or certiorari to circuit court.
§ 64. Probate court orders and proceedings.
§ 65. ——Guardianship and incompetency proceedings.
§ 66. Eminent domain and highway proceedings.
§ 67. Duties and functions of justices of the peace and commissioners.
§ 68. Proceedings and orders of Court of Mediation.

III. Compulsion of administrative or municipal officers and bodies.

A. In General; Particular Officers.

§ 69. In general; noninterference with co-ordinate departments.
§ 70. Governor and executive officers of state.

§ 71. Boards and official bodies.
§ 72. State auditors.
§ 73. Legislative officers.

B. Compellable Acts and Duties.

§ 74. In general; nature of duty which may be compelled.
§ 75. Existence and certainty of duty.
§ 76. Demand for performance, opportunity and refusal.
§ 77. Delegation or abdication of duty.
§ 78. Duty pertaining to other than respondent.
§ 79. Duty pertaining to respondent in nonofficial capacity.
§ 80. Performance of official functions in general.
§ 81. Ministerial or discretionary character of acts and decisions.
§ 82. Elections, nominations, and counting and recounting of votes.
§ 83. ——On submission of questions to electors.
§ 84. Certification of election and admission to office.
§ 85. Appointments and confirmations and approvals.
§ 86. Restoration of public officer or employee to service.
§ 87. Tax levies, assessments, and sales and deeds.
§ 88. Application, appropriations, and disposal of public funds.
§ 89. Accounting for and paying over and refunding tax moneys and public revenues.
§ 90. ——On division of territory or consolidation.
§ 91. Auditing of state claims.
§ 92. ——Of municipal, township, and county claims.
§ 93. Issuance of warrants and payment of claims and judgments.
§ 94. ——Claims for salaries and compensations of office.
§ 95. ——Invalidities, defenses, and defects in claim.
§ 96. ——Existence and sufficiency of fund.
§ 97. ——Effect of levy or transfer.
§ 98. ——State claims and debts.
§ 99. Making, letting, and performance of public contracts.
§ 100. Disposal, sale or patent of state lands.
§ 101. Acceptance or approval of plats.
§ 102. Bridge and highway construction and repairs.
§ 103. School administration and duties.
§ 104. Keeping of and access to public records and files.
§ 105. Prison regulations, labor, and discipline.
§ 106. Issuance of licenses and permits and franchises.
§ 107. Corporate filings, approvals and permits.
§ 108. Regulations for public service and rates.
§ 109. Institution of actions and defenses on behalf of public.

IV. Compulsion of private corporations and individuals' duties.

§ 110. In general; compellable private duties.
§ 111. Duties of corporations to the public.
§ 112. Duties of corporations to members or private persons.
§ 113. ——Of public service corporations.
§ 114. ——Of associations or membership corporations.
§ 115. ——Assessments on members.
§ 116. ——Access to books, papers, and records.
§ 117. Duties of principal or grand and subsidiary associations.
§ 118. Election of remedy within association or by agreement.
§ 119. Duties of corporate officers.

§ 120. Duties of foreign corporations.
§ 121. Duties of joint stock companies (partnership associations).
§ 122. Duties of representatives, trustees, and guardians.

V. Parties, procedure and relief, and enforcement of writ.

§ 123. In general; jurisdiction and powers of courts to issue writ.
§ 124. Application to supreme court in first instance.
§ 125. State and federal jurisdiction.
§ 126. Relators; sufficiency of private relator's interest.
§ 127. ——To enforce duties toward public.
§ 128. ——Corporations as relators.
§ 129. Attorney general and other attorneys to represent public.
§ 130. Necessary and proper respondents.
§ 131. ——Successors and transferees.
§ 132. Intervention of parties or public attorneys.
§ 133. Abatement of writ and effect of cessation of office.
§ 134. Amendment as to parties or capacity of parties.
§ 135. Application or petition.
§ 136. ——Showing as to demand and refusal to perform duty.
§ 137. ——Prayer.
§ 138. Statement of case on application to supreme court.
§ 139. Propriety of alternate writ or order to show cause.
§ 140. Order to show cause or alternative writ, and amendments thereof.
§ 141. Service or appearance to writ.
§ 142. Mode of pleading or response to writ or order to show cause.
§ 143. Requisites, time, and sufficiency of return or answer.
§ 144. ——Allegations of defense or justification.
§ 145. Objections to pleadings and waiver of objections.
§ 146. ——Dismissal for defects.
§ 147. Practice on evasion or disobedience of writ or order.
§ 148. Replication or further pleadings.
§ 149. Amendments of petition or answer.
§ 150. Calling up and hearing cause.
§ 151. Opening and closing.
§ 152. Framing issues and trial thereof.
§ 153. Sending issues down to circuit for trial.
§ 154. Issues and questions for consideration.
§ 155. ——Restriction to record and return.
§ 156. ——Questions not presented to or considered by respondent.
§ 157. ——Questions affecting persons not parties.
§ 158. ——Questions antecedent or collateral to duty alleged.
§ 159. ——Merits or regularity of proceedings to which judicial duty pertains.
§ 160. ——Collateral review of judicial acts.
§ 161. Sufficiency, construction and effect of showing on the record.
§ 162. ——Justification, excuse, or readiness to perform.
§ 163. Burden of proof, presumptions and intendments.
§ 164. Admissions by failure to answer, deny or make return.
§ 165. Admissions by demurrer to petition.
§ 166. Assumed truth and conclusiveness of answer.
§ 167. ——Admissions by demurrer or failure to take issue on return.

§ 168. Affidavits and effect thereof.
§ 169. Admissibility and sufficiency of evidence.
§ 170. Findings and conclusions.
§ 171. Judgment and disposal of cause and peremptory writ.
§ 172. ——Character and terms of command and extent of relief.
§ 173. ——Denial or allowance of writ on conditions or without prejudice.
§ 174. ——Rendition of opinion or suggestion on irregular or defective mandamus.
§ 175. Performance or offer as bar to peremptory writ.
§ 176. Suspension, stay or recall of writ.
§ 177. Review of mandamus judgments and proceedings.

I. GENERAL NATURE, GROUNDS AND PROPRIETY OF WRIT.

§ 1. In general.

Original or appellate nature and office of writ, see post § 2.
Grounds and propriety of the writ, see post §§ 4-20, and see post II, III, IV.
Discretion and power or jurisdiction to issue writ, see post §§ 3, 123-125.
Nature of duties which may be compelled, see post §§ 16-19, and see post II, III, IV.
Trial of title to office, see post § 20.
Nature of duties which may be enforced by mandamus, see post § 16 et seq.
Other adequate legal remedy as primary recourse, see post § 13.
Office and function of writ to require judicial action, see post § 21.
Amenability of aggregate body of officers, e. g., city council, to mandamus, see post § 71.
Issues and matters triable in mandamus, see post § 154 et seq.
Impropriety of mandamus to reach question collaterally or indirectly, see post § 158.
Jurisdiction and power to issue the writ, see post § 123 et seq.
Proper parties to the action, see post §§ 126-132.
Procedure and relief, see post V.
Impropriety of alternative writ as compared with order to show cause, see post § 139.
Nature and terms of the order to show cause, see post § 140.
Terms and command of peremptory writ, see post § 172.
Retention of mandamus as form of action under Judicature Act, see Jud. Act, chap. XI, § 1; Comp. L. 1915, § 12350.

¶ 1. The history and nature of the writ of mandamus examined and expounded.—McBride v. Grand Rapids Common Council, 32 Mich. 360.

¶ 2. Mandamus is a prerogative writ designed to afford a summary and specific remedy where the party applying for it would otherwise be subjected to serious injustice.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 3. The primary purpose of the writ of mandamus is to enforce duties created by law.—Waterman-Waterbury Co. v. Cato Township School Dist. No. 4, 183 Mich. 168.

¶ 4. Mandamus proceedings are "civil actions" within the meaning of Pub. Acts 1905, No. 309, providing for a change of venue.—Woodworth v. Old Second Nat. Bank, 144 Mich. 338.

¶ 5. Mandamus is neither an action of debt nor assumpsit.—McRae v. Auditor General, 146 Mich. 594.

§ 2. Original, supervisory or appellate nature.

Scope and subjects of judicial review and compulsion, see post II.
Scope of review and matters considered, see post § 154 et seq.
Impropriety in mandamus to judge of trying merits of case whence his duty arose, see post § 159.
Impropriety of collateral review of judicial acts by mandamus to enforce duty founded thereon, see post § 160.
General supervisory powers of supreme court and circuit courts, see Courts §§ 52, 55.

¶ 6. Where a mandamus issues to direct the action of a legal tribunal, proceeding in the course of justice, it is an exercise of supervisory judicial control, and is in the exercise of appellate action. In other cases it is generally, if not always, in the nature of original action.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

¶ 7. Mandamus to a township board is not an appellate proceeding wherein the sufficiency of the evidence to sustain refusal to approve sureties in a liquor bond can be reviewed.—Post v. Sparta Township Board, 64 Mich. 597.

§ 3. Discretion to grant or deny writ.

Various factors influencing discretion, see post §§ 7-12.
Available and adequate other remedy as reason against writ, see post § 13.
Performance or offer in answer to perform as bar to writ, see post § 175.

Discretion to allow or deny order to show cause, see post § 139.
Discretion as to terms and extent of relief or command of peremptory writ, see post ¶ 980.
Impropriety of writ to control discretion of respondent, see post §§ 18, 28.

¶ 8. The writ, though a prerogative one, is demandable of right in a proper case, yet it is only to be granted in the exercise of a sound legal discretion.—People v. Regents of University of Michigan, 4 Mich. 98.

¶ 9. Mandamus is usually a discretionary writ, and is properly denied where its exercise is asked in a matter of policy rather than of right, and where there is no danger of evils serious enough to demand interference.—People ex rel. Board of Water Com'rs v. East Saginaw Common Council, 33 Mich. 164.

¶ 10. The writ of mandamus is discretionary, not of right, and is granted only to secure or protect substantial rights.—Pistorius v. Stempel, 81 Mich. 133; Schmedding v. May, 85 Mich. 1; Tennant v. Crocker, 85 Mich. 328; Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20; McCreery v. Bay Circuit Judge, 93 Mich. 463; Elder v. Garner, 97 Mich. 617.

¶ 11. Mandamus will not be awarded in all cases even where a prima facie right to relief is shown, it being a discretionary one.—Tennant v. Crocker, 85 Mich. 328.

¶ 12. Mandamus is not a writ of right and will not be used on technical grounds to deprive a suitor of his day in court.—Durand v. Saginaw Circuit Judge, 76 Mich. 624.

¶ 13. A mandamus, in a case where the duty of a public officer is absolute and specific to pay over public moneys, is no more matter of discretion than any other remedy.—Courts cannot refuse to enforce absolute rights.—Aplin, Auditor General v. Treasurer of Tuscola County, 73 Mich. 28.

¶ 14. The naked right to the writ of mandamus is not sufficient to warrant its issuance, and it will be denied where the public interest would be injuriously affected, or where there is a doubt of its propriety.—New York Mortg. Co. v. Secretary of State, 150 Mich. 197.

§ 4. Existence and certainty of duty.

Existence and certainty of judicial duty, see post § 22 et seq.
Existence and certainty of administrative or official duty, see post § 75.
Duties resting in discretion of respondent, see post § 18.
Impropriety of mandamus to compel performance of duties of a continuing and indeterminate nature, see post § 17.
Necessity that respondent have power to perform command of writ, if issued, see post § 9.
Pendency of motion for same relief as bar to mandamus, see also post ¶ 139.
Necessity and sufficiency of allegations of duty in petition, see post § 135.
Existence and maturity of right in relator to performance of the duty, see post § 6.

¶ 15. Mandamus issues only to compel the recognition of a clean legal right or the performance of a legal duty; it does not issue so long as the right or the duty is disputed or doubtful.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302; People ex rel. Bradley v. Branch Circuit Judges, 1 D. 319; People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296; People ex rel. Pack v. Presque Isle County Sup'rs, 36 Mich. 377; Peck v. Kent County Sup'rs, 47 Mich. 477; Post v. Sparta Township Board, 63 Mich. 323.

¶ 16. Mandamus will not issue to enforce a doubtful right.—Olds v. Commissioner State Land Office, 150 Mich. 134.

¶ 17. Mandamus to compel a village common council to commence proceedings to remove obstructions in an alleged public highway or street will be refused where the legality of the highway is contested in good faith by the person obstructing, where the relator has an ample remedy in equity if the facts alleged in his petition are true.—French v. Common Council of Village of South Haven, 85 Mich. 135.

¶ 18. Mandamus does not lie to enforce a disputed stipulation to settle a case, even though money has been paid thereunder. The parties to the stipulation are entitled to have the fact as to the settlement tried on a regular issue before a jury.—Leavitt v. Detroit Superior Court Judge, 52 Mich. 595.

¶ 19. It is exceedingly doubtful whether the question of title can be tried in a mandamus proceeding against the auditor general to cancel a tax deed, where the title of the relator to the land is in doubt.—Hanchett v. Auditor General, 124 Mich. 424.

§ 5. Pendency or bar of other proceedings.

General rule as to other pending action as ground for abatement, see Abatement § 10 et seq.

¶ 20. Where an appeal is pending in the supreme court from a decree of the circuit court in chancery dismissing appellant's bill to compel the auditor general to recall a certificate of error canceling a tax deed, such appellant cannot obtain a writ of mandamus commanding the vacation of the certificate upon the same grounds set up in the chancery suit, since, by issuing such writ, the court would have to determine, contrary to the rights insisted upon by the appellant

in his suit pending, that the chancery court had no jurisdiction to grant him relief.—Smith v. Auditor General, 151 Mich. 622.

¶ 21. That an appeal is pending from the dismissal of a bill to enjoin city officers from holding a charter election, does not prevent the bringing of mandamus proceedings to compel such officers to hold such election.—Attorney General ex rel. Baum v. City of Saginaw, 177 Mich. 432.

¶ 22. A writ of mandamus to compel a supervisor to assess a drain tax should not be dismissed because of the pendency of an appeal from a decree dismissing the bill of complaint attacking the validity of the drain proceeding and dissolving a preliminary injunction against the collection of taxes.—Brown v. Nehmer, 128 Mich. 690.

¶ 23. A suit in chancery to enjoin the issue of bonds by a village in accordance with a vote of the electors, and the granting therein of a preliminary injunction, do not constitute a bar to a proceeding by mandamus to compel the village authorities to sign bonds voted at an election subsequently held, where it does not appear but that the injunction was granted because of some mere irregularity in the first election.—Daniels v. Long, 111 Mich. 562.

§ 6. Existence and maturity of right in relator.

Want of exigency or beneficial occasion as reason for denying mandamus, see post § 7.

Necessity of payment or tender of amount due to mature right, see also post ¶ 455.

Sufficiency of relator's interest to entitle him, see post §§ 126-128.

Necessity and sufficiency of allegations in petition, see post § 135.

¶ 24. A mandamus will not be issued to compel a circuit judge to make an order, when such order is not necessary to perfect the right of the party applying for the writ.—People ex rel. Amperse v. Wayne Circuit Judge, 14 Mich. 33.

¶ 25. On mandamus to require dissolution it is not important whether the circuit court has jurisdiction to grant a temporary injunction restraining the board of election commissioners from printing on the ballots the name of a person who alleges that he was nominated to fill a vacancy in the office of county prosecuting attorney, unless it appears that some right of such person is involved or some legal duty of the board of election commissioners is interfered with.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 26. Mandamus will not lie to compel a county to pay ditch orders at the instance of one not clearly showing himself to have title thereto.—Brownell v. Gratiot County Sup'rs, 49 Mich. 414.

¶ 27. Since mandamus is not a writ of right but of discretion, it is rightly refused to compel a township clerk and supervisor to lay before the board of supervisors an assessment roll for a drain, where by demurring to the answer of the respondents relator admits that the drain is not yet completed and that therefore he is not yet entitled to payment of the order on which he founds his right.—Sherwood v. Rynearson, 141 Mich. 92.

¶ 28. Mandamus to compel payment to a contractor from a special assessment was denied where the assessment had been adjudged invalid in a suit brought by a taxpayer to recover back what he had paid so that it never went into the special fund to pay relator.—People ex rel. Gebhart v. City of East Saginaw, 40 Mich. 336.

¶ 29. An application for a mandamus to compel respondents to place the name of the relator upon the official ballot as a candidate for alderman is properly denied where it does not appear that the relator was selected by any assemblage or meeting of electors of his ward, but had simply announced himself as an independent candidate, giving only the right to write his name into the ballot in voting.—Chateau v. Jacobs, 88 Mich. 170.

¶ 30. Under How. St. § 745 providing that "one of the remaining justices" on being notified by any member of the township board shall meet with the board and have the same authority as the other members, in case there shall not be three members of the board able or competent to act, an application for a mandamus on behalf and by the third ranking justice of the peace to seat him on the board in case of disability will not lie, because the members of the board can call upon any justice to act temporarily as member of the board.—Grondin v. Logan, 88 Mich. 247.

¶ 31. If the writ of mandamus could be awarded at all to compel the registrar of deeds to permit a person to have access, so long and as far as it is found necessary, to the documents and files of his office, for the purpose of constructing a complete abstract of the titles of the real property in the county, it would be denied to a private foreign corporation where such corporation showed no authority from the state of its origin to deal in lands or land-titles.—Diamond Match Co. v. Powers, 51 Mich. 145.

¶ 32. The purchase of tax titles by the original owner having been only one method of paying his taxes and performing his duty to the state, and the tax titles, whether valid or invalid, having by such purchase become merged in the original title, a stranger could not by mandamus compel the cancellation of a tax deed for failure to pay all taxes.—Clippinger v. Auditor General, 135 Mich. 1.

¶ 33. A writ of mandamus will not issue to allow the inspection of corporate books and papers by a director whose term of office has expired pending certiorari to review the writ and who has not been re-elected, where he claims the right of inspection only in such capacity and not as a stockholder.—Leach v. Davy, 199 Mich. 378.

§ 7. Exigency and beneficial occasion for writ.

See also post ¶¶ 254, 293.

Denial of writ because of futility, see post §§ 8, 9.

Denial of writ because of unfairness, injustice, or misconduct, see post § 10.

Denial of writ tending to further illegality, see post § 11.

Discretion to deny writ in absence of exigency, see ante ¶ 9.

Substantial right as essential, see also ante ¶ 10.

Mandamus to correct record to show matter otherwise appearing of record, see post ¶ 369.

Useless questions in settlement of pleadings, see post § 32.

Necessity of mature right in relator to performance of the duty asserted, see ante § 6.

Delay and change of conditions as reason against writ, see post § 12.

Exigency or substantial occasion to correct injunctional orders, see post §§ 44, 45.

Declination of questions on hearing that have become immaterial, see post § 154 et seq.

Necessity and sufficiency of allegations in petition, see post § 135.

¶ 34. Mandamus is never issued unless to enforce a clear legal right, and in furtherance of justice; it will not issue to compel a judge to vacate an order striking out relator's plea, where the defense set up was waived a few days after the filing of the plea.—Electric Park Amusement Co. v. Wayne Circuit Judge, 155 Mich. 640.

¶ 34a. Where, after the removal of a cause from the Wayne circuit court to the superior court of Detroit, a mandamus was applied for to require its dismissal for want of jurisdiction of the defendant's person on the ground that he was not a resident of Detroit, the application was denied on a showing that the defendant had moved for a continuance in the circuit court, and had thereby precluded himself from raising this question of jurisdiction.—People ex rel. Field v. Superior Court Judge, 30 Mich. 10.

¶ 35. Mandamus to compel the dissolution of a preliminary injunction was denied where such injunction, whether right or wrong, had spent its principal force; it being desirable to have the entire merits before the supreme court on appeal after final hearing below.—Mills v. Wayne Circuit Judge, 77 Mich. 210.

¶ 36. Mandamus to vacate an order setting aside an execution sale after time for redemption had passed was denied in the court's discretion.—Stinton v. Kent Circuit Judge, 87 Mich. 286; Wilkie v. Ingham County Circuit Judge, 52 Mich. 641.

¶ 37. The supreme court in the exercise of its discretion will not compel a circuit court to proceed with the trial of a case where the only outcome must be a judgment against the relator.—Hatch v. Wayne Circuit Judge, 138 Mich. 184.

¶ 38. A judge will not be compelled by mandamus to allow an amendment ineffective to accomplish what relator seeks.—Kilby Mfg. Co. v. Menominee Circuit Judge, 138 Mich. 277.

¶ 39. Mandamus will not issue to compel a circuit judge to frame an issue in a proceeding before him to compel the approval of a druggist's bond, where it appears that before the hearing on such bond, three of the four sureties thereto withdrew from it; since, at the time such mandamus was heard, there was no proper bond before the court to be passed upon.—Young v. Van Buren Circuit Judge, 145 Mich. 341.

¶ 40. While a defendant cannot withdraw his demurrer and plead over without leave of court, the refusal of the court to hear the demurrer upon the ground that a plea had been filed is equivalent to the granting of such leave nunc pro tunc and the circuit judge having made return that in his discretion no costs should be allowed, mandamus will be denied to compel him to enter judgment on the demurrer.—Fisher v. Wayne Circuit Judge, 128 Mich. 543.

¶ 41. Mandamus will not issue to compel a circuit court judge to set aside an order continuing a cause for a term where at the time of respondent's return to the writ and final submission of the proceeding to the supreme court and the circuit court term at which the order was made has passed.—Palmer-Stevenson Const. Co. v. Mason Circuit Judge, 176 Mich. 326.

¶ 42. Relator moved the respondent judge to transfer a case to another county on the ground of local prejudice. The return of the judge disputed the existence of such prejudice. Held, the upper court would not on mandamus delay the trial in the circuit court in order to settle this issue of fact, where the defendant had waived any right he might have to such mandamus proceeding by asking that the case be set down on a day certain for trial.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 159 Mich. 210.

¶ 43. A writ of mandamus will not issue on petition of executors to compel a circuit judge to set aside an order in chancery restraining executors from turning over certain moneys to a legatee and ordering the

legatee to pay to complainant unpaid allimony for support of his children where the legatee does not appear to contest the proceedings and does not attempt to excuse his conduct.—Craig v. Wayne Circuit Judge, 192 Mich. 106.

§ 8. Futility of writ.

Want of exigency or beneficial occasion as reason against writ, see ante § 7.

Denial because of want of power to obey or perform, see post § 9.

¶ 44. Mandamus to compel a county clerk to issue a certificate of election to a person shown by the returns to have been legally elected was denied when it would not have given substantial relief, and the question might be raised again in an issue as to the accuracy of the returns or by proceedings in the nature of quo warranto.—Sherburne v. Horn, 45 Mich. 160.

¶ 45. Mandamus will not issue to compel the board of state canvassers, which refuses to credit a candidate at a general election with the votes cast for him in certain counties because his name is spelled incorrectly in the returns, to obtain corrected returns, and canvass the votes in accordance therewith, if the general result is such that the action would be an idle ceremony affecting no material rights or interests.—Baker v. Board of State Canvassers, 111 Mich. 278.

¶ 46. A court is not required to issue a mandamus where its effect would be of no avail.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 47. Mandamus will not lie to compel a duty under a law which duty is merely preliminary to the main purpose of the law, and which purpose the law provides no means of accomplishing.—Attorney General v. Lawton, 80 Mich. 386.

¶ 48. Where a condition attached to an approval by the common council of a street railway company's poles is inoperative and void, and where the council has already approved the pattern of the poles as required by the ordinance, mandamus will not be granted, because of the void condition, to compel the council to approve the poles over again.—Electric R. Co. of Grand Rapids v. Common Council of Grand Rapids, 84 Mich. 257.

¶ 49. Where the presiding officer of a city common council declared the adoption on a majority vote of a resolution which under the charter required a two-thirds vote of all the aldermen elect, a mandamus to compel him to reverse his decision and to declare the resolution lost was denied on the ground that it appeared from the face of the records that the resolution was not legally carried, because all persons are chargeable with notice of the illegality.—Tennant v. Crocker, 85 Mich. 328.

§ 9. ——Want of power to obey or perform duty.

Injunction against further proceedings in case as bar to mandamus to proceed to hearing, see post ¶ 225.

¶ 50. Mandamus will not be issued unless it clearly appears that the person to whom it is directed has the absolute power to execute it.—Turnbull v. Giddings, 95 Mich. 314; City of Benton Harbor v. St. Joseph & B. H. St. R. Co., 102 Mich. 386.

¶ 51. Mandamus will not lie where respondent has no power to obey its mandate.—Corby v. Wayne Probate Judge, 96 Mich. 11.

¶ 52. The writ of mandamus is a discretionary writ, and it must clearly appear that the party to whom it is directed has the power to execute it; otherwise, it will not be issued.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 53. Mandamus will not lie to compel a circuit judge to overrule his finding that the proceedings taken for the condemnation of a site for a schoolhouse were irregular, and to compel him to enter judgment for the amount found due against the district.—Delhi School Dist. No. 5 v. Ingham Circuit Judge, 49 Mich. 432.

¶ 54. Where, in a proceeding by a state and under a state law to condemn lands for the purposes of the general government, the state abandons the proceeding before its completion, and the owner of the lands applies for a mandamus to compel it to be carried through, the question of the state power is necessarily involved. Such a condemnation might be effectual if the general government has accepted the land, and the owner had received the compensation awarded, for a statute may transfer title in any form the parties mutually assent to, but until the assent of both is signified the proceeding must be wholly inoperative.—People ex rel. Trombley v. Humphrey, 23 Mich. 471.

¶ 55. Mandamus will not lie against the board of assessors to strike an improper tax assessment from the rolls, where the writ would be unavailing by reason of the fact that the rolls would at the time of its issuance be out of the hands of the assessors, and in the custody of the collectors.—W. A. Sturgeon & Co. v. Board Assessors City of Detroit, 159 Mich. 199.

§ 10. Fairness, injustice or misconduct affecting propriety.

Denial of writ to aid or further illegality, see post § 11.

Delay and laches affecting propriety of issuance, see post § 12.

¶ 56. The issuance of a writ of mandamus is not a matter of right, but is a matter of

discretion, and should be issued only where it appears that justice requires it.—MacKinnon v. Auditor General, 130 Mich. 552; Grand Rapids & I. Ry. Co. v. Auditor General, 144 Mich. 77.

¶ 57. Mandamus will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where it is apparent that it is applied for to gratify the spite of a private individual, or where the relator has instigated, authorized or approved the act complained of.—Hale v. Risley, 69 Mich. 596.

¶ 58. The writ of mandamus is a discretionary writ, and will not be issued when inconsistent with justice.—Wooster v. Calhoun Circuit Judge, 150 Mich. 459.

¶ 59. Mandamus is a discretionary writ, and should not issue where it works an injustice.—Craig v. Wayne Circuit Judge, 192 Mich. 106.

¶ 60. The rule that mandamus is not a writ of right and will only be allowed in the furtherance of justice upon a proper case presented, and will not be granted to accomplish an illegal purpose though the officer against whom it is invoked is charged with an express statutory duty, is as applicable to the circuit court as to the supreme court.—Cook v. Board Election Com'rs Cheboygan Co., 172 Mich. 437; George N. Fletcher & Sons v. Alpena Circuit Judge, 136 Mich. 511.

¶ 61. The writ of mandamus is not one of right, and will not be issued in behalf of one whose conduct equitably estops him from seeking it.—Mason v. City of Gladstone, 93 Mich. 232.

¶ 62. This writ is discretionary, and should always be refused where the record shows the injustice of relator's claim.—Van Akin v. Dunn, 117 Mich. 421.

¶ 63. The writ of mandamus is discretionary, hence the plea of the statute of limitations may be entertained and the writ refused, where the answer shows that the claim (upon a contingent county order) is fraudulent, and relator does not ask for the trial of an issue.—Merrill v. Gladwin County Treasurer, 61 Mich. 95.

¶ 64. Because his demand is inequitable and unjust, a holder of a city warrant issued to pay for street improvements cannot have a mandamus to compel the city to pay it out of the fund derived from a tax levied for that purpose, but which assessment the relator in another action had succeeded in having declared illegal.—Mason v. City of Gladstone, 93 Mich. 232.

¶ 65. The court in its discretion may refuse the writ altogether unless the party seeking it consents to do equity.—Stevens v. Saginaw County Sup'rs, 62 Mich. 579.

¶ 66. The writ of mandamus is discretionary, and those who invoke its aid must come into court with clean hands; it cannot be invoked to accomplish a purpose confessedly illegal, even though the officer against whom it is invoked is charged with an express duty under the statute.—Board of Supervisors of Cheboygan County v. Supervisor of Township of Mentor, 94 Mich. 386.

¶ 67. Relator railroad company repeatedly promised the city to build a bridge over a street which it crossed. Assurances were thus made during a number of years; no defense was made to proceedings to compel it; and defendant was in contempt for failing to obey the order of the circuit judge to build the bridge. Held, the relator was not in a position to ask the grace of the court to issue a writ of mandamus to vacate the order of the circuit judge.—Chicago, D. & C. G. T. Junct. R. Co. v. St. Clair Circuit Judge, 156 Mich. 567.

§ 11. Aiding or furthering illegality.

Invalidity in or objection to claim against the public as bar to mandamus to compel payment, see post § 95.

¶ 68. Mandamus will not be issued to aid in enforcement of an illegal claim.—Detroit Board of Education v. Detroit Common Council, 80 Mich. 548.

¶ 69. Mandamus to compel the common council of Detroit to order the issuing of bonds to purchase lands for a park contracted for by the board of park commissioners was denied as encroaching on the constitutional rights and functions of the city.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 70. Mandamus on the relation of a board of supervisors will not lie to compel individual supervisors who have opposed a fraudulent vote of money by the board to spread on their respective assessment rolls their proportion of the fraudulent tax.—Board of Supervisors of Cheboygan County v. Supervisor of Township of Mentor, 94 Mich. 386.

¶ 71. In mandamus proceedings against a municipal officer to compel the execution of certain bonds of the municipality, respondent may set up the illegality of the election by which the issue of such bonds was provided for.—Daniels v. Long, 111 Mich. 562.

¶ 72. Where one's unfitness for an official position from which he has been summarily removed is conceded, he cannot invoke the aid of the discretionary writ of mandamus to exact payment of salary for a period succeeding his discharge, even though his removal may have been illegal because without opportunity for hearing and defense.—McQueen v. Detroit Common Council of Detroit, 116 Mich. 90.

¶ 73. The Detroit controller could not be compelled by mandamus to draw a warrant for the salary of a clerk, where the city board of estimates had stricken out the item in question from the estimate of expenses for the office of the city board of assessors, nor could he be compelled to pay such items from other sources than taxation. (Following Robinson v. Detroit, 107 Mich. 168.)—City of Detroit v. Blades, 133 Mich. 249.

¶ 74. Where a village ordinance forbids the keeping of saloons or saloon bars or the sale of liquor in saloons or bars, mandamus will not lie to force the council to issue a license to sell liquor at a hotel bar.—Boos v. Scudder, 163 Mich. 678.

¶ 75. On April 20, 1911, a village council passed an ordinance prohibiting saloons, to be effective on May 10, 1911. On April 22, 1911, relator filed a petition and bond for a saloon license, which petition was rejected by the council on May 4, 1911. On May 8, 1911, relator presented a petition to the circuit court praying that a mandamus should issue requiring said council to meet within a reasonable time for the purpose of considering and acting upon the application of relator and to require said council to approve same. The hearing on said petition was held on May 22d. Held, mandamus was properly refused.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 76. A writ of mandamus to compel a village council to issue relator a saloon license will not be denied on the ground that the result will be to give the village four saloons instead of the three lawfully allowed, where said relator is not responsible for the unlawful action of the council in producing that result.—Rhode v. Wayne Circuit Judge, 168 Mich. 683. (Moore, C. J., dissenting.)

§ 12. Delay and change of conditions.

Denial of writ to enforce payment of barred claim, see also ante ¶ 63.

Laches and delay as bar to mandamus to judicial officers, see post § 23.

¶ 77. Mandamus is not a writ of right, and is not usually allowed to those who have been culpably dilatory or otherwise at fault.—People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31.

¶ 78. Where the statute of limitations is interposed to prevent the payment of a just claim, the court may refuse to permit the plea to interfere with issuing the writ when the period has been less than ten years.—Merrill v. Gladwin County Treasurer, 61 Mich. 95; County of Oceana v. Hart Township Sup'rs, 48 Mich. 319.

¶ 79. Mandamus being a discretionary writ will not issue when inconsistent with justice, and though it is a legal process it is governed by equitable principles and will not lie when legal redress is barred by the statute of limitations.—McRae v. Auditor General, 146 Mich. 594.

¶ 80. Mandamus is a discretionary writ, partaking of the nature of a bill in equity for specific performance, wherein stale claims are not favored.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 81. Mandamus proceedings for the purpose of collecting a debt are not different from any other suits, and are barred by laches, the bar following by analogy the statute of limitations.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 82. Mandamus to compel the quartermaster-general to receive a claim for a state bounty, provided for by act 27 of 1865, and under § 1 of act 132 of 1871 to examine and allow the claim and forward a certificate to the auditor-general, was denied in 1881 for laches.—Blanchard v. Church, 47 Mich. 644.

¶ 83. A delay for more than six years to demand payment of township and highway orders, or to apply for mandamus to compel such payment, if unexplained, will bar relief by such writ.—Avery v. Township Board of Township of Krakow, 73 Mich. 622.

¶ 84. Mandamus was not allowed to enforce the payment of a claim for salary as a city officer where the relator first elected to sue in assumpsit, but left the action undetermined, and, after ten years had passed from the date of his claim, sought his remedy by mandamus from the supreme court.—Walcott v. City of Jackson, 51 Mich. 249.

¶ 85. Mandamus having been determined to be the appropriate remedy to enforce payment of a claim against a county, it was not defeated on the ground of laches, where the statute of limitations had not run against the claim.—Hanna v. Chalker, 136 Mich. 8.

¶ 86. Mandamus being a discretionary writ, its issue to compel the payment of a county order will be refused, when the answer sets up the plea of the statute of limitations, and also shows that the claim is fraudulent, and the relator does not ask for the trial of an issue to determine the fact of fraud.—Merrill v. Gladwin County Treasurer, 61 Mich. 95.

¶ 87. Where a complainant has failed to enforce a claim against a county for nearly eight years, he having officially come in possession of all the facts in connection therewith, his laches will bar a writ of mandamus.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 88. Mandamus to compel the placing of certain property on an assessment roll is denied when applied for so late as to deprive the parties of the right to have the assess-

ment reviewed.—Maurer v. Cliff, 94 Mich. 194.

¶ 89. A county treasurer cannot be compelled by mandamus to issue tax-deeds for lands purchased by relator under § 80 of the tax-law of 1891, where it appears that before the writ was applied for, relator accepted a tender by respondent of the purchase-money, and that before tender back the lands were conveyed to others.—Aitcheson v. Huebner, 90 Mich. 648.

¶ 90. Mandamus proceedings to compel the auditor general to refund the amount paid at an invalid tax sale must fail where the petitioner has waited for fourteen years before bringing such suit, the state having the right in such proceedings to invoke the statute of limitations.—Wilkinson v. Auditor General, 147 Mich. 13.

¶ 91. A delay of fifteen years by the holder of drain orders in seeking by mandamus to compel the reassessment of a tax where a previous assessment had been set aside for irregularities, is sufficient to bar relief, where such remedy was available from the time he acquired the orders.—McDermott v. Alger, 186 Mich. 278.

¶ 92. Mandamus is granted to compel the board of education of the city of Detroit to rescind a resolution reconsidering one passed at a former meeting adopting a text-book for use in place of one which had been in use for upwards of five years, and making a different selection; it appearing that in the interim the publishers of the book first adopted, and the patrons of the school, had acted in reliance upon the rescinded resolution in the sale and purchase of books.—Jones v. Board of Education of City of Detroit, 88 Mich. 371.

¶ 93. Although the charter and ordinances of a city require the official printing to be done in a newspaper published in such city, a local publisher whose bid has been rejected cannot compel the city, by mandamus, to award him the contract, after it has been let to outside parties and partly performed.—Clark v. Mayor of West Bay City, 112 Mich. 283.

¶ 94. Where, pending proceedings to compel the common council of a city to approve a paving contract made with the relator by the board of public works, the contract is let to another party, and the work done, mandamus will be denied, and the relator left to his action against the city.—Talbot Paving Co. v. Common Council of City of Detroit, 91 Mich. 262.

§ 13. Other adequate remedy as bar to mandamus.

See also ante ¶ 17.
Availability of redress by nonjudicial action, see post § 14.
Mandamus or other remedy as proper one, see post §§ 15, 24-27.
Statutory proceeding to spread judgment on tax roll as remedy rather than mandamus to enforce payment, see post ¶ 633.
Denial of mandamus without prejudice to other remedy, see post § 173.
Judgment as bar or estoppel, see Former Adjudication.

¶ 95. Mandamus is not granted where relator has any other adequate legal remedy.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302; People ex rel. Bradley v. Branch Circuit Judges, 1 D. 319; People ex rel. Brower v. Wayne County Judge, 1 Mich. 359; People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296; People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487; Burt v. Wayne Circuit Judge, 82 Mich. 251; Corby v. Wayne Probate Judge, 96 Mich. 11; Eyke v. Lange, 104 Mich. 26; Cattermole v. Ionia Circuit Judge, 136 Mich. 274; Hartz v. Wayne Circuit Judge, 164 Mich. 231.

¶ 96. Mandamus will not be awarded in cases where another remedy is provided by law.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

¶ 97. Mandamus is not a writ of right, and will not lie, as a general rule, when the law has provided another remedy.—Trumbull Motor Car Co. v. Wayne Circuit Judge, 189 Mich. 554.

¶ 98. Mandamus is not to be resorted to when there is a plain, direct, and adequate remedy at law.—Coffin v. Board of Education of Detroit, 114 Mich. 342.

¶ 99. Mandamus is the proper remedy for enforcing a specific legal right for which there is no other adequate legal remedy, and it is not excluded by other legal remedies which are not adequate to secure the specific relief needed, nor by the existence of a specific remedy in equity.—People ex rel. La Grange Township v. State Treasurer, 24 Mich. 468.

¶ 100. Mandamus may issue where other remedies exist, if they are not sufficiently speedy to prevent material injury.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 101. Remedy by mandamus is not precluded by the fact that the respondent may be liable as for a misdemeanor in wilfully neglecting his duty; a criminal prosecution will not secure its performance, and specific compliance can be enforced only by mandamus.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 102. While the writ of mandamus has been treated as in its nature discretionary and prerogative, and not necessarily limited

by strict rules to cases involving positive statutory duties, or in which there is an entire absence of any other remedy, yet it has been frequently said that the writ will not be granted where there is another adequate remedy.—Waterman-Waterbury Co. v. Cato Township School Dist. No. 4, 188 Mich. 168.

§ 14. Availability of redress by nonjudicial action.

Resort to remedy within corporation as affecting right to mandamus, see post § 118.

¶ 103. Mandamus asked by the board of water commissioners of East Saginaw to compel the common council to levy a tax to pay bonds issued by the board, and about to mature, was denied, as the board had a remedy, by issuing new bonds, to meet the old ones.—People ex rel. Board of Water Com'rs v. East Saginaw Common Council, 33 Mich. 164.

¶ 104. The police justice of Grand Rapids has no authority to proceed against the supervisors of the county by mandamus to compel them to audit and allow to the city the fees charged by the act creating the police court, upon the county, in cases tried before him; the act being construed to require him to collect the costs imposed by him upon individuals, but not such as were payable by the county to the city, under the same.—People ex rel. McBride v. Kent County Sup'rs, 38 Mich. 421.

§ 15. Mandamus or other remedy as proper one.

Other adequate remedy as reason against writ, see ante § 13, post § 24 et seq.

Offices and functions of other remedies, see specific topics treating of such remedies, e. g., Injunctions, I; Certiorari; Appeal, I; Quo Warranto.

Common law and statutory rights to jury trial of issues, see Jury, I.

¶ 105. Mandamus, not injunction, is the proper remedy where nothing remains but the enforcement of a legal duty on a public officer's part.—Webster v. Newell, 66 Mich. 503.

¶ 106. Bill in equity, and not mandamus, is the proper remedy to restrain a city council from wrongfully submitting to a vote of the electorate a proposed amendment to the city charter.—Attorney General ex rel. Hudson v. Common Council City of Detroit, 164 Mich. 369. (Ostrander, C. J., and McAlvay and Blair, JJ., dissenting.)

¶ 107. The fact that there is a specific remedy in equity does not necessarily oust the jurisdiction of a common-law court in mandamus, but only appeals to its discretion, which may be exercised where the circumstances call for prompt interference by the courts.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 108. Mandamus against the proper officers to compel the levy and collection of the tax as provided by law is the remedy of the seller of road machinery to the road commissioners, to recover the price thereof, under Comp. L. 1897, §§ 4193-4197, which authorizes commissioners of highways in townships to purchase tools and machinery for making roads, and provides for a highway tax to raise funds for the payment therefor, and assumpsit against such township will not lie; since the township is not primarily liable, no contract relations existing between it and the seller of such machines; and the road districts in such townships, which through such commissioners purchased such machines, are not municipalities, which can assume obligations and sue and be sued.—Pape v. Township of Benton, 140 Mich. 165.

§ 16. Compellable duties in general.

[Note. For convenience the compellable judicial duties have been collated, post §§ 28-68, the compellable administrative, executive, and ministerial duties, post §§ 74-109, and the private duties, post §§ 110-122. Only the general nature of the duties which may be compelled is treated here (§§ 16-19).]

Existing, mature, and certain duty as basis for writ, see ante § 4.

Clear legal duty, see also ante ¶ 15.

Political and executive functions of government, see post § 69.

Writ for part of performance demanded, see post § 172.

¶ 109. If a statute imposes a special duty, either in terms or by fair and reasonable implication, and there is no other specific remedy, mandamus may be awarded to compel performance of the duty.—People ex rel. Secretary of State v. State Ins. Co., 19 Mich. 392.

¶ 110. Mandamus does not lie to enforce a contract; as where the relator is a bank, seeking to compel the respondent, an officer of a public board, to deposit with it, as required by law, funds to the custody of which it is entitled under a bid made therefor to the board.—Port Huron Board of Education v. Runnels, 57 Mich. 46.

§ 17. ——Continuing or indeterminate duties.

¶ 111. The remedy by mandamus is not adapted to cases calling for continuous action, varying according to circumstances.—Diamond Match Co. v. Powers, 51 Mich. 145.

§ 18. ——Duties resting in discretion.

To control or review judicial discretion, see post § 28.

¶ 112. Mandamus lies only to enforce strict legal rights, and will not be granted to

enforce the doing of an act which by law lies in the discretion of the officer refusing to do it.—People ex rel. Houghton County v. Auditor General, 36 Mich. 271.

¶ 113. The writ is granted to compel the performance of a ministerial act, but not to inquire into the proper exercise of judicial discretion.—People ex rel. Sweet v. Adam, 3 Mich. 427.

§ 19. ——Duties of private nature.

Compellable private duties, see post § 110 et seq.

¶ 114. Though the writ is generally used to enforce the performance of public rights and duties, it may also be resorted to for the enforcement of private rights, when withheld by public officers.—People ex rel. Bristow v. Macomb County Supervisors, 3 Mich. 475.

§ 20. Trial of title to office, franchise, or corporate existence.

See also post ¶ 932.

Declination of questions of title collateral to right or duty asserted, see also post § 154 et seq.

Declination of question of title to office in mandamus to compel payment of salary, see post ¶ 645.

Compulsion of duties pertaining to elections, certification of result, and appointments and induction to office, see post §§ 82-86.

Correction of improper injunction against interference with rights in office, see post § 45, ¶¶ 319, 320.

¶ 115. Mandamus is not the proper proceeding to try the title to a public office.—People ex rel. Cuthbert v. Detroit Common Council, 18 Mich. 338; People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416; Moiles v. Watson, 60 Mich. 415; Tallmadge Township School Dist. No. 8 v. Root, 61 Mich. 373; Frey v. Michie, 68 Mich. 323.

¶ 116. Quo warranto and not mandamus against the canvassing board is the proper remedy to determine the right to a public office, where the opposing candidate is actually exercising the duties of the office.—Lachance v. Board Canvassers Mackinac Co., 157 Mich. 679.

¶ 117. Respondent, running for the office of supervisor, demanded a recount by the board of canvassers, and upon their decision in his favor took the oath and entered upon the duties of the office. Held, mandamus proceedings begun by a rival candidate thereafter were not the proper remedy to try respondent's title to the office.—Miner v. Beurmann, 165 Mich. 672.

¶ 118. This writ is not the proper proceeding to oust one who is in the exercise of official duties, especially when he is not a party to the proceedings.—Pariseau v. Board of Education of Escanaba, 96 Mich. 302.

¶ 119. Mandamus to compel performance of official duty is not the proper method of trying the title to an office the de facto incumbent of which is not made a party to the proceeding.—Keeler v. Deo, 117 Mich. 1.

¶ 120. Although title to office will not usually be settled upon an application for mandamus, yet where the public interest demands it, and where a person in office de jure et de facto is interfered with by one whose lack of title is plain, it is proper to settle the question by mandamus.—Lawrence v. Hanley, 84 Mich. 399.

¶ 121. When the necessity is pressing and one entitled to hold office is an officer de facto as well as de jure, the court may determine his right thereto in a mandamus proceeding.—Lichtig v. Saginaw Circuit Judge, 180 Mich. 667.

¶ 122. Mandamus was not the proper remedy to compel an actual incumbent of the office of secretary of a village school board to turn over to another claimant to the office, the books and papers pertaining to such office; where respondent claimed to be the secretary and denied the title of the relator not only to the office of secretary but also to the office of trustee.—Ashwell v. Bullock, 122 Mich. 620.

¶ 123. The title of a town supervisor, prima facie entitled to the office and claiming to have been duly appointed and to be entitled to the books pertaining to the office, will not be tried in mandamus proceedings.—Pipper v. Wayne Circuit Judge, 122 Mich. 688.

¶ 124. Mandamus will not try the question of corporate existence.—People ex rel. Chapman v. State Land Office Com'r, 26 Mich. 146.

¶ 125. Mandamus is not a proper remedy to determine the boundaries of the franchises of two municipal boards, claiming the same power of appointment.—Frey v. Michie, 68 Mich. 323.

II. COMPULSION OF JUDICIAL DUTIES AND REVIEW OF PROCEEDINGS.

§ 21. In general.

Appellate or original character of mandamus, see ante § 2.

Extent of power to issue mandamus in supervisory control of lower tribunals, see Courts § 55.

Necessity of duty and clear legal right to performance and of exigency and beneficial occasion, see ante §§ 4-7.

Futility of writ as reason against allowance, see ante §§ 8, 9.

Impolicy, injustice, misconduct, unfairness and delay as barring issuance, see ante §§ 10-12.

Motion or request for action to fix duty, see post § 22.
Laches or other delay as bar to relief, see post § 23.
Other remedy as primary recourse, see post §§ 24-27.
Review of discretion or decisions of fact, see post §§ 28, 29.
Particular acts and proceedings compellable or reviewable, see post §§ 30-68.
Sufficiency of relator's interest, see post §§ 126-128.
Scope of review and matters considered, see post § 154 et seq.
Procedure for issuance of the writ and procedure on the writ, see post V.

¶ 126. A mandamus is allowed only to set the inferior jurisdiction in motion; but not for the purpose of requiring it to come to any particular conclusion, or of retracing its steps where it has already acted; and this notwithstanding the party has no other remedy.—People ex rel. Brower v. Wayne County Judge, 1 Mich. 359.

¶ 127. Mandamus is a proper process for setting a court in motion, but not for reviewing its affirmative judicial action, if there is any other effectual remedy.—Lloyd v. Wayne Circuit Judge, 56 Mich. 286.

¶ 128. The supreme court may, by mandamus, compel a judicial officer to proceed, hear, and decide, but can neither dictate his determination in advance nor review it after it is made by that writ.—Lyle v. Cass Circuit Judge, 157 Mich. 38.

¶ 129. Although mandamus will lie to compel a circuit judge to sign a decree upon his refusal to sign any decree, it will not lie to compel the signing of a particular decree.—Ambos v. Ingham Circuit Judge, 123 Mich. 618.

§ 22. Motion, request, or demand on respondent to fix duty.

See also post ¶ 278.
Necessity of payment or tender to mature right, see also post ¶ 455.
Necessity of notice to fix duty to settle bill of exceptions, see post ¶ 399.
Necessity and sufficiency of allegations in petition, see post § 136.
Sufficiency of the record to show breach of duty, see post § 161 et seq.
Declination of questions not presented to or considered by respondent judge, see post § 156.
Denial of writ without further inquiry for want of previous motion to respondent, see post ¶ 994.
Statutory provision dispensing with motion to vacate order made on hearing, see Jud. Act, chap. XXXVI, § 2; Comp. L. 1915, § 13438.

¶ 130. The writ will not be granted where the application is for something different from that for which the party has laid the foundation. The refusal of the circuit court to grant a motion for an assessment of damages in replevin is not a proper foundation for an application to the supreme court for a mandamus commanding the circuit court to impanel a jury to assess the value of the property replevied.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302.

¶ 131. A party to a cause is not entitled to mandamus to compel a circuit judge to file certain findings of law and fact, where he has neither made application to frame the issues to be tried by the court nor given the other party opportunity to prepare to meet them.—Caille Bros. Co. v. Saginaw Circuit Judge, 155 Mich. 480.

¶ 132. Where no application to the trial court to vacate an order has been made mandamus will not issue to compel it to be done.—Swarthout v. Saginaw Circuit Judge, 99 Mich. 347.

¶ 133. A writ of mandamus to set aside an order of a circuit judge may be properly denied where no application was made to the trial court to set aside the order complained of.—Mesler v. Jackson Circuit Judge, 188 Mich. 195.

¶ 134. Mandamus commanding the circuit court to set aside an order setting aside an order of default and an order of reference will be denied by this court where the relator has made no motion before the circuit court to vacate the order made.—Aitken v. Chippewa Circuit Judge, 146 Mich. 129.

¶ 135. It is not proper to bring mandamus to vacate an order of the circuit court granting a change of venue unless application therefor is first made to the circuit judge.—Freud v. Wayne Circuit Judge, 131 Mich. 606.

¶ 136. A motion to dissolve a temporary injunction is a formal prerequisite to an application for a mandamus to compel the vacating of the same.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 137. On a bill in chancery to avoid deeds obtained by defendant railroad company for a right of way, the court decreed that the deeds were void, but, as defendant had entered upon the land in good faith believing it had title, ordered that defendant should be enjoined from going on the premises or continuing its work unless it should deposit with the register a sum sufficient to cover any prospective award of damages to be made in condemnation proceedings to be begun within twenty days, and that in case of failure to make such deposit or to take such proceedings within the time, the case should be heard on four days' notice. On failure to agree as to the amount to be deposited, a reference was had, defendant examined witnesses, and at its motion the court fixed the sum. Complainant then applied to

¶ 33. A writ of mandamus will not issue to allow the inspection of corporate books and papers by a director whose term of office has expired pending certiorari to review the writ and who has not been re-elected, where he claims the right of inspection only in such capacity and not as a stockholder.—Leach v. Davy, 199 Mich. 378.

§ 7. Exigency and beneficial occasion for writ.

See also post ¶¶ 254, 293.
Denial of writ because of futility, see post §§ 8, 9.
Denial of writ because of unfairness, injustice, or misconduct, see post § 10.
Denial of writ tending to further illegality, see post § 11.
Discretion to deny writ in absence of exigency, see ante ¶ 9.
Substantial right as essential, see also ante ¶ 10.
Mandamus to correct record to show matter otherwise appearing of record, see post ¶ 369.
Useless questions in settlement of pleadings, see post § 82.
Necessity of mature right in relator to performance of the duty asserted, see ante § 6.
Delay and change of conditions as reason against writ, see post § 12.
Exigency or substantial occasion to correct injunctional orders, see post §§ 44, 45.
Declination of questions on hearing that have become immaterial, see post § 154 et seq.
Necessity and sufficiency of allegations in petition, see post § 135.

¶ 34. Mandamus is never issued unless to enforce a clear legal right, and in furtherance of justice; it will not issue to compel a judge to vacate an order striking out relator's plea, where the defense set up was waived a few days after the filing of the plea.—Electric Park Amusement Co. v. Wayne Circuit Judge, 155 Mich. 640.

¶ 34a. Where, after the removal of a cause from the Wayne circuit court to the superior court of Detroit, a mandamus was applied for to require its dismissal for want of jurisdiction of the defendant's person on the ground that he was not a resident of Detroit, the application was denied on a showing that the defendant had moved for a continuance in the circuit court, and had thereby precluded himself from raising this question of jurisdiction.—People ex rel. Field v. Superior Court Judge, 30 Mich. 10.

¶ 35. Mandamus to compel the dissolution of a preliminary injunction was denied where such injunction, whether right or wrong, had spent its principal force; it being desirable to have the entire merits before the supreme court on appeal after final hearing below.—Mills v. Wayne Circuit Judge, 77 Mich. 210.

¶ 36. Mandamus to vacate an order setting aside an execution sale after time for redemption had passed was denied in the court's discretion.—Stinton v. Kent Circuit Judge, 87 Mich. 286; Wilkie v. Ingham County Circuit Judge, 52 Mich. 641.

¶ 37. The supreme court in the exercise of its discretion will not compel a circuit court to proceed with the trial of a case where the only outcome must be a judgment against the relator.—Hatch v. Wayne Circuit Judge, 138 Mich. 184.

¶ 38. A judge will not be compelled by mandamus to allow an amendment ineffective to accomplish what relator seeks.—Kilby Mfg. Co. v. Menominee Circuit Judge, 138 Mich. 277.

¶ 39. Mandamus will not issue to compel a circuit judge to frame an issue in a proceeding before him to compel the approval of a druggist's bond, where it appears that before the hearing on such bond, three of the four sureties thereto withdrew from it; since, at the time such mandamus was heard, there was no proper bond before the court to be passed upon.—Young v. Van Buren Circuit Judge, 145 Mich. 341.

¶ 40. While a defendant cannot withdraw his demurrer and plead over without leave of court, the refusal of the court to hear the demurrer upon the ground that a plea had been filed is equivalent to the granting of such leave nunc pro tunc and the circuit judge having made return that in his discretion no costs should be allowed, mandamus will be denied to compel him to enter judgment on the demurrer.—Fisher v. Wayne Circuit Judge, 128 Mich. 543.

¶ 41. Mandamus will not issue to compel a circuit court judge to set aside an order continuing a cause for a term where at the time of respondent's return to the writ and final submission of the proceeding to the supreme court and the circuit court term at which the order was made has passed.—Palmer-Stevenson Const. Co. v. Mason Circuit Judge, 176 Mich. 326.

¶ 42. Relator moved the respondent judge to transfer a case to another county on the ground of local prejudice. The return of the judge disputed the existence of such prejudice. Held, the upper court would not on mandamus delay the trial in the circuit court in order to settle this issue of fact, where the defendant had waived any right he might have to such mandamus proceeding by asking that the case be set down on a day certain for trial.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 159 Mich. 210.

¶ 43. A writ of mandamus will not issue on petition of executors to compel a circuit judge to set aside an order in chancery restraining executors from turning over certain moneys to a legatee and ordering the

legatee to pay to complainant unpaid alimony for support of his children where the legatee does not appear to contest the proceedings and does not attempt to excuse his conduct.—Craig v. Wayne Circuit Judge, 192 Mich. 106.

§ 8. Futility of writ.

Want of exigency or beneficial occasion as reason against writ, see ante § 7.

Denial because of want of power to obey or perform, see post § 9.

¶ 44. Mandamus to compel a county clerk to issue a certificate of election to a person shown by the returns to have been legally elected was denied when it would not have given substantial relief, and the question might be raised again in an issue as to the accuracy of the returns or by proceedings in the nature of quo warranto.—Sherburne v. Horn, 45 Mich. 160.

¶ 45. Mandamus will not issue to compel the board of state canvassers, which refuses to credit a candidate at a general election with the votes cast for him in certain counties because his name is spelled incorrectly in the returns, to obtain corrected returns and canvass the votes in accordance therewith, if the general result is such that the action would be an idle ceremony affecting no material rights or interests.—Baker v. Board of State Canvassers, 111 Mich. 378.

¶ 46. A court is not required to issue a mandamus where its effect would be of no avail.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 47. Mandamus will not lie to compel a duty under a law which duty is merely preliminary to the main purpose of the law, and which purpose the law provides no means of accomplishing.—Attorney General v. Lawton, 80 Mich. 386.

¶ 48. Where a condition attached to an approval by the common council of a street railway company's poles is inoperative and void, and where the council has already approved the pattern of the poles as required by the ordinance, mandamus will not be granted, because of the void condition, to compel the council to approve the poles over again.—Electric R. Co. of Grand Rapids v. Common Council of Grand Rapids, 84 Mich. 257.

¶ 49. Where the presiding officer of a city common council declared the adoption on a majority vote of a resolution which under the charter required a two-thirds vote of all the aldermen elect, a mandamus to compel him to reverse his decision and to declare the resolution lost was denied on the ground that it appeared from the face of the records that the resolution was not legally carried, because all persons are chargeable with notice of the illegality.—Tennant v. Crocker, 85 Mich. 328.

§ 9. ——Want of power to obey or perform duty.

Injunction against further proceedings in case as bar to mandamus to proceed to hearing, see post ¶ 225.

¶ 50. Mandamus will not be issued unless it clearly appears that the person to whom it is directed has the absolute power to execute it.—Turnbull v. Giddings, 95 Mich. 314; City of Benton Harbor v. St. Joseph & B. H. St. R. Co., 102 Mich. 386.

¶ 51. Mandamus will not lie where respondent has no power to obey its mandate.—Corby v. Wayne Probate Judge, 96 Mich. 11.

¶ 52. The writ of mandamus is a discretionary writ, and it must clearly appear that the party to whom it is directed has the power to execute it; otherwise, it will not be issued.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 53. Mandamus will not lie to compel a circuit judge to overrule his finding that the proceedings taken for the condemnation of a site for a schoolhouse were irregular, and to compel him to enter judgment for the amount found due against the district.—Delhi School Dist. No. 5 v. Ingham Circuit Judge, 49 Mich. 432.

¶ 54. Where, in a proceeding by a state and under a state law to condemn lands for the purposes of the general government, the state abandons the proceeding before its completion, and the owner of the lands applies for a mandamus to compel it to be carried through, the question of the state power is necessarily involved. Such a condemnation might be effectual if the general government has accepted the land, and the owner had received the compensation awarded, for a statute may transfer title in any form the parties mutually assent to, but until the assent of both is signified the proceeding must be wholly inoperative.—People ex rel. Trombley v. Humphrey, 23 Mich. 471.

¶ 55. Mandamus will not lie against the board of assessors to strike an improper tax assessment from the rolls, where the writ would be unavailing by reason of the fact that the rolls would at the time of its issuance be out of the hands of the assessors, and in the custody of the collectors.—W. A. Sturgeon & Co. v. Board Assessors City of Detroit, 159 Mich. 199.

§ 10. Fairness, injustice or misconduct affecting propriety.

Denial of writ to aid or further illegality, see post § 11.

Delay and laches affecting propriety of issuance, see post § 12.

¶ 56. The issuance of a writ of mandamus is not a matter of right, but is a matter of

discretion, and should be issued only where it appears that justice requires it.—MacKinnon v. Auditor General, 130 Mich. 552; Grand Rapids & I. Ry. Co. v. Auditor General, 144 Mich. 77.

¶ 57. Mandamus will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where it is apparent that it is applied for to gratify the spite of a private individual, or where the relator has instigated, authorized or approved the act complained of.—Hale v. Risley, 69 Mich. 596.

¶ 58. The writ of mandamus is a discretionary writ, and will not be issued when inconsistent with justice.—Wooster v. Calhoun Circuit Judge, 150 Mich. 459.

¶ 59. Mandamus is a discretionary writ, and should not issue where it works an injustice.—Craig v. Wayne Circuit Judge, 192 Mich. 106.

¶ 60. The rule that mandamus is not a writ of right and will only be allowed in the furtherance of justice upon a proper case presented, and will not be granted to accomplish an illegal purpose though the officer against whom it is invoked is charged with an express statutory duty, is as applicable to the circuit court as to the supreme court.—Cook v. Board Election Com'rs Cheboygan Co., 172 Mich. 437; George N. Fletcher & Sons v. Alpena Circuit Judge, 136 Mich. 511.

¶ 61. The writ of mandamus is not one of right, and will not be issued in behalf of one whose conduct equitably estops him from seeking it.—Mason v. City of Gladstone, 93 Mich. 232.

¶ 62. This writ is discretionary, and should always be refused where the record shows the injustice of relator's claim.—Van Akin v. Dunn, 117 Mich. 421.

¶ 63. The writ of mandamus is discretionary, hence the plea of the statute of limitations may be entertained and the writ refused, where the answer shows that the claim (upon a contingent county order) is fraudulent, and relator does not ask for the trial of an issue.—Merrill v. Gladwin County Treasurer, 61 Mich. 95.

¶ 64. Because his demand is inequitable and unjust, a holder of a city warrant issued to pay for street improvements cannot have a mandamus to compel the city to pay it out of the fund derived from a tax levied for that purpose, but which assessment the relator in another action had succeeded in having declared illegal.—Mason v. City of Gladstone, 93 Mich. 232.

¶ 65. The court in its discretion may refuse the writ altogether unless the party seeking it consents to do equity.—Stevens v. Saginaw County Sup'rs, 62 Mich. 579.

¶ 66. The writ of mandamus is discretionary, and those who invoke its aid must come into court with clean hands; it cannot be invoked to accomplish a purpose confessedly illegal, even though the officer against whom it is invoked is charged with an express duty under the statute.—Board of Supervisors of Cheboygan County v. Supervisor of Township of Mentor, 94 Mich. 386.

¶ 67. Relator railroad company repeatedly promised the city to build a bridge over a street which it crossed. Assurances were thus made during a number of years; no defense was made to proceedings to compel it; and defendant was in contempt for failing to obey the order of the circuit judge to build the bridge. Held, the relator was not in a position to ask the grace of the court to issue a writ of mandamus to vacate the order of the circuit judge.—Chicago, D. & C. G. T. Junct. R. Co. v. St. Clair Circuit Judge, 156 Mich. 567.

§ 11. Aiding or furthering illegality.

Invalidity in or objection to claim against the public as bar to mandamus to compel payment, see post § 95.

¶ 68. Mandamus will not be issued to aid in enforcement of an illegal claim.—Detroit Board of Education v. Detroit Common Council, 80 Mich. 548.

¶ 69. Mandamus to compel the common council of Detroit to order the issuing of bonds to purchase lands for a park contracted for by the board of park commissioners was denied as encroaching on the constitutional rights and functions of the city.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 70. Mandamus on the relation of a board of supervisors will not lie to compel individual supervisors who have opposed a fraudulent vote of money by the board to spread on their respective assessment rolls their proportion of the fraudulent tax.—Board of Supervisors of Cheboygan County v. Supervisor of Township of Mentor, 94 Mich. 386.

¶ 71. In mandamus proceedings against a municipal officer to compel the execution of certain bonds of the municipality, respondent may set up the illegality of the election by which the issue of such bonds was provided for.—Daniels v. Long, 111 Mich. 562.

¶ 72. Where one's unfitness for an official position from which he has been summarily removed is conceded, he cannot invoke the aid of the discretionary writ of mandamus to exact payment of salary for a period succeeding his discharge, even though his removal may have been illegal because without opportunity for hearing and defense.—McQueen v. Detroit Common Council of Detroit, 116 Mich. 90.

¶ 73. The Detroit controller could not be compelled by mandamus to draw a warrant for the salary of a clerk, where the city board of estimates had stricken out the item in question from the estimate of expenses for the office of the city board of assessors, nor could he be compelled to pay such items from other sources than taxation. (Following Robinson v. Detroit, 107 Mich. 168.)—City of Detroit v. Blades, 133 Mich. 249.

¶ 74. Where a village ordinance forbids the keeping of saloons or saloon bars or the sale of liquor in saloons or bars, mandamus will not lie to force the council to issue a license to sell liquor at a hotel bar.—Boos v. Scudder, 163 Mich. 678.

¶ 75. On April 20, 1911, a village council passed an ordinance prohibiting saloons, to be effective on May 10, 1911. On April 22, 1911, relator filed a petition and bond for a saloon license, which petition was rejected by the council on May 4, 1911. On May 8, 1911, relator presented a petition to the circuit court praying that a mandamus should issue requiring said council to meet within a reasonable time for the purpose of considering and acting upon the application of relator and to require said council to approve same. The hearing on said petition was held on May 22d. Held, mandamus was properly refused.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 76. A writ of mandamus to compel a village council to issue relator a saloon license will not be denied on the ground that the result will be to give the village four saloons instead of the three lawfully allowed, where said relator is not responsible for the unlawful action of the council in producing that result.—Rhode v. Wayne Circuit Judge, 168 Mich. 683. (Moore, C. J., dissenting.)

§ 12. Delay and change of conditions.

Denial of writ to enforce payment of barred claim, see also ante ¶ 63.

Laches and delay as bar to mandamus to judicial officers, see post § 23.

¶ 77. Mandamus is not a writ of right, and is not usually allowed to those who have been culpably dilatory or otherwise at fault.—People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31.

¶ 78. Where the statute of limitations is interposed to prevent the payment of a just claim, the court may refuse to permit the plea to interfere with issuing the writ when the period has been less than ten years.—Merrill v. Gladwin County Treasurer, 61 Mich. 95; County of Oceana v. Hart Township Sup'rs, 48 Mich. 319.

¶ 79. Mandamus being a discretionary writ will not issue when inconsistent with justice, and though it is a legal process it is governed by equitable principles and will not lie when legal redress is barred by the statute of limitations.—McRae v. Auditor General, 146 Mich. 594.

¶ 80. Mandamus is a discretionary writ, partaking of the nature of a bill in equity for specific performance, wherein stale claims are not favored.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 81. Mandamus proceedings for the purpose of collecting a debt are not different from any other suits, and are barred by laches, the bar following by analogy the statute of limitations.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 82. Mandamus to compel the quartermaster-general to receive a claim for a state bounty, provided for by act 27 of 1865, and under § 1 of act 132 of 1871 to examine and allow the claim and forward a certificate to the auditor-general, was denied in 1881 for laches.—Blanchard v. Church, 47 Mich. 644.

¶ 83. A delay for more than six years to demand payment of township and highway orders, or to apply for mandamus to compel such payment, if unexplained, will bar relief by such writ.—Avery v. Township Board of Township of Krakow, 73 Mich. 622.

¶ 84. Mandamus was not allowed to enforce the payment of a claim for salary as a city officer where the relator first elected to sue in assumpsit, but left the action undetermined, and, after ten years had passed from the date of his claim, sought his remedy by mandamus from the supreme court.—Walcott v. City of Jackson, 51 Mich. 249.

¶ 85. Mandamus having been determined to be the appropriate remedy to enforce payment of a claim against a county, it was not defeated on the ground of laches, where the statute of limitations had not run against the claim.—Hanna v. Chalker, 136 Mich. 8.

¶ 86. Mandamus being a discretionary writ, its issue to compel the payment of a county order will be refused, when the answer sets up the plea of the statute of limitations, and also shows that the claim is fraudulent, and the relator does not ask for the trial of an issue to determine the fact of fraud.—Merrill v. Gladwin County Treasurer, 61 Mich. 95.

¶ 87. Where a complainant has failed to enforce a claim against a county for nearly eight years, he having officially come in possession of all the facts in connection therewith, his laches will bar a writ of mandamus.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 88. Mandamus to compel the placing of certain property on an assessment roll is denied when applied for so late as to deprive the parties of the right to have the assess-

ment reviewed.—Maurer v. Cliff, 94 Mich. 194.

¶ 89. A county treasurer cannot be compelled by mandamus to issue tax-deeds for lands purchased by relator under § 80 of the tax-law of 1891, where it appears that before the writ was applied for, relator accepted a tender by respondent of the purchase-money, and that before tender back the lands were conveyed to others.—Aitcheson v. Huebner, 90 Mich. 648.

¶ 90. Mandamus proceedings to compel the auditor general to refund the amount paid at an invalid tax sale must fail where the petitioner has waited for fourteen years before bringing such suit, the state having the right in such proceedings to invoke the statute of limitations.—Wilkinson v. Auditor General, 147 Mich. 13.

¶ 91. A delay of fifteen years by the holder of drain orders in seeking by mandamus to compel the reassessment of a tax where a previous assessment had been set aside for irregularities, is sufficient to bar relief, where such remedy was available from the time he acquired the orders.—McDermott v. Alger, 186 Mich. 278.

¶ 92. Mandamus is granted to compel the board of education of the city of Detroit to rescind a resolution reconsidering one passed at a former meeting adopting a text-book for use in place of one which had been in use for upwards of five years, and making a different selection; it appearing that in the interim the publishers of the book first adopted, and the patrons of the school, had acted in reliance upon the rescinded resolution in the sale and purchase of books.—Jones v. Board of Education of City of Detroit, 88 Mich. 371.

¶ 93. Although the charter and ordinances of a city require the official printing to be done in a newspaper published in such city, a local publisher whose bid has been rejected cannot compel the city, by mandamus, to award him the contract, after it has been let to outside parties and partly performed.—Clark v. Mayor of West Bay City, 112 Mich. 283.

¶ 94. Where, pending proceedings to compel the common council of a city to approve a paving contract made with the relator by the board of public works, the contract is let to another party, and the work done, mandamus will be denied, and the relator left to his action against the city.—Talbot Paving Co. v. Common Council of City of Detroit, 91 Mich. 262.

§ 13. Other adequate remedy as bar to mandamus.

See also ante ¶ 17.
Availability of redress by nonjudicial action, see post § 14.
Mandamus or other remedy as proper one, see post §§ 15, 24-27.
Statutory proceeding to spread judgment on tax roll as remedy rather than mandamus to enforce payment, see post ¶ 633.
Denial of mandamus without prejudice to other remedy, see post § 173.
Judgment as bar or estoppel, see Former Adjudication.

¶ 95. Mandamus is not granted where relator has any other adequate legal remedy.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302; People ex rel. Bradley v. Branch Circuit Judges, 1 D. 319; People ex rel. Brower v. Wayne County Judge, 1 Mich. 359; People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296; People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487; Burt v. Wayne Circuit Judge, 82 Mich. 251; Corby v. Wayne Probate Judge, 96 Mich. 11; Eyke v. Lange, 104 Mich. 26; Cattermole v. Ionia Circuit Judge, 136 Mich. 274; Hartz v. Wayne Circuit Judge, 164 Mich. 231.

¶ 96. Mandamus will not be awarded in cases where another remedy is provided by law.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

¶ 97. Mandamus is not a writ of right, and will not lie, as a general rule, when the law has provided another remedy.—Trumbull Motor Car Co. v. Wayne Circuit Judge, 189 Mich. 554.

¶ 98. Mandamus is not to be resorted to when there is a plain, direct, and adequate remedy at law.—Coffin v. Board of Education of Detroit, 114 Mich. 342.

¶ 99. Mandamus is the proper remedy for enforcing a specific legal right for which there is no other adequate legal remedy, and it is not excluded by other legal remedies which are not adequate to secure the specific relief needed, nor by the existence of a specific remedy in equity.—People ex rel. La Grange Township v. State Treasurer, 24 Mich. 468.

¶ 100. Mandamus may issue where other remedies exist, if they are not sufficiently speedy to prevent material injury.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 101. Remedy by mandamus is not precluded by the fact that the respondent may be liable as for a misdemeanor in wilfully neglecting his duty; a criminal prosecution will not secure its performance, and specific compliance can be enforced only by mandamus.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 102. While the writ of mandamus has been treated as in its nature discretionary and prerogative, and not necessarily limited

by strict rules to cases involving positive statutory duties, or in which there is an entire absence of any other remedy, yet it has been frequently said that the writ will not be granted where there is another adequate remedy.—Waterman-Waterbury Co. v. Cato Township School Dist. No. 4, 188 Mich. 168.

§ 14. Availability of redress by nonjudicial action.

Resort to remedy within corporation as affecting right to mandamus, see post § 118.

¶ 103. Mandamus asked by the board of water commissioners of East Saginaw to compel the common council to levy a tax to pay bonds issued by the board, and about to mature, was denied, as the board had a remedy, by issuing new bonds, to meet the old ones.—People ex rel. Board of Water Com'rs v. East Saginaw Common Council, 33 Mich. 164.

¶ 104. The police justice of Grand Rapids has no authority to proceed against the supervisors of the county by mandamus to compel them to audit and allow to the city the fees charged by the act creating the police court, upon the county, in cases tried before him; the act being construed to require him to collect the costs imposed by him upon individuals, but not such as were payable by the county to the city, under the same.—People ex rel. McBride v. Kent County Sup'rs, 38 Mich. 421.

§ 15. Mandamus or other remedy as proper one.

Other adequate remedy as reason against writ, see ante § 13, post § 24 et seq.

Offices and functions of other remedies, see specific topics treating of such remedies, e. g., Injunctions, I; Certiorari; Appeal, I; Quo Warranto.

Common law and statutory rights to jury trial of issues, see Jury, I.

¶ 105. Mandamus, not injunction, is the proper remedy where nothing remains but the enforcement of a legal duty on a public officer's part.—Webster v. Newell, 66 Mich. 503.

¶ 106. Bill in equity, and not mandamus, is the proper remedy to restrain a city council from wrongfully submitting to a vote of the electorate a proposed amendment to the city charter.—Attorney General ex rel. Hudson v. Common Council City of Detroit, 164 Mich. 369. (Ostrander, C. J., and McAlvay and Blair, JJ., dissenting.)

¶ 107. The fact that there is a specific remedy in equity does not necessarily oust the jurisdiction of a common-law court in mandamus, but only appeals to its discretion, which may be exercised where the circumstances call for prompt interference by the courts.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 108. Mandamus against the proper officers to compel the levy and collection of the tax as provided by law is the remedy of the seller of road machinery to the road commissioners, to recover the price thereof, under Comp. L. 1897, §§ 4193-4197, which authorizes commissioners of highways in townships to purchase tools and machinery for making roads, and provides for a highway tax to raise funds for the payment therefor, and assumpsit against such township will not lie; since the township is not primarily liable, no contract relations existing between it and the seller of such machines; and the road districts in such townships, which through such commissioners purchased such machines, are not municipalities, which can assume obligations and sue and be sued.—Pape v. Township of Benton, 140 Mich. 165.

§ 16. Compellable duties in general.

[Note. For convenience the compellable judicial duties have been collated, post §§ 28-68, the compellable administrative, executive, and ministerial duties, post §§ 74-109, and the private duties, post §§ 110-122. Only the general nature of the duties which may be compelled is treated here (§§ 16-19).]

Existing, mature, and certain duty as basis for writ, see ante § 4.

Clear legal duty, see also ante ¶ 15.

Political and executive functions of government, see post § 69.

Writ for part of performance demanded, see post § 172.

¶ 109. If a statute imposes a special duty, either in terms or by fair and reasonable implication, and there is no other specific remedy, mandamus may be awarded to compel performance of the duty.—People ex rel. Secretary of State v. State Ins. Co., 19 Mich. 392.

¶ 110. Mandamus does not lie to enforce a contract; as where the relator is a bank, seeking to compel the respondent, an officer of a public board, to deposit with it, as required by law, funds to the custody of which it is entitled under a bid made therefor to the board.—Port Huron Board of Education v. Runnels, 57 Mich. 46.

§ 17. ——Continuing or indeterminate duties.

¶ 111. The remedy by mandamus is not adapted to cases calling for continuous action, varying according to circumstances.—Diamond Match Co. v. Powers, 51 Mich. 145.

§ 18. ——Duties resting in discretion.

To control or review judicial discretion, see post § 28.

¶ 112. Mandamus lies only to enforce strict legal rights, and will not be granted to

enforce the doing of an act which by law lies in the discretion of the officer refusing to do it.—People ex rel. Houghton County v. Auditor General, 36 Mich. 271.

¶ 113. The writ is granted to compel the performance of a ministerial act, but not to inquire into the proper exercise of judicial discretion.—People ex rel. Sweet v. Adam, 3 Mich. 427.

§ 19. ——Duties of private nature.

Compellable private duties, see post § 110 et seq.

¶ 114. Though the writ is generally used to enforce the performance of public rights and duties, it may also be resorted to for the enforcement of private rights, when withheld by public officers.—People ex rel. Bristow v. Macomb County Supervisors, 3 Mich. 475.

§ 20. Trial of title to office, franchise, or corporate existence.

See also post ¶ 932.

Declination of questions of title collateral to right or duty asserted, see also post § 154 et seq.

Declination of question of title to office in mandamus to compel payment of salary, see post ¶ 645.

Compulsion of duties pertaining to elections, certification of result, and appointments and induction to office, see post §§ 82-86.

Correction of improper injunction against interference with rights in office, see post § 45, ¶¶ 319, 320.

¶ 115. Mandamus is not the proper proceeding to try the title to a public office.—People ex rel. Cuthbert v. Detroit Common Council, 18 Mich. 338; People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416; Moiles v. Watson, 60 Mich. 415; Tallmadge Township School Dist. No. 8 v. Root, 61 Mich. 373; Frey v. Michie, 68 Mich. 323.

¶ 116. Quo warranto and not mandamus against the canvassing board is the proper remedy to determine the right to a public office, where the opposing candidate is actually exercising the duties of the office.—Lachance v. Board Canvassers Mackinac Co., 157 Mich. 679.

¶ 117. Respondent, running for the office of supervisor, demanded a recount by the board of canvassers, and upon their decision in his favor took the oath and entered upon the duties of the office. Held, mandamus proceedings begun by a rival candidate thereafter were not the proper remedy to try respondent's title to the office.—Miner v. Beurmann, 165 Mich. 672.

¶ 118. This writ is not the proper proceeding to oust one who is in the exercise of official duties, especially when he is not a party to the proceedings.—Pariseau v. Board of Education of Escanaba, 96 Mich. 302.

¶ 119. Mandamus to compel performance of official duty is not the proper method of trying the title to an office the de facto incumbent of which is not made a party to the proceeding.—Keeler v. Deo, 117 Mich. 1.

¶ 120. Although title to office will not usually be settled upon an application for mandamus, yet where the public interest demands it, and where a person in office de jure et de facto is interfered with by one whose lack of title is plain, it is proper to settle the question by mandamus.—Lawrence v. Hanley, 84 Mich. 399.

¶ 121. When the necessity is pressing and one entitled to hold office is an officer de facto as well as de jure, the court may determine his right thereto in a mandamus proceeding.—Lichtig v. Saginaw Circuit Judge, 180 Mich. 667.

¶ 122. Mandamus was not the proper remedy to compel an actual incumbent of the office of secretary of a village school board to turn over to another claimant to the office, the books and papers pertaining to such office; where respondent claimed to be the secretary and denied the title of the relator not only to the office of secretary but also to the office of trustee.—Ashwell v. Bullock, 122 Mich. 620.

¶ 123. The title of a town supervisor, prima facie entitled to the office and claiming to have been duly appointed and to be entitled to the books pertaining to the office, will not be tried in mandamus proceedings.—Pipper v. Wayne Circuit Judge, 122 Mich. 688.

¶ 124. Mandamus will not try the question of corporate existence.—People ex rel. Chapman v. State Land Office Com'r, 26 Mich. 146.

¶ 125. Mandamus is not a proper remedy to determine the boundaries of the franchises of two municipal boards, claiming the same power of appointment.—Frey v. Michie, 68 Mich. 323.

II. COMPULSION OF JUDICIAL DUTIES AND REVIEW OF PROCEEDINGS.

§ 21. In general.

Appellate or original character of mandamus, see ante § 2.

Extent of power to issue mandamus in supervisory control of lower tribunals, see Courts § 55.

Necessity of duty and clear legal right to performance and of exigency and beneficial occasion, see ante §§ 4-7.

Futility of writ as reason against allowance, see ante §§ 8, 9.

Impolicy, injustice, misconduct, unfairness and delay as barring issuance, see ante §§ 10-12.

Motion or request for action to fix duty, see post § 22.
Laches or other delay as bar to relief, see post § 23.
Other remedy as primary recourse, see post §§ 24-27.
Review of discretion or decisions of fact, see post §§ 28, 29.
Particular acts and proceedings compellable or reviewable, see post §§ 30-68.
Sufficiency of relator's interest, see post §§ 126-128.
Scope of review and matters considered, see post § 154 et seq.
Procedure for issuance of the writ and procedure on the writ, see post V.

¶ 126. A mandamus is allowed only to set the inferior jurisdiction in motion; but not for the purpose of requiring it to come to any particular conclusion, or of retracing its steps where it has already acted; and this notwithstanding the party has no other remedy.—People ex rel. Brower v. Wayne County Judge, 1 Mich. 359.

¶ 127. Mandamus is a proper process for setting a court in motion, but not for reviewing its affirmative judicial action, if there is any other effectual remedy.—Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 128. The supreme court may, by mandamus, compel a judicial officer to proceed, hear, and decide, but can neither dictate his determination in advance nor review it after it is made by that writ.—Lyle v. Cass Circuit Judge, 157 Mich. 33.

¶ 129. Although mandamus will lie to compel a circuit judge to sign a decree upon his refusal to sign any decree, it will not lie to compel the signing of a particular decree.—Ambos v. Ingham Circuit Judge, 123 Mich. 618.

§ 22. Motion, request, or demand on respondent to fix duty.

See also post ¶ 278.
Necessity of payment or tender to mature right, see also post ¶ 455.
Necessity of notice to fix duty to settle bill of exceptions, see post ¶ 399.
Necessity and sufficiency of allegations in petition, see post § 136.
Sufficiency of the record to show breach of duty, see post § 161 et seq.
Declination of questions not presented to or considered by respondent judge, see post § 156.
Denial of writ without further inquiry for want of previous motion to respondent, see post ¶ 994.
Statutory provision dispensing with motion to vacate order made on hearing, see Jud. Act, chap. XXXVI, § 2; Comp. L. 1915, § 13438.

¶ 130. The writ will not be granted where the application is for something different from that for which the party has laid the foundation. The refusal of the circuit court to grant a motion for an assessment of damages in replevin is not a proper foundation for an application to the supreme court for a mandamus commanding the circuit court to impanel a jury to assess the value of the property replevied.—People ex rel. Willing v. Jackson Circuit Judges, 1 D. 302.

¶ 131. A party to a cause is not entitled to mandamus to compel a circuit judge to file certain findings of law and fact, where he has neither made application to frame the issues to be tried by the court nor given the other party opportunity to prepare to meet them.—Caille Bros. Co. v. Saginaw Circuit Judge, 155 Mich. 480.

¶ 132. Where no application to the trial court to vacate an order has been made mandamus will not issue to compel it to be done.—Swarthout v. Saginaw Circuit Judge, 99 Mich. 347.

¶ 133. A writ of mandamus to set aside an order of a circuit judge may be properly denied where no application was made to the trial court to set aside the order complained of.—Mesler v. Jackson Circuit Judge, 188 Mich. 195.

¶ 134. Mandamus commanding the circuit court to set aside an order setting aside an order of default and an order of reference will be denied by this court where the relator has made no motion before the circuit court to vacate the order made.—Aitken v. Chippewa Circuit Judge, 146 Mich. 129.

¶ 135. It is not proper to bring mandamus to vacate an order of the circuit court granting a change of venue unless application therefor is first made to the circuit judge.—Freud v. Wayne Circuit Judge, 131 Mich. 606.

¶ 136. A motion to dissolve a temporary injunction is a formal prerequisite to an application for a mandamus to compel the vacating of the same.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 137. On a bill in chancery to avoid deeds obtained by defendant railroad company for a right of way, the court decreed that the deeds were void, but, as defendant had entered upon the land in good faith believing it had title, ordered that defendant should be enjoined from going on the premises or continuing its work unless it should deposit with the register a sum sufficient to cover any prospective award of damages to be made in condemnation proceedings to be begun within twenty days, and that in case of failure to make such deposit or to take such proceedings within the time, the case should be heard on four days' notice. On failure to agree as to the amount to be deposited, a reference was had, defendant examined witnesses, and at its motion the court fixed the sum. Complainant then applied to

the supreme court for a mandamus requiring the court to vacate all its orders except the finding that the deeds were void, and directing it to proceed to final decree. Held, that a motion below by complainant for final decree was an essential prerequisite to the application.—Chesebro v. Kent Circuit Judge, 70 Mich. 650.

¶ 138. One who has obtained judgment by default and not on the merits is not entitled to mandamus to compel a circuit judge to enter "final judgment" where he has not made clear that the kind of final judgment he demanded was one determining the action only.—Orsland v. Wayne Circuit Judge, 138 Mich. 395.

¶ 139. An application for mandamus to compel the circuit court to enter judgment on motion is premature where it appears from the return that the motion is still pending and that respondent has been at all times ready to dispose of the motion and either enter or refuse to enter judgment upon the disposal of the motion; the proper remedy being to ask the court to dispose of the motion.—Presthus v. Gogebic Circuit Judge, 142 Mich. 204.

¶ 140. An application for an order to show cause will be considered even though application has not been made to the circuit court, where the circuit judge is disqualified.—Manly v. Washtenaw Probate Judge, 97 Mich. 615 (note).

¶ 141. Under Comp. L. 1897, § 10504, a relator may bring mandamus to compel the trial court to include in the bill of exceptions the proceedings relating to a motion for a new trial and the reasons given by the judge for overruling the motion, although the relator made no request of the trial judge that he would file his reasons with his decision on the motion.—United States Graphite Co. v. Saginaw Circuit Judge, 158 Mich. 598.

¶ 142. Where a petition is made to a court for the discharge of a person from imprisonment for failure to pay a judgment, it is not necessary that such person make another application to the judge for the vacation of the order of imprisonment in order to entitle him to bring mandamus against the judge for the vacation of such order.—Lapham v. Oakland Circuit Judge, 170 Mich. 564.

¶ 143. In the absence of an application to a trial judge to vacate an order quashing an information in a criminal case, a writ of mandamus will not issue to compel him to do so.—Bennett v. Kalamazoo Circuit Judge, 181 Mich. 700. (Ostrander, J., dissenting.)

§ 23. Laches and delay or neglect of other redress as bar.

See also generally ante § 12.
Waiver of irregularity objected to as making order illegal, see also post ¶ 424.
Delay in moving to assail incompetency order, see post ¶ 474.
Denial of mandamus to prevent condemnation where appropriation was already done, see post ¶ 479.
Delay or laches as defense to mandamus to compel opening of default, see also Defaults ¶¶ 94, 98.

¶ 144. Mandamus to compel the amendment of a judgment for the defendant in replevin so as to require return of the property was denied where the application was not made until several terms of the court after execution had been satisfied, nor until a new judge was elected.—Gray v. Saginaw Circuit Judge, 49 Mich. 628.

¶ 145. Mandamus to compel amendment of bill of exceptions was denied where one term had passed and assignments of error had been filed by relator.—People ex rel. Fowler v. Manistee Circuit Judge, 81 Mich. 72.

¶ 146. Mandamus to compel allowance of filing of exceptions to special findings was denied where motion for leave had been delayed a long time.—Eggleston v. Kent Circuit Judge, 50 Mich. 147.

¶ 147. Mandamus will not issue to compel a circuit judge to sign a bill of exceptions where relator has rested upon the finality of the judgment below for two years.—Besser v. Alpena Circuit Judge, 155 Mich. 631.

¶ 148. Upon a petition for mandamus to compel a circuit judge to grant an extension of time for settling a bill of exceptions, the claim that relator was guilty of laches is untenable where it appears that the delay was caused by the absence of respondent.—Harper v. Wayne Circuit Judge, 155 Mich. 543.

¶ 149. The discretion of a circuit judge in ordering a new appeal-bond to be filed by defendant who has appealed from a judgment in summary proceedings to recover possession of land, will not be interfered with by mandamus where the appellant could have filed a new bond or made a showing before the circuit court of the sufficiency of the sureties in the original bond.—Felcher v. Wayne Circuit Judge, 97 Mich. 638.

¶ 150. After the time for bringing certiorari has expired mandamus will not lie to vacate an order dismissing an appeal from the probate court.—Crittenden v. Macomb Circuit Judge, 97 Mich. 637.

¶ 151. Where the receiver of a corporation has recovered judgment against a debtor of such corporation, and duly assigned the judgment to the corporation, and later filed a petition for his dismissal and the discharge of the sureties on his bond, mandamus will not issue on petition of the judgment debtor to set aside a conditional order that the re-

ceiver and his sureties be discharged, unless such judgment debtor pay the expenses of an extension of his bond; where it appears that the judgment debtor delayed applying for a new trial until after the time for taking out a writ of error had expired and, after a new trial was granted, delayed bringing it on.—Wooster v. Calhoun Circuit Judge, 150 Mich. 459.

¶ 152. Pub. Acts 1907, No. 312, giving the railroad commission power to establish rates, provides that a bill in equity filed by the railroad to test the validity of an order of the commission shall take precedence in the circuit and supreme courts over all other cases. A final determination can be secured within sixty days. The relator railroad allowed over sixty days to elapse after the filing of the commissioner's answer in relator's suit for injunction in the circuit court. Held, relator was not as a matter of law entitled to a writ of mandamus to compel the circuit judge to issue a temporary injunction.—Michigan Cent. R. Co. v. Wayne Circuit Judge, 156 Mich. 459.

¶ 153. After six years' delay mandamus to compel the probate court to set aside its adjudication of mental incompetency on jurisdictional grounds was denied.—Coot v. Willett, 93 Mich. 304.

¶ 154. Mandamus will not issue on the ground of irreparable injury to compel the dissolution of a temporary injunction restraining the construction of a drainage ditch, where the applicant secured a postponement after an early hearing of the cause had been secured by stipulation; since his injuries, if any, were due to his own negligence.—Chatfield v. Lenawee Circuit Judge, 140 Mich. 636.

§ 24. Other existing remedy or recourse as reason against writ.

See also ante ¶ 127.
Appeal or writ of error as preferable or proper remedy, see post § 25.
Certiorari as proper remedy, see post § 26.
Amendment in lower court as proper remedy, see post § 27.
Prohibition rather than mandamus is the remedy where an exercise of unwarranted jurisdiction is to be prevented in the future as well as to vacate orders already made. See Prohibition.

¶ 155. Mandamus never lies to review irregularities in the judicial action of an inferior tribunal where the party injured has another adequate remedy—O'Brien v. Tallman, 36 Mich. 13.

¶ 156. Mandamus will not lie when there is another adequate remedy by appeal.—Mardian v. Wayne Circuit Judge, 118 Mich. 353.

¶ 157. It is a general rule that the writ of mandamus does not lie where the law has provided another remedy.—Glinnan v. Detroit Recorder's Court Judge, 173 Mich. 674.

¶ 158. The supreme court will not review an interlocutory order of a court by mandamus if there is another adequate remedy.—Zemon v. Wayne Circuit Judge, 171 Mich. 589.

¶ 159. The writ of mandamus will not be allowed to take the place of an appeal or a writ of prohibition, or any other writ to review the action of the lower court.—Wells v. Montcalm Circuit Judge, 139 Mich. 544.

¶ 160. An execution on the judgment in a cause appealed from before a justice was antedated, and a motion to require the sheriff to return it for correction was denied. Mandamus to compel the circuit judge to grant the motion was denied, as in any proceeding against the sureties on the appeal bond the facts could be shown.—Jennings v. Kalamazoo Circuit Judge, 44 Mich. 99.

¶ 161. A mandamus to compel a circuit judge to imprison, for contempt for refusal to answer questions, a complainant in a suit in equity pending in another state, who had been summoned before the judge as a witness under How. St. § 7455, was denied, on the ground that the court in which the suit was pending had power to compel the party to make any proper disclosure by refusing to allow him to proceed until he should do so.—Atchison, T. & S. F. R. Co. v. Jennison, 60 Mich. 232.

§ 25. ——Appeal or error as proper remedy.

For further applications of the rules stated in this section, see sections following throughout division II.
For review of new trial orders, see post § 36.
Correction of interlocutory orders, see post § 38.
Continuance orders, see post § 40.
Reference and receivership proceedings and orders, see post §§ 42, 43.
Cost orders and allowances as reviewable on error or appeal, see also post § 49.
To review or correct decision of appeal or certiorari case from inferior court, see post §§ 61-63.
Appeal to circuit or mandamus to correct probate orders, see post §§ 64, 65.
Remedy to review eminent domain orders, see post § 66.
For cases holding that appeal or error are not proper methods of review because mandamus lies, see Appeal § 3.
Office and functions of writ of error and appeal, see Appeal, I.

¶ 162. Mandamus will not lie where there is a remedy by appeal or writ of error.—Lyle v. Cass Circuit Judge, 157 Mich. 33.

¶ 163. Except in cases where delay is calculated to produce injury, mandamus will not issue to control the action of the circuit

judge if the aggrieved party has a remedy by appeal or writ of error. So held where the writ was sought to compel the circuit judge to quash a summons for alleged insufficient service.—Michigan Mut. Fire Ins. Co. v. Wayne Circuit Judge, 112 Mich. 270.

¶ 164. Mandamus should not issue where error or appeal will lie, except where the slowness of legal forms is likely to produce immediate injury or mischief which ought to be prevented.—Cattermole v. Ionia Circuit Judge, 136 Mich. 274.

¶ 165. The fact that an appeal from an order that evidence in a chancery suit be heard in open court would be expensive does not justify the bringing of mandamus to vacate the order.—Tarsney v. Wayne Circuit Judge, 152 Mich. 641.

¶ 166. Mandamus is not the proper remedy for the review of an appealable order in a chancery case.—Thomas v. Wayne Circuit Judges, 97 Mich. 606; Hall v. Wayne Circuit Judge, 111 Mich. 395.

¶ 167. Mandamus will not lie to obtain a decision upon the merits in a chancery case, appeal being the proper remedy.—Sherwood v. Ionia Circuit Judge, 105 Mich. 540.

¶ 168. In a bill for divorce, a wife secured a ruling giving her possession of the furniture formerly used by herself and husband. On mandamus to vacate the order, held, that although the relator husband might be legally entitled to the furniture, the supreme court would not review the discretion of the lower court where the order entered was final and appealable, and no injustice appeared to be done.—Price v. Kent Circuit Judge, 159 Mich. 614.

¶ 169. Mandamus will not lie to determine which circuit court has jurisdiction of a divorce proceeding, where relator has pleaded the pendency of a suit in another county in abatement of one brought before respondent, since the question could be determined on appeal.—Wells v. Montcalm Circuit Judge, 139 Mich. 544.

¶ 170. Mandamus will not lie to review irregularities in the judicial action of an inferior court; error is the proper remedy.—People ex rel. Mabley v. Detroit Superior Judge, 32 Mich. 190.

¶ 171. Mandamus does not lie where the remedy sought is the revision of a final judgment on matters of record, and where everything necessary to a determination may be returned on writ of error.—Olson v. Muskegon Circuit Judge, 49 Mich. 85.

¶ 172. Application was made for writ of mandamus to compel the respondent to set aside an order of court made by him. Held, that mandamus is not the proper remedy; that, the order being in effect a judgment, a complete and adequate remedy is open to plaintiff by writ of error.—Kingsley v. Kent Circuit Judge, 171 Mich. 305.

¶ 173. Mandamus will not be granted where a writ of error will afford adequate relief.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 174. Mandamus not error is the proper remedy to review a judgment dependent on the question of the validity of a notice of trial.—Worth v. Hand, 30 Mich. 264.

¶ 175. Mandamus is not the proper remedy to compel a circuit judge to review a decree under which petitioner's land was sold for drainage taxes, and to allow petitioner to answer, the petitioner alleging the illegality of the tax and nonservice of subpoena, but not that the petition itself and the list of lands were not duly advertised; the statute authorizes an appeal.—Wiley v. Tuscola Circuit Judge, 86 Mich. 381.

§ 26. ——Certiorari as proper remedy.

Office and functions of certiorari, see Certiorari.

For cases holding that certiorari is not and that mandamus is the proper remedy, see also Certiorari § 7.

¶ 176. Mandamus is not the proper proceeding where the relief sought is the revision of a final judgment of matters of record, and where everything necessary to a determination may be returned on a writ of certiorari.—Hartz v. Wayne Circuit Judge, 164 Mich. 35.

¶ 177. Mandamus will not lie to compel a circuit judge to vacate an order denying a motion to dismiss quo warranto proceedings on the ground that leave of court to file the information was not obtained, another adequate remedy being available.—Peninsular Club of Grand Rapids v. Kent Circuit Judge, 150 Mich. 614.

¶ 178. Where a motion to dismiss quo warranto proceedings is made and denied, a contention on petition for mandamus, that a plea to the information would have been a waiver of the question of jurisdiction raised in the motion to dismiss, constitutes no reason for issuing the writ, the matter of waiver being one of choice.—Peninsular Club of Grand Rapids v. Kent Circuit Judge, 150 Mich. 614.

¶ 179. Mandamus is not the proper remedy to correct the action of the circuit court in allowing a new affidavit to be filed in an attachment case in the place of a void original.—People ex rel. Bradley v. Branch Circuit Judges, 1 D. 319.

¶ 180. Mandamus is not the proper remedy to compel a circuit judge to vacate an order

denying an application to dissolve a writ of attachment; certiorari is the proper writ to review his ruling.—S. K. Martin Lumber Co. v. Menominee Circuit Judge, 116 Mich. 354.

§ 27. ——Remedy by amendment in lower court.

Available motion for relief from default as bar to mandamus, see post ¶ 350.
Further amendment as remedy for improper amendment, see post ¶ 219.
Necessity of motion or request to trial court to fix duty, see ante § 22.
Motion in respondent's court as proper remedy to correct formal defects in forcible entry complaint and process, see also Forcible Entry ¶ 119.

¶ 181. Mandamus will not be granted to compel the circuit court to set aside defective proceedings, when the defects are such as may be obviated by amendment in that court.—People v. Calhoun Circuit Judges, 1 D. 417.

¶ 182. In a suit by a city to compel relator railroad to build a bridge over a street, the circuit court made a last adjournment of the suit on June 15, 1908, and directed the order against relator to be entered. It was not actually entered until August 7, 1908. Held, mandamus would not lie on this account to vacate the order, since the proceeding might be corrected by an order nunc pro tunc.—Chicago, D. & C. G. T. Junct. R. Co. v. St. Clair Circuit Judge, 156 Mich. 567.

§ 28. Review of discretionary orders and acts.

Decisions resting in fact, see post § 29.
New trial orders, see post § 36.
Order reopening or denying reopening of case for further proofs, see post ¶ 230.
Entering, making, vacating, and modifying orders and judgments, see post § 37 et seq.
Orders on motions for change of venue, see post § 39.
Injunctional orders, see post §§ 44, 45.
Postponement of hearing pending collateral litigation, see also post ¶ 226.
Burden of showing improper exercise of discretion, see post § 163.

¶ 183. Mandamus does not lie to review the exercise of judicial discretion.—People ex rel. United States Attorney v. Monroe County Probate Judge, 16 Mich. 204; People ex. rel. Ætna Live Stock & Tornado Ins. Co. v. Wayne Circuit Judge, 20 Mich. 220; People ex rel. Evans v. Saginaw Circuit Judge, 89 Mich. 123; People ex rel. Mabley v. Detroit Superior Court Judge, 41 Mich. 31.

¶ 184. An order to stay waste is discretionary and will not be compelled by mandamus.—People ex rel. Parks v. Marquette Circuit Judge, 38 Mich. 244.

¶ 185. Mandamus does not lie to review the discretion of a circuit judge in refusing a motion to allow one judgment to be set off against another.—People ex rel. Wells v. St. Joseph Circuit Judge, 39 Mich. 21.

¶ 186. Mandamus will not be granted to review the refusal of a circuit court to rescind an order holding a party to bail, where bail was properly demandable; a fortiori where special bail had been perfected.—People ex rel. Cohn v. Detroit Superior Court Judge, 40 Mich. 169.

¶ 187. Where it is evident that an order setting aside a judgment would not have been granted but for a stipulation between the parties, the conditions of which have not been complied with, the order cannot be sustained as an exercise of discretion, and mandamus will lie to vacate it.—People ex rel. Roche v. Branch Circuit Judge, 26 Mich. 370.

§ 29. Review of decisions of fact.

Injunctional orders based on facts, see post § 45.
Probate decision as to fitness of appointee as personal representative, see post ¶ 463.
Refusal on showing of facts to open default, see post ¶ 354.

¶ 188. The decision of an inferior court acting judicially upon questions of fact, or of law, if the latter are properly before it for judicial determination, cannot, however erroneous, be reviewed by mandamus; but where the case does not, on facts or evidence, legitimately raise the question of law or fact decided, so that the court could act judicially upon it, its action is not properly judicial, and no assumed determination of the question, or order resting on it, will preclude the remedy by mandamus if the case is suited thereto in other respects.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 189. A motion for an order to show cause why a case should not be transferred was denied where the circuit judge, in the exercise of his statutory power, had passed upon certain disputed facts.—Passmore v. Saginaw Circuit Judge, 54 Mich. 237.

¶ 190. Where solicitor for defendant below applies to the supreme court for mandamus to compel a circuit judge to grant a motion to vacate a decree in so far as it allows a fee to the solicitor for complainant, and to allow a fee to solicitor for defendant, the writ will be denied, where the respondent states in his return that he decided against the claim of relator from his knowledge of the history of the case, and the services rendered in it.—Wood v. Wayne Circuit Judge, 150 Mich. 71.

§ 30. Issuance, regulation or quashal of process or writs.

See also ante ¶ 163.
Mandamus to set aside or perfect service, see post § 31.

To compel admission to special bail, see ante ¶ 186.
Issuance and control of execution and other final executive writs, see post §§ 51, 52.
Issuance of warrants for arrest for crime, see post § 57.
Remedy for improper attachment proceedings or dissolution, see also ante § 26, ¶¶ 179, 180.
Correction of orders of quashal and dismissal, see post § 46.
Mandamus to compel circuit judge to issue mandamus, see also post ¶ 797.
Compelling action by justice of the peace, see post § 67.
Mandamus to test refusal to quash capias, see also Civil Arrest ¶ 85.
Occasion and duty to issue, quash, or control process, see Process; Attachment; Replevin.

¶ 191. Mandamus to compel the quashing of a writ of capias ad respondendum was denied, where the affidavit for capias stated a cause of action and the judge passed upon a disputed question on affidavits.—Krekler v. Kent Circuit Judge, 135 Mich. 94.

¶ 192. Mandamus will not lie to compel the setting aside of an order quashing a writ of capias ad respondendum, the judgment being final and there being a remedy by writ of error.—Cattermole v. Ionia Circuit Judge, 136 Mich. 274.

¶ 193. Mandamus will not lie to compel a circuit judge to allow a motion to discharge defendant sued by capias on the ground that the capias action has become res adjudicata and that the tort on which it is based has been waived by suit in assumpsit resulting in such judgment, both which facts are pleaded defensively in the capias suit; since the motion is not a proper way to anticipate and try the issues.—Polasky v. Kalamazoo Circuit Judge, 147 Mich. 197.

¶ 194. Vacation of an order denying an order to quash a capias and proceedings thereon will not be compelled at the relation of the person arrested on the ground that the affidavit is technically deficient, where relator has made it to appear to the court that the facts set out in the affidavit as appearing of record are true, and only the conclusions of law making the relator amenable to the writ are disputed.—Robinson v. Branch Circuit Judge, 142 Mich. 70.

¶ 195. Mandamus will not lie to compel the vacation of an order quashing a writ of replevin with costs, such order being final and reviewable on error.—Dages v. Sanilac Circuit Judge, 122 Mich. 490.

¶ 196. In the prosecution of a complaint made by a dairy and food inspector, the deputy attorney general of the state and the state's attorney had a controversy as to whether the state or the county should pay the subpoena, witness, and mileage fees. The circuit judge issued the subpoenas, with an entry on their face to the effect that the county should not be liable for the fees. Held, mandamus would lie to compel the judge to issue them without such entry, and in the usual form.—Chase v. Kalamazoo Circuit Judge, 154 Mich. 271.

¶ 197. Mandamus is not the proper remedy against abuse of process of courts, and against legal proceedings instituted for delay and annoyance.—Burt v. Wayne Circuit Judge, 82 Mich. 251.

¶ 198. The proper remedy, where a party to the record is aggrieved by an order granting a writ of assistance, is by appeal, and not by mandamus to compel the court to set aside the order.—Aldrich v. Wayne Circuit Judge, 111 Mich. 525.

§ 31. Setting aside or perfecting service.

¶ 199. Mandamus lies to vacate the service of a civil capias wrongfully issued.—Baldwin v. Branch Circuit Judge, 48 Mich. 525.

¶ 200. Mandamus lies to set aside the service of a summons if made upon one who at the time is outside of the jurisdiction in which he lives, and is there for the sole purpose of attending as a necessary witness in other cases.—Mitchell v. Huron Circuit Judge, 53 Mich. 541.

¶ 201. Mandamus will be granted to compel a judge to set aside a service of summons, where such service was breach of privilege and abuse of process.—Jacobson v. Wayne Circuit Judge, 76 Mich. 234.

¶ 202. On a writ of mandamus by the supreme court to set aside an order setting aside the service of a declaration on the ground the witness was privileged, the matter will be considered because the court below refused to retain jurisdiction, and because, further, the order setting aside the service of the declaration is not, necessarily, a final order, reviewable on error.—Coatsworth v. Wayne Circuit Judge, 177 Mich. 565.

§ 32. Regulation and settlement of pleadings and amendments.

See also post ¶ 252.
Compelling dissolution of injunction granted on insufficient bill, see post § 45.
Compelling ineffective amendments, see also ante ¶ 38.
Impropriety of mandamus to vacate order striking plea which was afterwards waived, see ante ¶ 34.
Requiring entry of judgment on demurrer after pleading over, see also ante ¶ 40.
Propriety and duty of allowing amendment, striking, or other requested action on the pleadings, see Pleading; Equity, VII.

¶ 203. Mandamus is the proper remedy of the party seeking the reversal of a decision of the circuit court on a motion to strike a declaration from the files in a common-law action. The motion and decision would constitute no part of the common-law record, and exceptions could not be alleged to the decision.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

¶ 204. Mandamus does not lie to set aside an irregular plea in chancery.—People ex rel. Hunt v. Jackson Circuit Judge, 41 Mich. 5.

¶ 205. Mandamus will not lie to review the action of a judge in striking a cross-bill in a divorce is impertinent and scandalous, the proper remedy being by appeal.—Kellogg v. Wayne Circuit Judge, 167 Mich. 95.

¶ 206. Mandamus will not lie to compel a judge to vacate an order striking a plea in abatement from the files, where the result would be different in no essential respect from what it would have been had a jury been directed to find for plaintiff upon a trial of the issue raised by such plea; as thereby the judge "proceeded and determined" the issues.—Steel v. Clinton Circuit Judge, 133 Mich. 695.

¶ 207. Mandamus will not lie to compel the setting aside of an order sustaining a demurrer to a plea in abatement.—Grand Rapids & I. Ry. Co. v. Charlevoix Circuit Judge, 133 Mich. 122, overruling Carpenter v. St. Clair Circuit Judge, 122 Mich. 323.

¶ 208. Where in the trial of a cause counsel for plaintiff declines to amend his complaint to show jurisdiction because no such declaration is necessary, either party may secure an order which will dispose of the case in the court below and review the ruling on error, a proceeding in which they will be entitled to have strict legal rights determined. Hence mandamus will not lie.—Reynolds v. Mecosta Circuit Judge, 148 Mich. 470.

¶ 209. Mandamus to compel the striking from the files of a replication in quo warranto to try the title to an office, on the grounds that certain averments regarding relator's title appeared for the first time in the replication and that under C. C. Rule 46 (e) the respondent was given no opportunity to reply, was denied, the circuit court having power, on special application, to permit a further reply, and such application being the proper practice.—Swart v. Chippewa Circuit Judge, 119 Mich. 598.

¶ 210. Mandamus lies to correct the action of the trial court in ordering a bill of particulars, if it goes beyond what is properly required to be stated in such a bill.—Van Vranken v. Wayne Circuit Judge, 85 Mich. 140.

¶ 211. Mandamus will not lie to review the decision of the trial court denying a motion that a more specific bill of particulars be filed in a suit in assumpsit, writ of error being the proper and adequate remedy.—Olds Motor Works v. Wayne Circuit Judge, 164 Mich. 470.

¶ 212. One Holmes sued relator for services rendered, and relator demanded a further bill of particulars. Holmes in a petition for discovery set forth that he was employed by relator, and that the latter had all the books in his possession containing a record of Holmes' services. Held, the lower court properly granted the petition to enable Holmes to prepare the bill of particulars, and mandamus to vacate the order should be dismissed.—Smith v. Wayne Circuit Judge, 158 Mich. 588.

¶ 213. Whether mandamus will lie to get rid of an amendment to a declaration whereby a new and distinct cause of action is introduced and the identity of the cause of action for which the suit was originally instituted is destroyed, quære.—People ex rel. Powers v. Kent Circuit Judge, 30 Mich. 387.

¶ 214. Mandamus will not be granted to compel a circuit judge to vacate an order denying, in his discretion, an amendment of a declaration.—Pratt v. Montcalm Circuit Judge, 105 Mich. 499.

¶ 215. The action of the circuit judge in permitting a plaintiff to amend his declaration, against defendant's objection that the amendment sets up a new and different cause of action, is not reviewable on mandamus but on error.—St. Clair Tunnel Co. v. St. Clair Circuit Judge, 114 Mich. 417.

¶ 216. Writ of error and not mandamus is the proper procedure to obtain review of an order setting aside an order allowing an amendment to a plea.—Skutt v. Kent Circuit Judge, 136 Mich. 477.

¶ 217. Mandamus is not a proper remedy to review the action of the Circuit Court in refusing to strike an amended declaration from the files on the ground that it sets up a new cause of action.—City of Detroit v. Wayne Circuit Judge, 125 Mich. 634.

¶ 218. An order before trial denying leave to file an amended declaration, being reviewable on error after judgment on proper exceptions, will not be reviewed by mandamus.—Jones v. Wayne Circuit Judge, 141 Mich. 408.

¶ 219. Mandamus will not lie to compel a circuit judge to strike from the files an amendment to a chancery bill, which amendment he has discretion to allow, for insufficiencies which can be remedied by another amendment.—Third National Bank v. Wayne Circuit Judge, 81 Mich. 438.

¶ 220. Mandamus is improper to require the striking from the files of an amended declaration which permitted plaintiff to continue the action in the name of herself as survivor of herself and her deceased husband after a decision by the Supreme Court that the action was single and could not be split, the original declaration having pleaded a sole cause of action.—Blackburn v. Alpena Circuit Judge, 136 Mich. 48.

¶ 221. In an eminent domain suit to appropriate land for a cemetery, the defendant in her answer set out that the city had contracted with a mining company by which the latter was to mine the land under the old cemetery for its own profit; that the mining company had secured new ground to which it agreed to remove the bodies from the old cemetery; that it had a predominating influence on the city government; and other like allegations. Held, mandamus would not lie to compel the circuit judge to vacate an order striking out these and other immaterial parts of the answer.—McDonald v. Marquette Circuit Judge, 159 Mich. 367.

§ 33. Hearing and disposal of motions.

Mandamus to correct orders on motions, see post § 36 et seq.
Correction of motions and orders settling pleadings, see ante § 32.
Motions and orders based on executions, see post § 51.
Motion practice and rights of moving parties and opponents, see Motions and Orders.
To compel hearing of motion relating to another judge's case, see also Judges ¶ 12.

¶ 222. Mandamus lies to compel the hearing of a motion for continuance made by parties who have filed no affidavit of merits to prevent inquest.—People ex rel. Begole v. Ionia Circuit Judge, 32 Mich. 61.

¶ 223. The supreme court will not review an interlocutory motion on mandamus when the court does not refuse to proceed with the case, if there is another adequate remedy, though mandamus may be resorted to in some cases if the court does so refuse.—Geddis v. Wayne Circuit Judge, 151 Mich. 122.

§ 34. Hearing, taking proofs, and completion of trial.

Compelling hearing and disposal of motions, see ante § 33.
Requiring probate judge to proceed to hearing, see also post ¶ 473.
To compel proper action by justice of the peace, see post § 67.
To compel hearing in habeas corpus case, see post ¶ 417.
Correction of improper continuance, see post § 40.
Correction of decree taken on improper trial by jury, see also post ¶ 243.
Denial of mandamus where judgment against relator could be only outcome of trial, see also ante ¶ 37.
To compel setting down for hearing at term already past, see also ante ¶ 41.
Right to bring case on for trial or hearing and mode of taking proofs thereon, see Calendar; Equity, VIII; Trial.

¶ 224. Mandamus lies to compel a circuit judge to proceed to the hearing of a chancery cause in open court where such hearing has been regularly claimed, unless an order has been made upon good cause shown directing it to be proceeded in otherwise.—People ex rel. Stebbins v. Barry Circuit Judge, 27 Mich. 170.

¶ 225. Mandamus will not lie to compel a court to proceed with a trial that has been enjoined.—Ives v. Muskegon County Circuit Judge, 40 Mich. 63.

¶ 226. The writ will not compel a chancery judge to proceed with a hearing, where in his discretion he has postponed it awaiting the outcome of a law case pending on error and affecting the same subject matter.—Schmid v. Benzie Circuit Judge, 138 Mich. 452.

¶ 227. Mandamus lies to compel the vacating of an order dismissing a bill in chancery filed to wind up a mining company's affairs, and to compel the circuit court to proceed with the case.—Brown v. Pontiac Min. Co., 105 Mich. 653.

¶ 228. An order of the trial judge sending the issues in a suit for annulment of marriage to a jury will not be ordered vacated by mandamus in view of his right on his own motion to make another order for jury trial under How. St. § 6622, even if the first was erroneous.—Maier v. Wayne Circuit Judge, 112 Mich. 491.

¶ 229. An order that evidence in a chancery suit be heard in open court is appealable, and therefore mandamus to vacate it does not lie.—Tarsney v. Wayne Circuit Judge, 152 Mich. 641.

§ 35. Reopening or rehearing of case.

New trial orders, see post § 36.
Propriety and duty of allowing reopening, see Equity § 173; Trial, V, B.
Propriety of rehearing in chancery, see Equity § 229 et seq.
Mandamus to compel reopening of chancery cause for further proofs, see also Equity ¶ 717.

¶ 230. While the supreme court will hesitate to act in matters involving the discretion of a circuit judge, a mandamus was issued to compel on proper terms the vacation of an order closing proofs in a chancery case, where it appeared that the issues were important, and ought not to be disposed of without proofs being taken on both sides, and that the failure to take proofs on the part of the relator was due to the illness of

one of its solicitors.—Lansing Lumber Co. v. Ingham Circuit Judge, 108 Mich. 305.

§ 36. Grant or vacation of order for new trial.

Necessity of previous request to compel statement of reasons, see ante ¶ 141.
Necessary allegations in petition, see post ¶ 818.
Sufficiency of record showing against respondent judge, see post § 161.
Rehearing orders and orders reopening proofs, see ante § 35.
Propriety, grounds for, and duty of allowing new trial, see New Trial.

¶ 231. The discretionary power to grant a new trial in the circuit court is not reviewable on mandamus.—People ex rel. Ætna Live Stock Fire & Tornado Ins. Co. v. Wayne Circuit Judge, 20 Mich. 220; People ex rel. Stork v. Detroit Superior Court Judge, 41 Mich. 5.

¶ 232. Mandamus will not be issued to interfere with the discretion—unless it is palpably abused—of the circuit court in refusing or granting a new trial in a civil case.—Detroit Tug & Wrecking Co. v. Wayne Circuit Judge, 75 Mich. 360; Manufacturers' Mut. Fire Ins. Co. v. Gratiot Circuit Judge, 79 Mich. 241; Chicago & G. T. R. Co. v. Genesee Circuit Judge, 89 Mich. 549.

¶ 233. Where the affidavit on a motion for a new trial contains something upon which the circuit judge is called upon to exercise his judgment, it becomes a matter addressed to his discretion, and this court has no authority to issue a mandamus to direct him to rescind his order.—People ex rel. Shimer v. Branch County Circuit Judge, 17 Mich. 67.

¶ 234. The granting or refusing a new trial upon the ground of the jury's misconduct rests in the discretion of the trial judge, and if that discretion is abused mandamus is the proper remedy.—Gray v. Barton, 62 Mich. 186.

¶ 235. Mandamus to vacate an order for a new trial in ejectment for want of notice to the opposite party was denied in the court's discretion.—People ex rel. Dennison v. Genesee Circuit Judge, 37 Mich. 281.

¶ 236. Where a circuit judge set aside a judgment and ordered a new trial on the ground of having discovered, as he supposed, that he had an interest in the case, mandamus to vacate his order was refused.—People ex rel. Alderman v. Montcalm Circuit Judge, 41 Mich. 550.

¶ 237. Mandamus lies to compel a circuit judge to set aside a verdict and grant a new trial because of the jury's communicating and drinking with others after being sent out to consider their verdict.—Churchill v. Alpena Circuit Judge, 56 Mich. 536.

¶ 238. Mandamus lies to compel the granting of a new trial where a default judgment in attachment exceeds the sum sworn as due in the affidavit with interest.—Rose v. Newaygo Circuit Judge, 74 Mich. 332.

¶ 239. Whether mandamus will lie to compel the lower court to give his particular grounds for overruling a motion for a new trial, quære.—Board of Education, City of Grand Rapids v. Brown, 159 Mich. 148.

§ 37. Correction or vacation of orders and decisions.

Discretionary orders, see ante § 28.
Interlocutory orders generally, see post § 38.
Change of venue orders and transfer orders, see post § 39.
Continuance orders and denials, see post § 40.
Orders relating to discovery and inspection of documents, examination and depositions, see post § 41.
Reference and receivership orders, see post §§ 42, 43.
Injunctional and dissolution orders, see post §§ 44, 45.
Dismissal, discontinuance, and nonsuit orders, see post § 46.
Default orders and orders refusing to open defaults, see post §§ 47, 48.
Cost orders and allowances, see post § 49.
Orders after judgment relating to final process, see post §§ 51, 52.
Judgments and sentences in criminal cases, see post § 57.
Vacation or correction of probate orders and decrees, see post §§ 64, 65.
Grant of new trial, see ante § 36.
Correction of record of the judgment, see post § 50.
Necessity of motion or request for desired performance, see ante § 22.
Laches as bar to relief, see ante § 23.
To compel entry of judgment beyond respondent's power, see ante ¶ 53.
Appeal or writ of error as proper remedy, see ante § 25.
Certiorari as proper remedy for errors of record, see ante § 26.
Motion for amendment as proper remedy, see also ante § 27.
Compelling vacation of unauthorized order for extension of time for settling bill of exceptions, see post ¶ 401.
Right to and propriety of vacating or otherwise relieving from judgment, see Judgments, V, VI.

¶ 240. The setting aside of judgments is a matter resting in the sound discretion of the circuit judge, and mandamus will not issue to compel him to vacate an order setting aside a judgment unless it appears that he has abused that discretion.—McMillan v. Wayne Circuit Judge, 155 Mich. 651.

¶ 241. Setting aside an irregular judgment may be compelled by mandamus.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

¶ 242. Mandamus lies to compel a circuit judge to set aside a judgment irregularly

payment. In 1911, defendants being in default in payment under said agreement, the assignee of complainant in said foreclosure suit filed a petition for a sale of the property under said foreclosure decree. He failed to give notice of the hearing on the petition to defendants. Respondent circuit judge ordered a sale of said premises. Relators, defendants in said foreclosure suit, brought mandamus to compel respondent to vacate said order on the ground that the failure to give notice of the hearing on said petition was jurisdictional. Held, the application for mandamus should be denied, relators' remedy being by appeal if they had any.—Mann v. Ionia Circuit Judge, 169 Mich. 419.

§ 53. Stay and supersedeas.

Rights and duties respecting stay or supersedeas, see Stay.

¶ 377. Stay of proceedings will not be compelled by mandamus for a mere irregularity in procedure.—Culver v. Detroit Superior Court Judge, 57 Mich. 25.

¶ 378. Where a court below has denied a motion founded on affidavits to stay proceedings on a judgment on the ground that it has been compromised and paid, and the compromise and payment are denied by the plaintiff, the supreme court will not grant a mandamus to stay proceedings.—People ex rel. Parker v. Calhoun Circuit Judge, 24 Mich. 408.

¶ 379. Mandamus to compel a circuit judge to stay proceedings for the collection of a judgment was denied where it appeared that he had refused the stay on the ground that the judgment had been assigned before the commencement of the proceedings in garnishment, was subject to a lien for attorney's fees, and was not garnishable at law.—Gunzberg v. Kent Circuit Judge, 42 Mich. 591.

¶ 380. Mandamus is the appropriate remedy by which to review the contention that the court erred in refusing to stay execution against the relator, an administrator, individually and personally, pending the final decision on appeal.—Luther v. Kent Circuit Judge, 151 Mich. 71.

§ 54. Allowance of and procedure for civil appeal or error.

Rights of appeal or review by writ of error and duty of trial court preparatory thereto, see Appeal.

Proper remedy for amendment of appeal bond, see Appeal § 88.

Preparation and settlement of record and bill of exceptions, see post § 55.

Compelling extensions of time for preparation of record, see post § 56.

Appeal and certiorari cases in circuit court from inferior tribunals, see post §§ 61-63.

Contempt orders to enforce cost allowance, see post ¶ 420.

Review in habeas corpus cases, see post § 58.

¶ 381. Mandamus is not the proper remedy to procure a sufficient appeal bond.—Pulte v. Wayne Circuit Judge, 47 Mich. 646.

§ 55. Preparation and settlement of record for review.

Extending time for settlement, see post § 56.

Compelling settlement of bill or case for appeal, see also Appeal § 115.

Mandamus to vacate order extending time to settle bill, see also Appeal ¶ 438.

Compelling amendment of record on appeal, see also Appeal § 244.

Laches and delay as bar to relief, see ante § 23.

Successor of judge as respondent, see post § 131.

Rights and duties of the trial judge, see Appeal, VI.

¶ 382. Mandamus lies to compel the settlement of exceptions properly presented after a trial by the court alone.—People ex rel. Teller v. Littlejohn, 11 Mich. 60.

¶ 383. Mandamus to compel the settlement and signing of a bill of exceptions was granted where the relator had done all in his power to comply with the orders made for its settlement, and had completed and furnished it in due time.—People ex rel. De Moss v. Van Buren Circuit Judge, 41 Mich. 725.

¶ 384. Mandamus is the proper remedy to compel the circuit judge to incorporate in a bill of exceptions the evidence bearing on a point which the judge has charged there was no evidence tending to prove.—People ex rel. Crane v. Wayne Circuit Judge, 24 Mich. 513.

¶ 385. Mandamus lies to compel the amendment by the circuit court of records sent up on error.—Scribner v. Gay, 5 Mich. 511.

¶ 386. Mandamus will not be granted to require a circuit judge to sign a bill of exceptions in proceedings held before him on habeas corpus.—People ex rel. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

¶ 387. A circuit judge will not be required by mandamus to settle and sign a bill of exceptions in the form requested by appellant, where the former is ready to sign and settle such a bill as is warranted by the facts.—Corby v. Wayne Circuit Judge, 186 Mich. 533.

¶ 388. Mandamus will not be granted to compel the adoption of a bill of exceptions tendered for settlement by the party taking the exceptions, if the bill adopted was not essentially defective.—People ex rel. Harbaugh v. Wayne Circuit Judge, 32 Mich. 259.

¶ 389. Where, after many meetings to settle upon a proper bill of exceptions, defendant, who presented the bill, abandoned all but one error assigned, and requested the judge to sign the bill as then presented, which contained only plaintiff's evidence, and the court refused the request, and allowed an amendment proposed by plaintiff, which contained a large part of defendant's testimony, the act of the judge in allowing the amendment, which incorporated matter deemed by him material, was an exercise of judicial discretion, and, no abuse thereof being shown, will not be disturbed by mandamus.—Morgan v. Kent Circuit Judge, 150 Mich. 64.

¶ 390. A circuit judge will not be compelled by mandamus to authenticate a proposed record where it is incomplete and does not properly present the evidence though the adverse party files no amendments or corrections.—Alderson v. Newaygo Circuit Judge, 173 Mich. 608.

¶ 391. Mandamus denied, to compel a trial judge to sign a proposed bill of exceptions which he averred to be incomplete and inaccurate.—Pope v. Judge of Recorder's Court, 107 Mich. 25.

¶ 392. Where an application is made to the circuit court for mandamus to compel an official court stenographer to deliver a transcript of testimony upon the tender or payment of the statutory fees the respondent will be remitted to his legal remedy so far as any disputed charges not provided for by the statute are concerned.—Lyle v. Sherman, 147 Mich. 424.

¶ 393. Mandamus to compel the trial judge to settle and sign a bill of exceptions containing none but plaintiff's evidence, which would have presented the motion of defendant to direct a verdict, will be denied, where the judge included other evidence of defendant and where the propriety of the ruling might be regularly reviewed on writ of error whilst the granting of mandamus would necessarily entail an exhaustive examination of the evidence to determine that relator's contention was tenable.—Morgan v. Kent Circuit Judge, 150 Mich. 64.

§ 56. ——Extensions of time.

¶ 394. The supreme court will not, except where the lower court has abused its discretion, reverse on application for mandamus an order denying an extension of time for appeal.—Roberge v. De Lisle, 158 Mich. 16; De Lisle v. Wayne Circuit Judge, Id.

¶ 395. An order extending the time for settling a case on review beyond four months after a decree will not be set aside on mandamus where it appears that the defendant's delay was due to the inability of the complainant to furnish exhibits.—Weber v. Marquette Circuit Judge, 126 Mich. 69.

¶ 396. Where a motion for a new trial has been denied, and within four days thereafter the party moved for an extension of the time in which to settle his bill of exceptions, and his motion was denied, mandamus will lie to compel the court to grant the extension.—Harper v. Wayne Circuit Judge, 155 Mich. 543.

¶ 397. Where a respondent trial judge has exercised his discretion upon a proper showing, and extended the time for settling a bill of exceptions, the upper court will not review the exercise of his discretion in a mandamus proceeding.—Pettinger v. Montmorency Circuit Judge, 164 Mich. 463.

¶ 398. Mandamus will not lie to compel a circuit judge to vacate an order denying a motion to extend the time for settling a bill of exceptions, where the rules of the court were not observed, and it cannot be said that the denial of the motion constituted an abuse of judicial discretion.—Carrier v. Emmet Circuit Judge, 155 Mich. 344.

¶ 399. Mandamus will not issue to compel the extension of time within which to settle a bill of exceptions, where no formal notice of intention to settle such bill was served within the time limited by the original order of the court, and four of the five defendants in no way consented to any extension or delay.—Carrier v. Emmet Circuit Judge, 155 Mich. 344.

¶ 400. In the absence of a written stipulation extending the time mandamus will not be granted to set aside an order refusing to settle a bill of exceptions after the expiration of the time provided in 1897 C. C. Rule 47.—Lake Shore & M. S. R. Co. v. Branch Circuit Judge, 116 Mich. 399.

¶ 401. Mandamus lies to compel the setting aside of an order extending the time to settle a bill of exceptions, where the court extending the time had no authority to do so.—Burgess v. Wayne Circuit Judge, 171 Mich. 583.

§ 57. Arrests and prosecutions for crime or penalty.

See also Arrest ¶ 115.

Mandamus to compel detail of police to watch and make arrests, see post ¶ 533.

Correction of improper change of venue or denial thereof, see also ante ¶ 261.

Regulation of civil process of arrest, see ante § 30.

Necessity and sufficiency of previous motion to respondent for relief, see ante § 22.

Title of private person to be relator, see post § 127.

Sufficiency of record showing, see post § 161.

Error or mandamus as mode of review in criminal cases, see also Indictment § 570.

Mandamus to compel action to correct return on preliminary examination for crime, see Arrest ¶ 114.

¶ 267. The question as to the court's discretion in entering an order requiring plaintiff in an action for personal injuries to submit to a medical examination before trial will not be reviewed by mandamus, as the question can be raised after judgment by appeal or writ of error.—Hooper v. Hally, 175 Mich. 599.

¶ 268. Mandamus does not lie to compel a circuit judge to suppress a deposition taken in a chancery case; the question should be raised on appeal.—Chandler v. Antrim Circuit Judge, 97 Mich. 621.

¶ 269. Mandamus will not lie to vacate an order for the issue of a commission to take a witness' deposition on a motion for a new trial.—Muskegon Booming Co. v. Muskegon Circuit Judge, 97 Mich. 622.

§ 42. ——Reference orders and proceedings.

Grounds and propriety of reference, see Reference.

¶ 270. Mandamus does not lie to review the setting aside of a reference on cause shown.—People ex rel. Taylor v. Osceola Circuit Judge, 30 Mich. 99.

¶ 271. Mandamus lies to compel the circuit court to vacate its action setting aside a referee's report as against the weight of evidence and ordering a new trial.—People ex rel. First Nat. Bank v. Wayne Circuit Judge, 18 Mich. 483.

¶ 272. Mandamus is the proper remedy to compel a circuit judge to set aside his action appointing himself referee in a cause pending before him.—Woodin v. Phoenix, 41 Mich. 655.

¶ 273. Under How. Stat. §§ 7386, 7390, providing for the appointment of auditors when it shall appear that the trial will require investigation of accounts or examination of vouchers, and for their discharge and the appointment of others, etc., the discharge of an auditor is discretionary and not the subject of review by mandamus unless for abuse of such discretion.—Anti-Kalsomine Co. v. Kent Circuit Judge, 123 Mich. 658.

¶ 274. Mandamus does not lie to compel the appointment of commissioners to set off dower, the remedy being by appeal from the order refusing to appoint.—Pulling v. Wayne Probate Judge, 97 Mich. 605.

§ 43. ——Receivership orders and proceedings.

See also ante ¶ 256.

Mandamus to annul ex parte appointment of receiver for corporation, see also Corporations ¶ 878.

Grounds and propriety and duty of allowing receivership or relief incident thereto, see Receivers.

¶ 275. If the order refusing to appoint a receiver is a final one, an appeal will lie.—Zemon v. Wayne Circuit Judge, 171 Mich. 589.

¶ 276. Mandamus to compel a judge to show cause why a receiver was not appointed as prayed by a judgment creditor's bill is not a proper remedy. Appeal lies.—Zemon v. Wayne Circuit Judge, 171 Mich. 589.

¶ 277. Mandamus will not lie to vacate an order appointing a receiver, whereby the possession of property is divested, as such order is appealable.—Mardian v. Wayne Circuit Judge, 118 Mich. 353.

¶ 278. To warrant interference by mandamus with the decision of a circuit judge confirming the appointment of a receiver upon a motion to vacate the same, it is necessary for the moving party to show some overwhelming objection in point of propriety or some fatal objection upon principle to the person named.—Gypsum Plaster & Stucco Co. v. Kent Circuit Judge, 105 Mich. 497.

¶ 279. Mandamus will not lie, whether an appeal does or not, to review an order for the appointment of a receiver for an assigned estate.—Scott v. Wayne Circuit Judge, 58 Mich. 311.

¶ 280. Mandamus lies to vacate a void order appointing a receiver to manage a corporate business, and granting an interlocutory injunction depriving directors of control.—People ex rel. Port Huron & G. R. Co. v. St. Clair Circuit Judge, 31 Mich. 456.

¶ 281. Mandamus does not lie where there is another adequate remedy at law; and therefore does not lie to compel the circuit court to vacate an order appointing a receiver of a corporation, because such order is appealable.—Pontiac, O. & N. R. Co. v. Oakland Circuit Judge, 142 Mich. 257.

¶ 282. An order dismissing a receiver and discharging the sureties on his bond is reviewable on appeal under section 10890, Comp. L. 1897, and mandamus will not issue to set such order aside.—Wooster v. Calhoun Circuit Judge, 150 Mich. 459.

¶ 283. The duty of the circuit judge to order performance of the duty commanded by Comp. L. 1897, § 6144, that a receiver of a state bank shall "pay over all money so collected or received to the state treasurer," is certain and unambiguous and may be enforced by mandamus, regardless of the inconvenience to the parties or the unwisdom of the legislation.—Moore v. Wayne Circuit Judge, 141 Mich. 398.

§ 44. ——Compelling, granting or continuing of injunctions.

Correction of orders denying dissolution or modification, see post § 45.

Compulsion of order to stay waste, see ante ¶ 184.
Occasion and duty to grant injunctions, see Injunctions.

¶ 284. Where in a bill seeking a temporary injunction, the allegations were made on information and belief and without evidence, the order of the lower court denying the bill will not be vacated on mandamus from the supreme court.—Allen v. Wayne Circuit Judge, 159 Mich. 612.

¶ 285. Mandamus will issue to compel a circuit judge to issue an injunction restraining the negotiation of township bonds issued to aid a railroad, contrary to the constitution and decisions of the supreme court, as the refusal of an injunction under such circumstances is not an exercise of discretion in accordance with the law.—Dodge v. Van Buren Circuit Judge, 118 Mich. 189.

¶ 286. Relator, as complainant in a bill in equity, alleged therein that it had acquired a certain right of way for an electric railway; that defendant was proceeding to file a map including twenty-four miles of complainant's road bed with the railroad commission; and that such a course would cause complainant irreparable injury. A temporary injunction was prayed for. Defendant denied some of these allegations in its answer, and set up certain new facts which, if proved, showed complainant not entitled to the relief sought. Upon mandamus to compel the circuit judge to continue a temporary injunction in force, held, since he had not abused his discretion, and relator's rights would be conserved in an appeal on the bill, the writ should be denied.—Grand Rapids Elec. Ry. Co. v. Calhoun Circuit Judge, 156 Mich. 419.

¶ 287. Where a bill for an injunction to restrain the members of a labor union from interfering with the complainants' workmen showed that the members of such union picketed complainants' premises, threatened their employees, and by intimidation and violence sought to prevent them from going to work, and a temporary restraining order had been issued thereon, mandamus lies to compel the circuit judge to set aside an order dissolving such temporary injunction.—Baltic Min. Co. v. Houghton Circuit Judge, 177 Mich. 632.

¶ 288. Relator applied for an injunction to restrain members of a labor union from interfering with his workmen. The affidavits and complaint showed interference with his rights by picketing and by making threats against his employees and by actual violence toward them. Respondent denied the application but suggested that an order to show cause issue, the purpose being to bring members of the union before the court and instruct them as to their duties and thus pour oil upon the troubled waters. Upon an application for a writ of mandamus requiring the judge to issue the injunction, held that the denial of a temporary injunction was an abuse of discretion and writ should be granted.—Ideal Mfg. Co. v. Wayne Circuit Judge, 139 Mich. 92.

¶ 289. On mandamus the exercise of the judicial discretion of the chancellor in refusing to continue an injunction by a stockholder to restrain the issuance of corporate bonds on the ground of their being usurious was not interfered with, as the court could not say that a stockholder was entitled to enjoin a usurious contract, under any and all circumstances as a matter of law.—George N. Fletcher & Sons v. Alpena Circuit Judge, 136 Mich. 511.

¶ 290. Mandamus to compel respondent judge to continue an injunction as originally made was denied, where on a motion for dissolution of the preliminary injunction granted on the application of a stockholder to restrain the issuance of bonds which the corporation had decided to issue to avoid bankruptcy, was the injunction continued but so modified that the bonds drawing six per cent interest might be sold at a price not below 75 cents on the dollar.—George N. Fletcher & Sons v. Alpena Circuit Judge, 136 Mich. 511.

¶ 291. Where a bill to restrain the officers of a foreign corporation from disposing of its property has been dismissed for want of jurisdiction of the court, mandamus does not lie on the ground that if it is not granted the defendant will before the case can be heard on appeal improperly dispose of its assets and leave the relator without remedy, for if the relator has just grounds for his apprehension he may at once appeal, and procure from this court an injunction that will preserve the corporate assets until the appeal is determined.—Hitchcock v. Wayne Circuit Judge, 144 Mich. 362.

¶ 292. The Michigan Railroad Commission put into operation under Act No. 312, Pub. Acts 1907, a certain schedule of rates for carrying excess baggage against the relator railroad. The relator admitted they were not confiscatory, but were remunerative; offered no evidence at the hearings; made no application as provided by the statute, to the commission to change the rates; and took no steps to comply with the commission's order, but pretended that the work of making a new schedule was complicated, when in fact it was simple. The evidence showed that the defendant was operating in Indiana on a schedule lower than the one fixed by the commission. A bill by relator to enjoin temporarily the commission from putting their order into operation was denied by the circuit judge. Held, the circuit judge had not abused his discretion, and mandamus will not lie to compel him to issue the preliminary injunction.—Michigan Cent. R. Co. v. Wayne Circuit Judge, 156 Mich. 459.

¶ 293. Upon the refusal of a circuit judge to grant an injunction under a bill brought to set aside an award, mandamus will not lie to compel him to grant said injunction, where it is not made to appear that the relator will suffer injury if the award is confirmed and where his interests can be protected in the proceedings in equity.—Early v. Ingham Circuit Judge, 166 Mich. 517.

§ 45. ——Compelling dissolution or modification of injunctions.

See also post ¶ 335.

Correction or orders refusing injunctions or refusing to continue them, see ante § 44.

Necessity of previous motion to respondent to vacate or dissolve, see ante § 22.

Laches and delay as bar to relief, see ante § 23.

Where injunction has spent its force, see also ante ¶ 35.

Right of executors to mandamus where legatee injuriously affected does not complain, see also ante ¶ 43.

Occasion for and duty of dissolving or modifying injunctions, see Injunctions.

Mandamus to dissolve injunction against use of streets by railway, see also Injunctions ¶ 449.

Mandamus to compel modification of injunction issued in aid of creditor's bill, see also Injunctions ¶ 472.

¶ 294. Mandamus will lie to review the action of a circuit judge in granting a preliminary injunction, and in refusing to dissolve the same, where the return shows the question in dispute to be one of law, merely.—Ionia, etc., Mut. Fire Ins. Co. v. Ionia Circuit Judge, 100 Mich. 606; Thomas v. Kent Circuit Judge, 116 Mich. 106; Bogert v. Jackson Circuit Judge, 118 Mich. 457; Titus v. Chippewa Circuit Judge, 168 Mich. 507; B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

¶ 295. Mandamus will not ordinarily issue to compel the dissolution of a preliminary injunction, as the discretion of the court will not be interfered with unless abused.—Briggs v. Wayne Circuit Judges, 118 Mich. 200; B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

¶ 296. Mandamus lies to vacate an illegal injunction where the party affected thereby would otherwise have to submit to serious injury, or to the risk of proceedings for contempt in disregarding it.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479; Scott v. Chambers, 62 Mich. 532.

¶ 297. The action of a circuit judge in refusing to dissolve a preliminary injunction will not be reviewed on mandamus where there is no exigency requiring immediate action and the case can be heard on its merits without injury to the rights of defendant, unless the court acted entirely without jurisdiction and the question in dispute is solely one of law.—Central Bitulithic Paving Co. v. Manistee Circuit Judge, 132 Mich. 126.

¶ 298. Where an injunction is an abuse of discretion it may in an urgent case be dissolved by mandamus.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

¶ 299. A mandamus to disturb action by a circuit judge in equity—e. g., to compel the dissolution of an injunction—can issue only upon some exigency that requires prompt action to prevent mischief.—Detroit, L. & N. R. Co. v. Newton, 61 Mich. 33.

¶ 300. On an occasion urgent or pressing mandamus may be awarded to dissolve an injunction the granting of which was an abuse of discretion which cannot be justified on legal principles.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

¶ 301. It is only in very plain cases that the supreme court will interfere by mandamus to control the discretion of a circuit judge in granting an injunction.—Stenglein v. Saginaw Circuit Judge, 128 Mich. 440.

¶ 302. A preliminary injunction will not be dissolved and set aside on a writ of mandamus where there is no abuse of discretion by the trial court, shown in the petition.—Doud v. Mackinac Circuit Judge, 118 Mich. 96.

¶ 303. Mandamus will not be granted to compel a circuit judge to vacate an order dissolving an injunction, where the return shows that the merits of the question were considered, the supreme court rarely interfering with the discretion of the circuit court in such case.—Kelsey v. Wayne Circuit Judge, 120 Mich. 457.

¶ 304. Where the court below has issued an injunction restraining the erection of a building, and it appears that a final decree, obtained after months of delay, would fall far short of preserving defendant's rights, even if rendered in his favor, mandamus is the proper remedy.—Siegel v. Wayne Circuit Judge, 155 Mich. 459.

¶ 305. Denial of mandamus to compel the circuit judge to vacate an order refusing to dissolve an injunction, where the record showed there was jurisdiction to grant the injunction, was sustained upon the discretion exercised by respondent.—Krolik v. Wayne Circuit Judge, 112 Mich. 486.

¶ 306. An order to show cause on petition for mandamus to the circuit judge to dissolve a preliminary injunction was allowed, where the matter was of public interest and a pending public contract, suspended by the injunction, required prompt decision; though the injunction was rightly granted because the contract was authorized under an unconstitutional law.—Township of Ada v. Kent Circuit Judge, 114 Mich. 77.

¶ 307. Mandamus will not issue to compel a circuit judge to dissolve a temporary injunction on the ground that the bill fails to show any equity on the face of it, where such judge has already denied a motion to dissolve on the same ground, and where an appeal or writ of error would be an adequate remedy, under the circumstances.—Chatfield v. Lenawee Circuit Judge, 140 Mich. 636.

¶ 308. The fact that a bill is multifarious is a mere formal objection which does not entitle the relator to the issuance of a mandamus to compel the dissolution of an injunction.—Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204.

¶ 309. In mandamus to compel a chancery court of one county in a proceeding to cancel a benefit certificate for fraud, to vacate an order restraining prosecution of an action at law upon the certificate in another county, it is immaterial that the bill failed to allege the state of the pleadings in the law case.—Mactavish v. Kent Circuit Judge, 122 Mich. 242.

¶ 310. Mandamus lies to vacate an injunction where the bill upon which it was granted was devoid of substance, and could not, therefore, support the application for the writ.—Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

¶ 311. An injunction, under an invalid execution upon stock, to prevent the payment of dividends to the owner may be vacated by mandamus.—Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

¶ 312. Mandamus lies to vacate an order made in one court restraining competent proceedings in another court of co-ordinate jurisdiction.—Maclean v. Speed, 52 Mich. 257.

¶ 313. Mandamus is a proper writ to cause dissolution of an injunction against submission of a proposal to county electors to borrow money, where the only question is one of law.—Thomas v. Kent Circuit Judge, 116 Mich. 106.

¶ 314. Mandamus will not lie to control the exercise of the discretionary right of a chancery court in one county in a proceeding to cancel a benefit certificate for fraud, to restrain prosecution of an action at law upon the certificate in another county.—Mactavish v. Kent Circuit Judge, 122 Mich. 242.

¶ 315. Mandamus will not be granted to compel a circuit judge to dissolve an injunction restraining holders of the majority of the stock of a corporation from holding a meeting for the election of a board of directors under the claim that the former election was invalid.—Chiera v. Wayne Circuit Judge, 97 Mich. 688.

¶ 316. Mandamus will lie to vacate a preliminary injunction restraining a board of supervisors from purchasing a site for county buildings, and from issuing bonds in payment therefor, pursuant to a vote of the electors, where the averments of the bill, conceding them to be true, are insufficient to warrant the issue of an injunction.—Wayne County Sup'rs v. Wayne Circuit Judges, 106 Mich. 166.

¶ 317. A motion to dissolve a temporary injunction, restraining the drain commissioner from emptying water on complainant's land, on the ground that the complainant is not the owner in fee as alleged in his bill denied on a finding that the complainant has interests sufficient to entitle him to the injunction will not be disturbed by mandamus, complainant's interest actually being that of a purchaser in possession from a fee owner.—Emery v. Ionia Circuit Judge, 138 Mich. 542.

¶ 318. A railroad filed a bill to restrain defendant from interfering with and obstructing a certain sidetrack. Defendant answered alleging title to the land and asking affirmative relief. The court in an opinion preceding a decree in the case announced that the bill would be dismissed and the temporary injunction, which had been granted, dissolved. Thereafter and without notice to complainant a decree was made as indicated, but which also restrained complainant from going upon or operating trains across the land. Held that the latter part of the decree would not be vacated upon mandamus since the decree was not void nor did it embrace matters not fairly in issue.—Pere Marquette R. Co. v. Kalkaska Circuit Judge, 139 Mich. 436.

¶ 319. A writ of mandamus compelling the vacating of an injunction restraining intrusion upon an office until the right to the office was settled in the proper proceeding would practically be trying the title to such office, and therefore will not issue.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 320. One McNichols was appointed township clerk to fill out an unexpired term. Relator and McNichols ran for the office at the election and secured a tie vote. The board of election inspectors cast lots and declared relator elected. The circuit court on a bill by McNichols, enjoined relator from interfering with him in performing the office of township clerk. On mandamus to vacate this order, held, the upper court would not review the lower court's discretion in granting it.—Murphy v. Montmorency Circuit Judge, 159 Mich. 392.

¶ 321, A complainant alleged that he was the owner of land, and that defendant was taking down his fences, entering upon his land, and injuring his sod and clover. A temporary injunction was granted by the

lower court. Several points of law were involved in the case respecting the regularity of proceedings for a private highway taken by defendant under Act No. 283, Pub. Acts 1909, and the constitutionality of said statute. The lower court had not passed on the amount of damages due complainant. Held, a writ to vacate the injunction should be denied relator, the defendant in the aforesaid suit. Harbor Springs Lumber Co. v. Emmet Circuit Judge, 160 Mich. 497.

¶ 322. Where the number of saloons in a village is already in excess of the limit prescribed by section 39, Act No. 291, Pub. Acts 1909, an injunction is properly granted against a relator seeking to open a saloon under a license granted by said village, and mandamus will not lie to compel the circuit court issuing such injunction to dissolve the same.—Rohde v. Wayne Circuit Judge, 168 Mich. 683.

¶ 323. If the motion to dissolve a preliminary injunction discloses that material facts are in issue which should be determined only on final hearing, the refusal to dissolve the writ will not be reviewed on mandamus.—B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

¶ 324. The discretion of the trial court in refusing to dissolve a preliminary injunction prohibiting a lessee from making changes in the exterior walls of a demised building without the lessor's consent as required by the lease will not be reviewed on mandamus, where the question whether the proposed alterations will affect the structural stability of the building or increase the fire risk, were properly questions to be determined on final hearing.—B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145.

¶ 325. On bill to restrain the board of election commissioners from printing on the ballots the name of an alleged nominee to fill a vacancy in the office of county prosecuting attorney, whether the circuit court had jurisdiction to grant a temporary injunction as prayed should not be determined by an order requiring the circuit judges to show cause why a writ of mandamus should not issue requiring them to dissolve the temporary injunction, unless the shortness of time before the ballots must be printed will operate to make the temporary injunction final, in which case there would be no other adequate relief.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

§ 46. ——Discontinuance, dismissal or nonsuit orders.

See also ante ¶ 227.
Orders dismissing injunction bills and petitions, see also ante § 44.
Dismissal of appeal or certiorari from inferior court, see post §§ 61-63.
Occasion and duty to allow discontinuance, dismissal or nonsuit, see Discontinuance, Dismissal and Nonsuit.

¶ 326. Mandamus, it seems, is the most appropriate, if not the only, remedy to review a discontinuance allowed before trial.—Yawkey v. Richardson, 9 Mich. 529.

¶ 327. Mandamus to set aside a nonsuit was granted in a case where a motion to set it aside was denied for nonconformity to practice with leave to renew, where it was so renewed and where court below had refused to consider the merits and denied the renewed motion on reasons relating rather to the public convenience than to the mutual rights of the parties, to open the cause.—Lindsay v. Wayne Circuit Judges, 63 Mich. 735.

¶ 328. In a suit for commissions on the sale of real estate, the court after hearing plaintiff's evidence gave him permission to withdraw a juror and discontinue, and stated that unless he did so the court would direct a verdict for defendant. Plaintiff elected to withdraw a juror. The court ordered an entry that a juror was withdrawn and that plaintiff discontinued his case in open court. Plaintiff contended that he did not agree to a discontinuance. Held, there being a final judgment, plaintiff's proper remedy was by writ of error, and not mandamus to correct the judgment entry.—Meyering v. Wayne Circuit Judge, 164 Mich. 604.

¶ 329. An order made by the trial court dismissing plaintiff's suit on account of failure on her part to give security for costs with a judgment for costs against her is a final judgment reviewable upon writ of error, and mandamus is not the proper remedy.—Craig v. Ingham Circuit Judge, 171 Mich. 33. Same v. Porter, Id.

¶ 330. Appeal and not mandamus is the proper remedy to review a final order dismissing a bill of complaint upon the ground that the court did not have jurisdiction, and in such case appeal is the only remedy.—Hitchcock v. Wayne Circuit Judge, 144 Mich. 362.

¶ 331. Where the circuit court, by its order overruling a motion to quash the service and dismiss the case, retains jurisdiction of the case, the remedy is not by mandamus but by writ of error.—Trumbull Motor Car Co. v. Wayne Circuit Judge, 189 Mich. 554.

¶ 332. Mandamus will not lie to compel a circuit judge to dismiss a bill in equity for lack of jurisdiction, Act No. 310, Pub. Acts 1905, having no application.—Warren v. Lenawee Circuit Judge, 160 Mich. 572; Detroit, T. & I. Ry. v. Same, Id.

¶ 333. Mandamus is not the proper remedy to compel a circuit judge to dismiss gar-

nishment proceedings.—Freud v. Saginaw Circuit Judge, 125 Mich. 670.

¶ 334. Where a circuit judge, at the end of a divorce suit in which the defendant is served by publication and does not appear at the trial, states that the complainant has made out a ground for divorce, but has failed to acquire jurisdiction of the defendant, mandamus will not lie to compel the judge to sign a particular decree, but the relator's proper remedy is to appeal from the decree dismissing his suit.—Stevens v. Wayne Circuit Judge, 161 Mich. 130.

¶ 335. Mandamus lies to compel the granting of a motion to dismiss a bill for divorce, the oath to which fails to contain the statutory noncollusion clause, made by the defendant after an appearance and answer, and to dissolve a preliminary injunction granted on filing the bill, no motion to amend or order directing an amendment having been made.—Ayres v. Wayne Circuit Judge, 90 Mich. 380.

¶ 336. Mandamus will not issue to review the denial of a motion to dismiss a will contest, where such motion, is in effect, a motion to dismiss for want of jurisdiction.—Roberts v. Lenawee Circuit Judge, 140 Mich. 115.

¶ 337. A motion to dismiss a will contest (1) because such contest does not survive the decease of contestant, (2) such suit had not been diligently prosecuted, (3) contestant had failed to obey the order of the supreme court adjudging costs against him, is, in effect, a motion to dismiss for want of jurisdiction, and the order thereon cannot be reviewed by mandamus.—Roberts v. Lenawee Circuit Judge, 140 Mich. 115.

¶ 338. On the trial of an action to recover damages for an assault and battery committed in a different county from that in which the parties lived, where the declaration failed to show that the parties lived within the jurisdiction of the court where the venue was laid, and the court upon objection of the defendant to the introduction of evidence on the ground of nonjurisdiction discharged the jury after he had invited the plaintiff to amend to show jurisdiction a mandamus will not issue to compel the setting aside of such order.—Reynolds v. Mecosta Circuit Judge, 148 Mich. 470.

§ 47. ——Default orders and judgments.

Correction of orders opening or refusing to open defaults, see post § 48.

Occasion and duty to enter default, see Defaults.

Setting aside default for deficient proof of service, see also Defaults ¶ 10.

¶ 339. Mandamus may be granted to set aside default prematurely taken.—Rankans v. Ottawa Circuit Judge, 97 Mich. 623; Reid, Murdock & Co. v. Benzie Circuit Judge, 115 Mich. 418.

¶ 340. Mandamus was granted to vacate a default entered upon a plea in abatement filed by unauthorized attorneys and to strike the plea from the files.—Arno v. Wayne Circuit Judge, 42 Mich. 362.

¶ 341. Mandamus was granted to set aside judgment taken by default, where affidavit of service of declaration did not state how service was made.—People's Mut. Ben. Soc. v. Wayne Circuit Judge, 97 Mich. 627.

¶ 342. Mandamus will not lie to compel a circuit judge to set aside a default and judgment on the ground that under the facts shown the court had no jurisdiction, where the court below asserts and retains jurisdiction, since the question can be determined upon a writ of error.—Valley City Desk Co. v. Kent Circuit Judge, 139 Mich. 194.

¶ 343. Mandamus will not lie to compel a circuit judge to set aside a default, where he has granted a motion to set aside the default and permit the filing of a plea upon condition that defendant appear and plead to the merits, since the court's exercise of discretion will not be interfered with, and defendant can raise the question upon writ of error or case made, if he allows the case to go to judgment.—Hallwood Cash Register Co. v. Wayne Circuit Judge, 139 Mich. 198.

¶ 344. Mandamus is not a proper remedy to require a circuit court to grant a motion to set aside a judgment by default against a garnishee, but the validity of such judgment is determinable on appeal by an examination of the record.—Nichol v. Nevers, 196 Mich. 203.

§ 48. ——Orders opening or refusing to open defaults and judgments.

Correction of improper default orders, see ante § 47.

Order for allowance of costs on opening default, see post ¶ 363.

Necessity of previous motion to respondent, see ante § 22.

Grounds and occasion and duty to open or vacate judgments, see Judgments, V, VI.

Occasion, grounds and duty to open default, see Defaults.

¶ 345. Mandamus does not lie to review the opening, for alleged errors, of a judgment by default in the circuit court.—People ex rel. Evans v. Saginaw Circuit Judge, 39 Mich. 123.

¶ 346. Mandamus lies to vacate the setting aside, on mere motion, of a decree in chancery.—York v. Ingham Circuit Judge, 57 Mich. 421.

¶ 347. Mandamus will be granted to a purchaser of real estate to which title had been quieted before his purchase, requiring the circuit judge to set aside an order vacating the decree quieting the title, where such

order was granted without notice to, or knowledge of, such purchaser.—Vincent v. Benzie Circuit Judge, 139 Mich. 90.

¶ 348. Mandamus will not lie to compel the setting aside of an order vacating a decree pro confesso, on substituted service in a suit to quiet title, and allowing interested parties to appear and defend, since chancery practice affords better means for reaching equitable results than are to be found in legal proceedings.—Coffin v. Ontonagon Circuit Judge, 140 Mich. 420.

¶ 349. Mandamus will not lie to compel the setting aside of an order vacating a decree pro confesso, and allowing the grantee of defendant to appear and defend, in a suit to quiet title, though it may appear that the original defendant was not necessarily entitled to appear.—Coffin v. Ontonagon Circuit Judge, 140 Mich. 420.

¶ 350. Mandamus to compel vacation of an order setting aside a default because not made according to proper practice was denied where time remained in which defendant could move to protect his rights and open the default.—Aitken v. Chippewa Circuit Judge, 146 Mich. 129.

¶ 351. Mandamus will issue to compel a judge to vacate an order setting aside a default where the application to set aside was made more than six months after default was entered, in violation of Chancery Rule 7, subd. d.—St. Louis Hoop & Stave Co. v. Wayne Circuit Judge, 155 Mich. 311.

¶ 352. Mandamus does not lie to review the discretion of a court in refusing to reopen a judgment that an affidavit of nonexecution may be supplied.—Chicago & N. E. R. Co. v. Genesee Circuit Judge, 40 Mich. 168.

¶ 353. Mandamus will not lie to compel a circuit judge to set aside an order denying the motion of defendants to set aside their default in not pleading, with leave to plead or demur, where before the time had expired for defendants to plead, they obtained from the court ex parte 10 days further time, but neglected to serve notice of such extension upon plaintiff's attorneys, who duly entered default, defendants, within the 10 days, filing and serving a demurrer, which was stricken from the files by order of the court, and where defendants failed to comply with the rules by filing an affidavit of merits, pleading issuable, and tendering the costs of the default; but defendants may proceed under the rule of practice to set aside the default in 10 days.—Walsh v. Circuit Judge of Wayne County, 76 Mich. 470.

¶ 354. Where a circuit judge in hearing affidavits upon a relator's motion to set aside a default, honestly exercising his judgment, believes defendant's affidavits are untrue, and denies the motion, the upper court will not upon mandamus interfere with his ruling.—Boynton v. Kent Circuit Judge, 163 Mich. 500.

¶ 355. Mandamus will not issue on garnishment proceedings to compel a circuit judge to set aside an order denying the motion of garnishee defendant that the order of default and reference entered against him be vacated.—Gorman v. Calhoun Circuit Judge, 140 Mich. 230.

¶ 356. Entering default and refusing to take it off on the filing of a plea in abatement to the jurisdiction of the court over the person of the garnishee defendant, pleaded by attorney, and not in proper person, because such was deemed to constitute an appearance in garnishment proceedings whereby the jurisdiction of the court is admitted, will not be remedied by mandamus to compel vacation of the judgment and the default.—Gorman v. Calhoun Circuit Judge, 140 Mich. 230.

§ 49. Allowance and adjustment of costs and fees or security for costs.

See also post ¶¶ 458, 490.
Allowances based on decisions of fact, see ante ¶ 190.
Grounds and duty of allowing or awarding costs, see Costs.

¶ 357. Mandamus is the settled method of reviewing the taxation of costs.—Townsend v. Jackson Circuit Judge, 157 Mich. 231.

¶ 358. Without deciding whether or not error is the proper remedy to review a retaxation of costs by the circuit court, mandamus was awarded to vacate a taxation of costs, the court stating that it has been the common practice to proceed by mandamus in cases of taxation of costs.—Schmidt v. Wayne Circuit Judge, 136 Mich. 658.

¶ 359. Mandamus rather than writ of error is the proper remedy to review the retaxation of costs made by a circuit judge in proceedings removed from the probate court before him.—Patterson v. Calhoun Circuit Judge, 144 Mich. 416.

¶ 360. Mandamus will not be granted to compel a circuit judge to vacate an order disallowing costs on the dismissal of an order in chancery, on the technical claim that the practice prescribed by rule had not been followed, where the return is an ample justification for the denial of costs.—O'Brien v. Wayne Circuit Judge, 131 Mich. 67.

¶ 361. Appeal, and not mandamus, is the proper remedy where a motion to vacate a decree as to the solicitors' fees awarded therein, is denied.—Wood v. Wayne Circuit Judge, 150 Mich. 71.

¶ 362. Error in rendering judgment for costs against an administrator personally

cannot be reviewed by mandamus.—In re Colburn's Estate, 153 Mich. 206; More v. Luther, Id.

¶ 363. An order for costs on opening a default is discretionary, and an order to show cause why it should not be vacated will not be granted.—People ex rel. Miller v. Wayne Circuit Judge, 89 Mich. 375.

¶ 364. Mandamus will not lie to vacate an order granting costs to defendant in an action for trespass to lands on plaintiff's recovering judgment for less than $100, such order being a final judgment reviewable by writ of error.—Haney v. Muskegon Circuit Judge, 101 Mich. 392.

¶ 365. Mandamus will lie to vacate an order allowing a sheriff's claim for compensation as custodian of attached property.—Fletcher v. Kalkaska Circuit Judge, 81 Mich. 186.

¶ 366. Mandamus lies to compel a circuit judge to consider a coroner's account for fees and expenses incident to an inquest upon the view of the dead body of a stranger, and, if satisfied that the account is correct, to indorse his order of allowance thereon.—Locke v. Speed, 62 Mich. 408.

¶ 367. Mandamus will not lie at the instance of a county clerk to compel the circuit judge to vacate an order providing for the filing of a certificate of deposit with the clerk as security for costs in lieu of a bond, since the form of the security rests in the sound discretion of the court.—Smith v. Kent Circuit Judge, 139 Mich. 463.

§ 50. Correction of records and journals.

Summary order as adequate remedy to control or recall files and records of court, see Courts ¶ 9.

Power and duty of court respecting records, see Judgments, III; Records.

¶ 368. Mandamus lies, upon a seasonable application, to compel correction of an erroneous journal entry of judgment.—Frederick v. Mecosta Circuit Judge, 52 Mich. 529.

¶ 369. Mandamus to compel nunc pro tunc entry of a record of an election against a testamentary provision for a ward by the guardian was denied, where it appeared that in another way there had been a legally sufficient record of the election.—Bassett v. Durfee, 87 Mich. 167.

¶ 370. Whether the entry of a nunc pro tunc judgment against the principal debtor in garnishment proceedings as of the date of a motion by a garnishee defendant to set aside a default against him affects the latter's motion is a question which cannot be reviewed in mandamus proceedings but must be reviewed upon error from the judgment.—Travelers' Ins. Co. of Hartford v. Kent Circuit Judge, 144 Mich. 687.

§ 51. Regulation and control of executions and sales thereunder.

See also post ¶ 519.

Expiration of time for redemption as bar to mandamus to vacate order setting aside sale, see ante ¶ 36.

Contempt proceedings to enforce payment of sums adjudged, see post § 59.

Rights and duties as to executions, see Executions.

Denial of mandamus to vacate order setting aside execution sale because want of notice of the motion was immaterial to relator, see also Executions ¶ 270.

¶ 371. Where the supreme court has entered an unambiguous decree in favor of relator for a definite sum of money, mandamus will lie to compel the circuit judge to issue an execution to collect the same.—Gaskill v. Jackson Circuit Judge, 159 Mich. 472.

¶ 372. Mandamus to vacate an order setting aside an execution sale after the time for redemption had expired was denied in the discretion of the court.—Stinton v. Kent Circuit Judge, 37 Mich. 286; Wilkie v. Ingham County Circuit Judge, 52 Mich. 641.

¶ 373. Mandamus to compel a circuit court to grant relator's motion for a resale upon execution will not issue unless the case made on the motion at the circuit was such as to show a plain legal right.—People ex rel. McCarthy v. Monroe Circuit Judge, 36 Mich. 274.

¶ 374. The supreme court will not, by mandamus, at the instance of a judgment creditor, vacate an order of the circuit judge setting aside a sheriff's return nulla bona on an execution, where the evidence on which such return was set aside would, if believed, show the return not to have been in accordance with the facts.—William Wright Co. v. Wayne Circuit Judge, 109 Mich. 139.

§ 52. Regulation of foreclosure and other judicial sales.

To compel quashal or obtain relief from writ of assistance, see ante ¶ 198.

Rights and duties respecting foreclosure sales, see Foreclosure.

¶ 375. Mandamus was awarded to compel postponement of a foreclosure sale where it appeared that a year had not yet elapsed from the time part of the defendants were served with notice and appeared in the case, and also that by reason of the pendency of certain suits, the property could not sell to advantage until the disposition of such suits.—Roberts v. Kalamazoo Circuit Judge, 122 Mich. 560.

¶ 376. A decree of foreclosure of a mortgage was taken by default in 1903, defendants appearing but not answering. An arrangement was then made to extend time of

payment. In 1911, defendants being in default in payment under said agreement, the assignee of complainant in said foreclosure suit filed a petition for a sale of the property under said foreclosure decree. He failed to give notice of the hearing on the petition to defendants. Respondent circuit judge ordered a sale of said premises. Relators, defendants in said foreclosure suit, brought mandamus to compel respondent to vacate said order on the ground that the failure to give notice of the hearing on said petition was jurisdictional. Held, the application for mandamus should be denied, relators' remedy being by appeal if they had any.—Mann v. Ionia Circuit Judge, 169 Mich. 419.

§ 53. Stay and supersedeas.

Rights and duties respecting stay or supersedeas, see Stay.

¶ 377. Stay of proceedings will not be compelled by mandamus for a mere irregularity in procedure.—Culver v. Detroit Superior Court Judge, 57 Mich. 25.

¶ 378. Where a court below has denied a motion founded on affidavits to stay proceedings on a judgment on the ground that it has been compromised and paid, and the compromise and payment are denied by the plaintiff, the supreme court will not grant a mandamus to stay proceedings.—People ex rel. Parker v. Calhoun Circuit Judge, 24 Mich. 408.

¶ 379. Mandamus to compel a circuit judge to stay proceedings for the collection of a judgment was denied where it appeared that he had refused the stay on the ground that the judgment had been assigned before the commencement of the proceedings in garnishment, was subject to a lien for attorney's fees, and was not garnishable at law.—Gunzberg v. Kent Circuit Judge, 42 Mich. 591.

¶ 380. Mandamus is the appropriate remedy by which to review the contention that the court erred in refusing to stay execution against the relator, an administrator, individually and personally, pending the final decision on appeal.—Luther v. Kent Circuit Judge, 151 Mich. 71.

§ 54. Allowance of and procedure for civil appeal or error.

Rights of appeal or review by writ of error and duty of trial court preparatory thereto, see Appeal.

Proper remedy for amendment of appeal bond, see Appeal § 88.

Preparation and settlement of record and bill of exceptions, see post § 55.

Compelling extensions of time for preparation of record, see post § 56.

Appeal and certiorari cases in circuit court from inferior tribunals, see post §§ 61-63.

Contempt orders to enforce cost allowance, see post ¶ 420.

Review in habeas corpus cases, see post § 58.

¶ 381. Mandamus is not the proper remedy to procure a sufficient appeal bond.—Pulte v. Wayne Circuit Judge, 47 Mich. 646.

§ 55. Preparation and settlement of record for review.

Extending time for settlement, see post § 56.

Compelling settlement of bill or case for appeal, see also Appeal § 115.

Mandamus to vacate order extending time to settle bill, see also Appeal ¶ 438.

Compelling amendment of record on appeal, see also Appeal § 244.

Laches and delay as bar to relief, see ante § 23.

Successor of judge as respondent, see post § 131.

Rights and duties of the trial judge, see Appeal, VI.

¶ 382. Mandamus lies to compel the settlement of exceptions properly presented after a trial by the court alone.—People ex rel. Teller v. Littlejohn, 11 Mich. 60.

¶ 383. Mandamus to compel the settlement and signing of a bill of exceptions was granted where the relator had done all in his power to comply with the orders made for its settlement, and had completed and furnished it in due time.—People ex rel. De Moss v. Van Buren Circuit Judge, 41 Mich. 725.

¶ 384. Mandamus is the proper remedy to compel the circuit judge to incorporate in a bill of exceptions the evidence bearing on a point which the judge has charged there was no evidence tending to prove.—People ex rel. Crane v. Wayne Circuit Judge, 24 Mich. 513.

¶ 385. Mandamus lies to compel the amendment by the circuit court of records sent up on error.—Scribner v. Gay, 5 Mich. 511.

¶ 386. Mandamus will not be granted to require a circuit judge to sign a bill of exceptions in proceedings held before him on habeas corpus.—People ex rel. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

¶ 387. A circuit judge will not be required by mandamus to settle and sign a bill of exceptions in the form requested by appellant, where the former is ready to sign and settle such a bill as is warranted by the facts.—Corby v. Wayne Circuit Judge, 186 Mich. 533.

¶ 388. Mandamus will not be granted to compel the adoption of a bill of exceptions tendered for settlement by the party taking the exceptions, if the bill adopted was not essentially defective.—People ex rel. Harbaugh v. Wayne Circuit Judge, 32 Mich. 259.

¶ 389. Where, after many meetings to settle upon a proper bill of exceptions, defendant, who presented the bill, abandoned all but one error assigned, and requested the judge to sign the bill as then presented, which contained only plaintiff's evidence, and the court refused the request, and allowed an amendment proposed by plaintiff, which contained a large part of defendant's testimony, the act of the judge in allowing the amendment, which incorporated matter deemed by him material, was an exercise of judicial discretion, and, no abuse thereof being shown, will not be disturbed by mandamus.—Morgan v. Kent Circuit Judge, 150 Mich. 64.

¶ 390. A circuit judge will not be compelled by mandamus to authenticate a proposed record where it is incomplete and does not properly present the evidence though the adverse party files no amendments or corrections.—Alderson v. Newaygo Circuit Judge, 173 Mich. 608.

¶ 391. Mandamus denied, to compel a trial judge to sign a proposed bill of exceptions which he averred to be incomplete and inaccurate.—Pope v. Judge of Recorder's Court, 107 Mich. 25.

¶ 392. Where an application is made to the circuit court for mandamus to compel an official court stenographer to deliver a transcript of testimony upon the tender or payment of the statutory fees the respondent will be remitted to his legal remedy so far as any disputed charges not provided for by the statute are concerned.—Lyle v. Sherman, 147 Mich. 424.

¶ 393. Mandamus to compel the trial judge to settle and sign a bill of exceptions containing none but plaintiff's evidence, which would have presented the motion of defendant to direct a verdict, will be denied, where the judge included other evidence of defendant and where the propriety of the ruling might be regularly reviewed on writ of error whilst the granting of mandamus would necessarily entail an exhaustive examination of the evidence to determine that relator's contention was tenable.—Morgan v. Kent Circuit Judge, 150 Mich. 64.

§ 56. ——Extensions of time.

¶ 394. The supreme court will not, except where the lower court has abused its discretion, reverse on application for mandamus an order denying an extension of time for appeal.—Roberge v. De Lisle, 158 Mich. 16; De Lisle v. Wayne Circuit Judge, Id.

¶ 395. An order extending the time for settling a case on review beyond four months after a decree will not be set aside on mandamus where it appears that the defendant's delay was due to the inability of the complainant to furnish exhibits.—Weber v. Marquette Circuit Judge, 126 Mich. 69.

¶ 396. Where a motion for a new trial has been denied, and within four days thereafter the party moved for an extension of the time in which to settle his bill of exceptions, and his motion was denied, mandamus will lie to compel the court to grant the extension.—Harper v. Wayne Circuit Judge, 155 Mich. 543.

¶ 397. Where a respondent trial judge has exercised his discretion upon a proper showing, and extended the time for settling a bill of exceptions, the upper court will not review the exercise of his discretion in a mandamus proceeding.—Pettinger v. Montmorency Circuit Judge, 164 Mich. 463.

¶ 398. Mandamus will not lie to compel a circuit judge to vacate an order denying a motion to extend the time for settling a bill of exceptions, where the rules of the court were not observed, and it cannot be said that the denial of the motion constituted an abuse of judicial discretion.—Carrier v. Emmet Circuit Judge, 155 Mich. 344.

¶ 399. Mandamus will not issue to compel the extension of time within which to settle a bill of exceptions, where no formal notice of intention to settle such bill was served within the time limited by the original order of the court, and four of the five defendants in no way consented to any extension or delay.—Carrier v. Emmet Circuit Judge, 155 Mich. 344.

¶ 400. In the absence of a written stipulation extending the time mandamus will not be granted to set aside an order refusing to settle a bill of exceptions after the expiration of the time provided in 1897 C. C. Rule 47.—Lake Shore & M. S. R. Co. v. Branch Circuit Judge, 116 Mich. 399.

¶ 401. Mandamus lies to compel the setting aside of an order extending the time to settle a bill of exceptions, where the court extending the time had no authority to do so.—Burgess v. Wayne Circuit Judge, 171 Mich. 583.

§ 57. Arrests and prosecutions for crime or penalty.

See also Arrest ¶ 115.
Mandamus to compel detail of police to watch and make arrests, see post ¶ 533.
Correction of improper change of venue or denial thereof, see also ante ¶ 261.
Regulation of civil process of arrest, see ante § 30.
Necessity and sufficiency of previous motion to respondent for relief, see ante § 22.
Title of private person to be relator, see post § 127.
Sufficiency of record showing, see post § 161.
Error or mandamus as mode of review in criminal cases, see also Indictment § 570.
Mandamus to compel action to correct return on preliminary examination for crime, see Arrest ¶ 114.

Mandamus to compel reopening of criminal prosecution, see also Crimes ¶ 108.
Powers and duties of magistrates and circuit court officers in criminal cases, see Arrest; Indictment.
Proper officer to disperse assemblages and make arrests, see also post ¶ 517.

¶ 402. While a writ of mandamus will issue commanding a public official to perform a specific ministerial act, it does not lie against officials to compel the enforcement of the criminal law by obtaining complaint for its violation and by arrest, it being a discretionary executive power, and not subject to the control of the courts except in cases of gross and manifest abuse. (Per Brooke, J., Montgomery, Hooker and McAlvay, JJ., concurring; Blair, C. J., Ostrander and Montgomery, JJ., concurring in the result; Grant, J., dissenting.)—Gowan v. Smith, 157 Mich. 443.

¶ 403. A justice of the peace must entertain a complaint and issue a warrant on application where one is charged with selling intoxicating liquors without a license in violation of a city ordinance, and on his refusal and mandamus the question of the unreasonableness of the ordinance cannot be considered, especially where it does not appear that the person against whom a warrant is sought has ever made any application for a license or tendered the license fee.—Wells v. Torrey, 144 Mich. 689.

¶ 404. Mandamus to compel respondent justice of the peace to issue a warrant for violation of a municipal ordinance requiring license for saloons, and making no distinction between those where intoxicants are sold and those selling only nonintoxicants, should be denied where it appears that the amount of the license is excessive as applied to the latter class of saloons.—Kenaston v. Riker, 146 Mich. 163, Hooker and Grant, JJ., concurring on the ground that the writ ought not to issue to try the validity of an ordinance in view of the fact that there were other justices to whom application for the warrant might have been made.

¶ 405. Mandamus lies to review the quashing of an indictment and to compel the trial of a criminal cause.—People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 406. The proper remedy to secure the reversal of an order quashing an information is by writ of mandamus.—Hoffman v. Allegan Circuit Judge, 150 Mich. 58.

¶ 407. Mandamus will not lie to have the court in advance of the final determination of a case review the action of a circuit judge in refusing to quash an indictment.—Maynard v. Ingram Circuit Judge, 124 Mich. 465.

¶ 408. An information for forgery of a check was quashed, on the ground that the check being dated on Sunday was void and not a subject for forgery, and accused was remanded to the custody of the sheriff for 24 hours to allow the prosecuting attorney to file a new information. He thereupon swore to a complaint charging the obtaining of money by false pretenses by means of the same check, and accused was bound over for trial. The prosecuting attorney thereafter made a motion to vacate the order quashing the indictment which was denied, and he brought mandamus to compel the vacation. Held that since the accused had been bound over for trial, and the prosecutor had acquiesced in the court's action by causing him to be so bound over, and because the motion to vacate was oral, informal and ex parte and without notice to accused, mandamus would be denied without considering the question of the legal sufficiency of the information for uttering the forged check.—Louisell v. Benzie Circuit Judge, 139 Mich. 40.

¶ 409. Mandamus to vacate an order quashing an information for the sale of intoxicating liquors, on the ground that the information charged no crime, will be denied where the court is equally divided as to the sufficiency of the information, it containing no averment that the defendant had not given a retailer's bond, and no averment that he had given a bond authorizing him to sell liquor for medicinal purposes.—Peters v. Eaton Circuit Judge, 153 Mich. 467.

¶ 410. Mandamus may be granted to compel return of record from recorder's court to Wayne circuit court so that defendant may plead in abatement to indictment.—Lauder v. Wayne Circuit Judge, 79 Mich. 602.

¶ 411. Mandamus will not issue to compel the circuit judge to try information for alleged breach of peace in a case of private trespass where a civil action would lie.—Ware v. Branch Circuit Judge, 75 Mich. 488.

¶ 412. Mandamus will not lie to compel a circuit judge to try an information for an alleged "breach of the peace," charged to have been committed by the use of foul, abusive and insulting language in a dwelling-house, in the presence of the occupants, but accompanied with no threat, and causing no expectation or fear of personal violence.—Ware v. Branch Circuit Judge, 75 Mich. 488.

¶ 413. The supreme court will not review by mandamus proceedings an interlocutory order of a circuit judge denying a motion to dismiss criminal proceedings.—Hosford v. Gratiot Circuit Judge, 129 Mich. 302.

¶ 414. Where, upon a motion for change of venue in a criminal case, most of the showing made would apply to all of the populous counties in the state, and the showing of actual prejudice is met by counter-affidavits, which call for the exercise of the sound judgment and discretion of the circuit judge, his conclusion will not be dis-

turbed by the supreme court upon application for a writ of mandamus, except in a case of a clear abuse of discretion.—Glazier v. Ingham Circuit Judge, 153 Mich. 481.

¶ 414a. The granting of a change of venue at the request of the prosecution and against the protest of accused may be reviewed by mandamus, where it was arbitrary and was made without any effort to learn whether a jury might be obtained.—Glinnan v. Detroit Recorder's Court Judge, 173 Mich. 674.

§ 58. Habeas corpus decisions and orders.

Right to habeas corpus and general law thereof, see Habeas Corpus.

Mandamus to vacate habeas corpus order where defects are not remediable, see also Habeas Corpus ¶ 69.

Proper mode of reviewing habeas corpus decisions, see Habeas Corpus.

¶ 415. Where a circuit judge has jurisdiction, his order in habeas corpus proceedings discharging a prisoner confined in the state prison under a void sentence cannot be reviewed by mandamus.—Ellis, Attorney General v. Daboll, Jackson Circuit Judge, 90 Mich. 272.

¶ 416. Mandamus will not be granted to vacate an order made in habeas corpus proceedings where, from the whole record, it is apparent that such defects exist in the proceedings under which the defendants were held in custody as would, upon a new writ, justify their discharge.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 417. Mandamus will issue to compel a circuit judge to proceed with a hearing and allow presentation of proofs upon a writ of habeas corpus by a father to determine the right of custody of his child who had been intrusted to other relatives of the child in prior habeas corpus proceedings, where the petition alleges that those having custody of the child have refused to allow him to see the child except on their own premises and are continually prejudicing the child against the father.—Martin v. Benzie Circuit Judge, 200 Mich. 549.

§ 59. Contempt orders and proceedings.

See also ante ¶ 254.

Remedy in trial court as adequate substitute for mandamus to compel attachment for contempt, see ante ¶ 161.

General law of contempt and powers and disabilities of courts therein, see Contempt.

Mandamus to review action of judge on citation of witness for refusal to answer on deposition, see also Depositions ¶¶ 33, 34.

¶ 418. Mandamus will not lie to quash contempt proceedings while pending.—Toepel v. Wayne Circuit Judge, 138 Mich. 302.

¶ 419. An order by a police judge adjudging the city controller in contempt on refusal to return papers and files which are being investigated by the city council is reviewable on mandamus.—Schwartz v. Barry, 90 Mich. 267.

¶ 420. Mandamus does not lie to vacate an order of a circuit judge convicting a party of contempt for refusing to pay the costs awarded against him on a continuance; certiorari is the proper remedy.—Love v. St. Clair Circuit Judge, 97 Mich. 625.

¶ 421. Mandamus will lie to review the decision of a circuit judge quashing proceedings for contempt, commenced before his predecessor in office, on the ground of a want of jurisdiction to try the question of fact involved.—Montgomery v. Muskegon Circuit Judge, 100 Mich. 436.

¶ 422. Mandamus will lie to review an order adjudging relator guilty of contempt of court and ordering him to pay a certain sum within 10 days or be imprisoned, since the remedy by appeal in such case is not sufficiently expeditious.—Dillon v. Shiawassee Circuit Judge, 131 Mich. 574.

¶ 423. Where a defendant in a divorce proceeding is ordered to pay "necessary court expenses and witness fees as they accrue" and is adjudged in contempt of court for nonpayment, the order is not so invalid, as being indefinite, as to authorize the supreme court to issue a writ of mandamus to compel the judge to set aside the contempt order.—Lake v. Houghton Circuit Judge, 172 Mich. 660.

¶ 424. The supreme court will not issue a writ of mandamus to compel a judge to set aside an order adjudging a defendant in a divorce proceeding guilty of contempt for noncompliance with an order for temporary alimony and court expenses, on the ground the contempt proceedings are irregular and void, where irregularities in the proceedings were waived by being urged on a motion to set aside the contempt order, and other objections are not jurisdictional.—Lake v. Houghton Circuit Judge, 172 Mich. 660.

¶ 425. A defendant in divorce proceedings was ordered to pay temporary alimony and court expenses and on nonpayment an order to show cause why he should not be adjudged in contempt was not answered. The defendant's attorney pleaded ignorance of the latter order, but the court announced that a contempt order would be prepared. In leaving the bench the judge stated that an answer might be filed, which was done but was inadequate, and the contempt order was signed. Held, the determination of the defendant's guilt was not extra-judicial and would not authorize the supreme court to issue a writ of mandamus to compel the judge to set aside the contempt order.—Lake v. Houghton Circuit Judge, 172 Mich. 660.

¶ 426. A clear right to have an order for an attachment against a divorced husband

for the nonpayment of alimony so as to authorize a writ of mandamus against a circuit judge denying a motion to set aside an order denying such writ of attachment is not shown where the amended decree, which forms the basis for an order, was filed in a prior dismissed case between the same parties by mistake, and, after the filing of the petition for attachment, an amended decree is filed in the second case and relator fails to renew her application for an attachment based upon the amended record.—Dwyer v. Wayne Circuit Judge, 197 Mich. 888.

¶ 427. The relator in a previous suit by bill had alleged that, by fraud and false representations, the defendant in that suit had obtained $10,000. The court found with the complainant, and that the said defendants had $7,000 in their hands of the said funds, and ordered the defendants to pay it over. Relator brings this mandamus proceeding to compel the circuit judge to hold those defendants in contempt for failure to pay. Held, the decree of the circuit judge did not mean that the defendants had a specific fund of $7,000 in hand, but simply that they were indebted in breach of trust for that sum to the relator, and the writ is denied.—Mast v. Washtenaw Circuit Judge, 154 Mich. 485.

§ 60. Disbarment, suspension, and discipline of attorneys.

¶ 428. Mandamus is not the proper remedy to review an order suspending from practice an attorney-at-law.—Underwood v. Newaygo Circuit Judge, 97 Mich. 626.

¶ 429. Relator, the publisher of a newspaper, published an article intimating a suspicion that the officer in charge of the jury sitting upon a case in respondent judge's court had tampered with the jury. Respondent ordered relator to submit under oath in open court the facts upon which he based his article. Relator offered to submit such facts in private to the court in the presence of the officer, which offer the court refused. Held, mandamus should lie to compel the respondent to vacate the order as one beyond the power of the court.—Warren v. Connolly, 165 Mich. 274.

§ 61. Certiorari and appeal cases in circuit courts from inferior tribunals.

Cases appealed from boards and quasi-judicial officers, see post § 62.
Probate appeals, see post § 68.
Mandamus to vacate order allowing belated appeal from justice's court, see also Justices of the Peace ¶ 809.

¶ 430. Mandamus is the proper remedy to correct an order of the circuit that dismisses an appeal from a justice on the ground that the latter's decision was not a judgment, and therefore not appealable; a return to a writ of error would not regularly disclose all the proceedings on the motion to dismiss or the grounds of the dismissal.—People ex rel. Comstock v. Wayne Circuit Judge, 30 Mich. 98.

¶ 431. Mandamus is the proper remedy where an appeal has been improperly dismissed for defects in the bond and affidavit.—People ex rel. Detroit & B. Plank Road Co. v. Wayne Circuit Judge, 27 Mich. 303.

¶ 432. Under the rule that mandamus will not lie where a writ of error is available, mandamus cannot be used to review an order dismissing an appeal from a justice court even though judgment has not been entered, as judgment would have been entered on the plaintiff's motion and error would then lie.—Detroit, G. R. & W. R. Co. v. Eaton Circuit Judge, 128 Mich. 495.

¶ 433. Mandamus does not lie to compel a circuit judge to vacate an order dismissing an appeal from the judgment of a circuit court commissioner, a writ of error being plaintiff's relief.—Lemon v. Oakland Circuit Judge, 140 Mich. 540.

¶ 734. Mandamus is the proper writ by which to review an order of the circuit judge denying leave to take a special appeal from a judgment rendered by a justice of the peace.—Graham v. Wayne Circuit Judge, 145 Mich. 360.

¶ 435. Mandamus is not the appropriate remedy to review the action of the circuit judge in allowing a delayed appeal from a justice's court, inasmuch as such ruling may be reviewed by a writ of error.—Cosgrove v. Wayne Circuit Judge, 144 Mich. 682.

¶ 436. On mandamus a circuit judge will be compelled to vacate an order allowing an appeal from a justice court granted eleven days after judgment, in the absence of any statement in the affidavit that the appellant was prevented from applying within the five days as required under Comp. L. 1897, § 909.—Stanton v. Wayne Circuit Judge, 126 Mich. 715.

¶ 437. Mandamus will not lie to review the jurisdiction of a circuit judge in entering an order allowing a dilatory appeal from a justice's court, since the aggrieved party has a remedy by writ of error.—Mikkola v. Houghton Circuit Judge, 165 Mich. 583.

¶ 438. Where the circuit court in its discretion refuses to assume jurisdiction of an appeal from a justice court after the lapse of five days from the entry of the judgment, mandamus and not error is the proper method for review.—Huddleston v. Charles Amos & Co., 180 Mich. 253.

¶ 439. Mandamus is the proper remedy to compel a circuit court to take jurisdiction and try a case on appeal from the justice's court where the party appealing desires to

retry the issues determined in the justice's court and affidavits are required in the supreme court to show that error, if any, was committed.—American Boat Co. v. St. Clair Circuit Judge, 194 Mich. 146.

¶ 440. Mandamus is a proper remedy to compel a circuit judge to dismiss a common law writ of certiorari for the review of a decision of a justice of the peace, where the party obtaining the writ has ignored the remedy provided by statute.—Jacobs v. Wayne Circuit Judge, 132 Mich. 55.

¶ 441. Where, in a proceeding to compel a return to an alleged appeal from a justice's judgment, the circuit judge has determined that the justice has waived payment of the fee for making return, this decision is conclusive and cannot be reversed on mandamus or certiorari, if any facts stated by the justice tend to establish it; otherwise it seems that the court's order compelling a return may be vacated by mandamus.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 442. Mandamus will not lie to compel a circuit judge to set aside an order for an amended return by a justice in an appeal case, which, when made, shows that the jury fees have not been paid by the appellant, and a subsequent order dismissing the appeal unless such fees are paid.—Swarthout v. Saginaw Circuit Judge, 99 Mich. 347.

§ 62. ——From boards and quasi-judicial officers.

Compelling filing of drain papers to admit of taking certiorari, see also post ¶ 525.

¶ 443. An ordinance regulating the licensing of saloons, provided that if a saloonkeeper should be convicted within one year of a violation of the ordinance and of "the state law," his license might be revoked. The petitioner, a saloonkeeper, was so convicted, except that the state law violated was not the law controlling the sale of liquor, and his license was revoked. He appealed by certiorari to the circuit court to set aside the order of the common council. The circuit court held that aside from the question of the convictions, the council had discretion to revoke the license. Held, this ruling was not conclusive on the petitioner in mandamus, and the supreme court might review the question as to whether the violations proved against the petitioner were those spoken of in the ordinance.—Cox v. Jackson Common Council, 152 Mich. 630.

¶ 444. Relator brought certiorari to have the proceedings of a highway commissioner reviewed by respondent circuit judge. Respondent decided the case on the merits, and declined to reverse the holdings of the commissioner. Held, the relator's proper remedy to review the decision of respondent was by writ of error, not by mandamus.—Harts v. Wayne Circuit Judge, 164 Mich. 35.

§ 63. ——Probate appeal or certiorari to circuit court.

Eminent domain appeal cases, see post § 66.
Correction of order dismissing will contest, see ante ¶¶ 336, 337.

¶ 445. Mandamus lies to require a circuit judge to hear an appeal by executors from an order of the probate court disallowing a will.—Cheever v. Washtenaw Circuit Judge, 45 Mich. 6.

¶ 446. Where the petition for a probate appeal after time is sufficient to call for the circuit judge's judgment whether petitioner has been in default, and whether justice requires review, such judgment will not be disturbed on mandamus.—Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

¶ 447. Where an administrator appealed from an order of the probate court removing him, and the court fixed his bond at an unwarranted figure upon an erroneous conception of the law, he may proceed, by mandamus, to compel the probate judge to approve a proper bond though no proper bond had been presented for approval.—Fleming v. Ottawa Probate Judge, 137 Mich. 139.

¶ 448. Mandamus will not lie to compel a circuit judge to vacate an order allowing, after the statutory time, an appeal from an order of the probate court under How. St. § 6784, where the petition for leave to appeal sets forth facts sufficient to call for the exercise of the discretion of the court, and where such discretion has been exercised.—Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

¶ 449. Except in clear cases of abuse the discretion of the circuit court in denying an application for leave to appeal from the report of commissioners on claims disallowing a claim against a defendant's estate will not be reviewed on mandamus.—Smith v. Wayne Circuit Judge, 82 Mich. 93.

¶ 450. Mandamus to compel the circuit judge to dismiss an appeal from the probate court on the ground that the party making the appeal had no right to do so does not lie, inasmuch as such an order may be reviewed by a writ of error after final judgment.—Sharp v. Montcalm Circuit Judge, 144 Mich. 328.

¶ 451. Where the circuit court dismissed an appeal from the probate court, because an appeal had not been authorized, on mandamus to compel the setting aside the order, it is held that a writ of error will bring before the court everything essential to a proper determination of the alleged error of the trial court.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 452. Mandamus will not issue to compel a circuit judge to vacate an order denying a dilatory appeal from an order of the pro-

bate court allowing the final account of an executor. The order of the circuit judge was a final order, reviewable upon error, and therefore not a proper subject of mandamus proceedings.—Small v. Cheboygan Circuit Judge, 150 Mich. 6.

¶ 453. Mandamus lies to compel a circuit judge to dismiss an appeal from a probate order for an oral examination.—Palmer v. Jackson Circuit Judge, 90 Mich. 1.

¶ 454. Mandamus does not lie to compel a circuit judge to vacate an order reinstating an appeal from the probate court.—Gifford v. Washtenaw Circuit Judge, 189 Mich. 546.

¶ 455. Mandamus will not lie to compel a circuit judge to reinstate an appeal on behalf of one claiming to be purchaser at a probate sale, who does not show that he has tendered payment and performance so as to entitle himself to the rights of a purchaser.—People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296.

¶ 456. Mandamus denied to compel a circuit judge to vacate an order dismissing the appeal of an incompetent person from the order of the probate court denying his application for a discharge from guardianship, where it appears that the citation was directed to the guardian, mother, two sisters, and wife of the incompetent, all of whom, except the wife, resided in this state, and the files in the probate court fail to show service, either actual or constructive, upon the wife and one of the sisters.—Storms v. Allegan Circuit Judge, 99 Mich. 144.

¶ 457. Mandamus to compel the entry of judgment upon a verdict "for the full value of the estate" upon an appeal from the probate court was denied; as the testimony as to the value of the estate differed from the appraisal, and it could not be said whether the jury had in mind a verdict for the full value of the estate regardless of the debts and expenses of administration, or for an amount equal to the value of the estate after the payment of expenses and debts, other than the relator's claim.—Long v. Wayne Cir. Judge, 136 Mich. 12.

¶ 458. The fact that the circuit court in sustaining on appeal a claim allowed by commissioners against the estate rendered judgment against relator as administrator for the amount of the damages, and against him personally for the amount of the costs, if error, is one which can be reviewed by writ of error, and will not be reviewed by mandamus.—Luther v. Kent Circuit Judge, 151 Mich. 71.

¶ 459. The error of the circuit court, if any, in reviewing by certiorari and not by appeal the order of the probate court whereby allowance was made to one not the widow of a decedent, is reviewable by ordinary procedure in the supreme court; and therefore mandamus will not issue.—Reed v. St. Clair Circuit Judge, 122 Mich. 153.

¶ 460. Mandamus will not lie to compel a circuit judge to set aside, on the ground of alleged want of jurisdiction, his order reversing, on certiorari, an order of the probate court granting statutory allowance to a widow; the action of the judge being reviewable by appeal or writ of error.—Reed v. St. Clair Circuit Judge, 122 Mich. 153.

§ 64. Probate court orders and proceedings.

Guardianship and incompetency orders and decisions, see post § 65.

Eminent domain proceedings and orders, see post § 66.

Correction of decisions and orders of circuit court on appeal from probate, see ante § 63.

Duty to apply to circuit court for writ rather than to supreme court, and exceptions to rule, see post § 124.

Mandamus as remedy to secure hearing on claim, see also Estates of Decedents ¶ 509.

¶ 461. Mandamus does not lie to compel a probate judge to vacate an order admitting a will to probate. The remedy by appeal is adequate.—Corby v. Wayne Probate Judge, 96 Mich. 11.

¶ 462. Mandamus will not lie to review the refusal of a probate court to grant letters of administration on an intestate's estate.—People ex rel. Campau v. St. Joseph County Probate Judge, 36 Mich. 500.

¶ 463. This court will not review upon petition for mandamus, the conclusion of a probate judge upon the question whether or not the person appointed by him as administrator was a proper person for such appointment.—McMeekin v. Saginaw Probate Judge, 150 Mich. 354.

¶ 464. Mandamus is not the proper remedy to review an order of the probate court refusing to remove an administrator.—American Missionary Ass'n v. Hall, 138 Mich. 247.

¶ 465. Mandamus will not lie to compel the probate judge to vacate an interlocutory order sustaining a demurrer to an application for discovery of assets.—Mitchell v. Bay Probate Judge, 155 Mich. 550.

¶ 466. It is discretionary with the probate judge whether he will hear and adjudicate upon claims; he cannot be required by mandamus to do so.—People ex rel. United States Attorney v. Monroe County Probate Judge, 16 Mich. 204.

¶ 467. Appeal and not mandamus is the proper remedy to review the action of the probate court in assuming without first appointing a general administrator to order the hearing of claims before himself, it being

doubtful whether How. St. § 5853 is broad enough to permit it to be done under pendency of special administration.—Jenks v. St. Clair Probate Judge, 96 Mich. 122.

¶ 468. Mandamus will not lie to compel a judge of probate to extend the time for proving claims.—People ex rel. United States Attorney v. Monroe County Probate Judge, 16 Mich. 204.

¶ 469. Mandamus lies to enforce a creditor's right to a hearing of his claim against an intestate's estate where the estate is not closed.—Hart v. Shiawassee Circuit Judge, 56 Mich. 592.

¶ 470. Mandamus lies to compel the commissioners on an estate to return evidence into the probate court where the law requires it.—Buchoz v. Pray, 37 Mich. 512.

¶ 471. Mandamus will not lie to compel a probate judge to allow a claim against a decedent's estate, the proper remedy being by appeal from the order of disallowance.—John Hancock Mut. Life Ins. Co. v. Wayne Probate Judge, 97 Mich. 618.

§ 65. ——Guardianship and incompetency proceedings.

Appeals in incompetency proceedings, see ante § 63.

Laches and delay as bar to relief, see ante § 23.

¶ 472. Proceedings in the circuit court to test the validity of orders of the probate court appointing guardians for incompetent persons are to be reviewed on certiorari or error and not by mandamus to compel judicial action by vacating an order of appointment.—Coot v. Willett, 93 Mich. 304.

¶ 473. Mandamus is the proper remedy to compel the probate court to proceed, upon a proper petition, to a hearing and determination of the present competency of one who has been adjudged an incompetent person.—Coot v. Willett, 93 Mich. 304.

¶ 474. One who has been adjudged an incompetent person cannot, after waiting nearly six years, have a mandamus to compel the setting aside on jurisdictional grounds of such adjudication, as those who have acted in good faith in reliance upon the jurisdiction might be seriously affected; but he is entitled to a hearing as to his present competency.—Coot v. Willett, 93 Mich. 304.

¶ 475. Mandamus will not be granted to compel a probate judge to vacate an order denying a petition for an accounting by a guardian, since such order is appealable.—Hopper v. Livingston Probate Judge, 137 Mich. 124.

§ 66. Eminent domain and highway proceedings.

See also ante ¶ 54.

Compelling settlement of pleadings, see also ante ¶ 221.

Propriety of mandamus to review highway proceeding, see also Highways ¶ 191.

¶ 476. The circuit court cannot be required by mandamus to appoint commissioners to condemn, in favor of a street railway company, the franchises of a plank-road company, until the proceedings had, under the petition, shown that the land asked for is subject to condemnation.—Detroit, S. & D. R. Co. v. Wayne Circuit Judge, 95 Mich. 318.

¶ 477. Where condemnation proceedings had been commenced in the circuit court by a railroad and objections filed by the property owners, and after a hearing the court had dismissed the proceedings, review thereof cannot be had by mandamus inasmuch as the dismissal was a final order disposing of the entire proceeding, such being reviewable by error.—Detroit United Ry. v. Oakland Circuit Judge, 146 Mich. 540.

¶ 478. An order to show cause against mandamus was allowed to test condemnation proceedings by a railroad, where an order of the probate court dismissing the proceedings on the ground that the taking proposed was not for public use was appealed to the circuit under the general statute (Comp. L. 1897, § 669) for appeals from orders of the probate court and not under the statute for appeals in condemnation cases, and where the circuit court instead of reversing the probate court and remanding the case reversed the order of dismissal and set the case down for hearing on the merits in the circuit court. The ordinary remedy by appeal or certiorari was deemed inadequate in such circumstances because the jurisdiction of the merits erroneously assumed by the circuit court might result in a judgment of condemnation under which the railroad company might take possession before review of such judgment could be had, and thereby might use the land before it could be decided whether the use was a public or a private one.—Pere Marquette R. Co. v. United States Gypsum Co., 148 Mich. 308. [Mandamus was held to be the proper writ on hearing because the appeal was a nullity and should have been vacated and the case remanded.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.]

¶ 479. Mandamus to compel the probate court to set aside an award of damages in a railroad condemnation proceeding which had been paid under protest was denied where the land had been actually appropriated.—Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

¶ 480. On granting mandamus to compel the vacation by a circuit judge of an order made in an appeal from the probate court in an eminent domain proceeding, such being beyond any appellate jurisdiction, and on remanding the proceeding to the probate

court, leave was reserved to petitioner, the condemning corporation, to apply for a certiorari to review the condemnation proceedings in view of the expiration meantime of the time within which common law certiorari might be applied for.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

¶ 481. Mandamus will be denied to quash a certiorari issued to review a highway commissioner's proceedings in laying out a private road; there being an adequate remedy by appeal after rendition of judgment in the circuit court.—Gibson v. Lenawee Circuit Judge, 97 Mich. 620.

¶ 482. The relator railroad crossed a public street, and was ordered by the circuit court, under section 6234, Comp. L. 1897, to build a bridge for the street. Another railroad was under contract with the relator using the same crossing. Held, mandamus would not on this account lie to vacate the circuit court's order, but relator should take steps to adjust the equities with the other road.—Chicago, D. & C. G. T. Junct. R. Co. v. St. Clair Circuit Judge, 156 Mich. 567.

§ 67. Duties and functions of justices of the peace and commissioners.

Mandamus to compel justice to make or amend return to certiorari, see Jud. Act, chap. LXXVIII, § 32; Comp. L. 1915, § 14432.

¶ 483. Under Comp. L. 1897, § 997, providing that, in garnishment proceedings, within 30 days after the examination therein, at the request of the plaintiff, the justice shall issue a summons commanding the garnishee to appear and show cause, mandamus will lie to compel the justice to issue such summons if applied for within the 30 days, though the plaintiff did not appear at the time of disclosure and judgment was entered against him.—Hyde v. Chadwick, 132 Mich. 270.

¶ 484. Mandamus lies to compel a justice of the peace to enter in proper form a verdict in replevin and judgment on it, which though informal plainly indicated for which party the jury found the issues.—People v. Foote, 1 D. 102.

¶ 485. When judgment of discontinuance is rendered by the justice in a replevin suit, the defendant, if he waives a return of the property, is entitled of right to have his damages assessed, and if the justice refuses to assess them he may be compelled to do so by mandamus.—People ex rel. Taylor v. Tripp, 15 Mich. 518; People ex rel. Forbes v. Washtenaw Circuit Judge, 23 Mich. 497; People ex rel. La Barr v. Osborn, 38 Mich. 313; Humphrey v. Bayn, 45 Mich. 565; Johnson v. Dick, 69 Mich. 108.

¶ 486. The writ will issue to compel a justice who has dismissed a writ of replevin to receive evidence of the value of the property if return is waived.—People ex rel. La Barr v. Osborn, 38 Mich. 313.

¶ 487. While mandamus may issue to compel a justice, if he refuses, to proceed and enter up a judgment in a case proper for a judgment, it will not lie to compel him to vacate or change a judgment he has already rendered, and which is subject to be reviewed by certiorari or on appeal.—O'Brien v. Tallman, 36 Mich. 13.

¶ 488. Where a case in the justice court is adjourned until a specified day a clear legal duty rests upon the justice to take some action or render some judgment on the adjourned day, and if the justice, on request, refuses to perform this duty, he may be compelled by mandamus to perform it.—People ex rel. Dota v. McKay, How. N. P. 103.

¶ 489. Mandamus lies to compel a circuit court commissioner to proceed on an order of reference tendered to him for execution in a foreclosure case.—Warner v. Randall, 37 Mich. 473.

¶ 490. Mandamus will issue to compel a circuit court commissioner to tax costs in proceedings under the fraudulent debtor act, and to issue execution for collection thereof.—Watson v. Randall, 44 Mich. 514.

§ 68. Proceedings and orders of Court of Mediation.

¶ 491. No appeal lies from a decision of the State Court of Mediation and Arbitration created by Comp. L. 1897, §§ 559-568, and therefore where such a court exceeds its powers by granting a rehearing after the rendition of a decision, the writ of mandamus will be granted to vacate the order granting a rehearing.—Renaud v. State Court of Mediation, 124 Mich. 648.

III. COMPULSION OF ADMINISTRATIVE OR MUNICIPAL OFFICERS AND BODIES.

A. IN GENERAL; PARTICULAR OFFICERS.

§ 69. In general; noninterference with coordinate departments.

Original or appellate nature of mandamus, see ante § 2.
Mandamus to governor and other executive officers, see post §§ 70, 72.
Mandamus to legislative officers, see post § 73.
Denial of writ interfering with constitutional powers of municipalities, see ante ¶ 69.
Disability of courts to control or interfere with other departments, see Constitutional Law §§ 41-44.

¶ 492. Mandamus does not lie to review the exercise of political and executive functions when they are not ministerial and

would require the court to act outside of judicial authority.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

§ 70. Governor and executive officers of state.

Mandamus to secretary of state in election matters, see post § 82.
Duties of secretary of state pertaining to initiative and referendum, see post § 83.
Duties of state board of canvassers, see also post §§ 82, 83.
Filing and approving corporate articles, see post § 107.
Compelling attorney general to sue or defend, see post § 109.
Certainty and clearness of duty of state treasurer, see also post § 75, ¶¶ 506, 507.
Statutory denial of power to issue writ to state officers, see Jud. Act, chap. XXXVI, § 3; Comp. L. 1915, § 13439.

¶ 493. Mandamus cannot issue to the governor; and his voluntary appearance and professed willingness to abide by the decision of the court, though questioning its jurisdiction, will not give jurisdiction to issue a mandamus to him.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

¶ 494. The performance of the duty imposed upon the governor by the acts of congress making a land grant for the construction of the Portage Lake & Lake Superior Ship Canal, and by the state legislation on the subject, to issue, when satisfied that the work has been done according to law, his certificate of the fact, cannot be enforced by mandamus.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

¶ 495. Mandamus will not lie to compel the governor to perform duties of a purely executive or political character.—Germaine v. Ferris, 176 Mich. 585.

§ 71. Boards and official bodies.

Compellable duties of public official bodies, see also post § 74.

¶ 496. The performance of a ministerial duty may as well be enforced when it rests upon an aggregate body like the common council as when incumbent upon a single officer.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

§ 72. State auditors.

Ministerial and discretionary duties, see post § 81.
Duties relating to sales for taxes, see post § 87.
Mandamus to compel audit, see post § 91.
Compelling issuance of warrants for payment, see post § 98.
Making contracts for state printing, see post ¶ 664.

¶ 497. The board of state auditors is made by the constitution an independent tribunal over which the courts have no supervisory control, and the supreme court has no jurisdiction by mandamus to coerce or direct its action.—People ex rel. Dewey v. Board of State Auditors, 32 Mich. 191.

¶ 498. The supreme court exercises no control over the board of state auditors in its disposition of claims against the state, not provided for by general law.—People ex rel. Ambler v. Auditor General, 38 Mich. 746.

¶ 499. Mandamus lies to compel the board of state auditors to perform mandatory duties imposed on it by the legislature outside of the exclusive powers vested in it by Const. art. VIII, §§ 4, 5.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 500. The writ of mandamus has been granted for the purpose, among others, of compelling the board of state auditors to take action to carry out the provisions of Laws 1879, Act No. 168, in regard to the publication of the state reports.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

§ 73. Legislative officers.

¶ 501. Mandamus will not lie to compel the president and secretary of the senate, or the speaker and clerk of the house, to insert in the journals matter by way of protest which the senate and house have refused to consider or receive; although the constitution requires the keeping of a journal and authorizes protests to be made and entered in the journal.—Turnbull v. Giddings, 95 Mich. 314.

B. COMPELLABLE ACTS AND DUTIES.

§ 74. In general; nature of duty which may be compelled.

Necessity of duty and clear legal right to performance and of exigency and beneficial occasion for writ, see ante §§ 4-7.
Futility of writ as bar to issuance, see ante §§ 8, 9.
Impolicy, injustice, misconduct, unfairness, and delay as reasons against writ, see ante §§ 10-12.
Denial of writ to compel useless annulment of act void on the record, see ante ¶ 49.
Necessity that official duty exist and be certain and clear, see post § 75.
Necessity of demand for performance and refusal by respondent, see post § 76.
Nondelegability or abdication of duty to avoid mandamus, see post § 77.
Duty pertaining to other than respondent, see post § 78.
Duty pertaining to respondent in unofficial capacity, see post § 79.
Particular duties, see post §§ 80-109.
Keeping of legislative journals, see ante ¶ 501.
Compulsion of part of demanded duty, see post § 172.
Procedure for the writ and upon the writ when issued, see post V.

Original or appellate nature of mandamus, see ante § 2.
Impropriety in mandamus to compel performance of duty of inquiring into collateral or antecedent issues and questions, see post § 158.

¶ 502. It is within the province of courts to restrain public bodies and officers of counties and other municipal divisions from exceeding their jurisdiction, and to require them to perform such specific duties as the law imposes on them.—Attorney General v. Iron County Board of Canvassers, 64 Mich. 607; Tennant v. Crocker, 85 Mich. 328.

¶ 503. Where a subordinate body has been vested by the legislature with the right to exercise its judgment, and with the power to determine questions of fact, mandamus may lie to compel the body to act, but will not lie to compel it to act in a particular way.—Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488.

¶ 504. The use of the writ of mandamus directed to a board of supervisors to compel the performance of an act enjoined by law, and to compel the performance of such official acts as clearly pertain to their duty and are an absolute obligation, is well recognized.—Attorney General ex rel. Greenfield v. Board Sup'rs Alcona Co., 167 Mich. 666.

¶ 505. Mandamus lies to compel the state treasurer to deliver up to the makers for cancellation municipal aid bonds deposited with him under an unconstitutional statute.—People ex rel. Bay City v. State Treasurer, 23 Mich. 499; People ex rel. Township of La Grange v. State Treasurer, 24 Mich. 468.

¶ 505a. Legislation authorizing municipal corporation to vote taxes and pledge their credit in aid of the construction of railroads by private companies is unconstitutional; and, therefore, a township will not be compelled to execute and issue bonds in accordance with a resolution adopted by it in favor of a company which subsequently constructed its road in reliance thereupon.—People ex rel. Detroit & H. R. Co. v. Salem Township Board, 20 Mich. 452.

§ 75. Existence and certainty of duty.

General necessity of clear legal duty, see ante §§ 3, 4.
Necessity of existence and sufficiency of fund for payment in order to have mandamus to pay claim on it, see post § 96.
Duty to certify result of election and admit to office, see post ¶ 561.
Sufficiency of relator's interest to sustain the action, see post §§ 126-128.
Necessity and sufficiency of allegations of duty in petition, see post § 135.
Sufficiency of record showing to rebut duty or delinquency, see post § 162.

¶ 506. It would require a very clear case of practical acquiescence to authorize the court to compel the head of a bureau of the government to follow precedents which he does not himself regard as binding, unless they are at least so harmonious with the language of the law as to create no repugnance to it.—Employers' Liability Assur. Co., Ltd. v. Insurance Com'r, 64 Mich. 614.

¶ 507. No mandamus can issue to a state officer to compel him to perform any but some unquestionable and legally defined duty. Thus, the writ will not be granted to compel the state treasurer to pay a balance claimed to be due on bills of the Government Stock Bank, there being no adjudication that the amount claimed is due from the state.—Bresler v. Butler, 60 Mich. 40.

¶ 508. Mandamus does not lie to compel a township to raise money to pay bonds so long as it is an open question whether the bonds are a legal obligation on the township and whether the relator is a bona fide holder of them.—Loomis v. Rogers Township Board, 53 Mich. 135.

¶ 509. Where city orders for work done in paving contain no promise to pay interest and are payable out of a particular fund the principal of which has been paid and accepted, mandamus to compel the payment of interest must be denied; there being no authority for such payment.—Talbot v. Mayor, etc., Bay City, 71 Mich. 118.

§ 76. Demand for performance, opportunity and refusal.

Necessity and sufficiency of allegations in petition, see post § 136.

¶ 510. Mandamus will not lie to compel a board of supervisors to audit a claim until the claimant has requested its allowance and has either appeared or produced proofs in support thereof, or has offered to do so; the board has the right to fix the time and place for hearing proofs, and such notice thereof is enough if it occurs in the course of the proceedings.—Hickey v. Oakland County Sup'rs, 62 Mich. 94.

¶ 511. Mandamus to compel board of supervisors to reconvene and canvass vote for removal of county seat will be denied where board has not refused to canvass but proposes to do so on adjourned day.—Double v. McQueen, 96 Mich. 39.

¶ 512. The circuit court may, in its discretion, entertain an application for mandamus requiring the common council, as a board of canvassers, to canvass the returns of votes for alderman, and issue a certificate to the relator, without a previous application by the relator to the board for such certificate, where it is convinced that such request would not have availed.—Hilton v. Common Council of Grand Rapids, 112 Mich. 500.

¶ 513. A city collector, as the proper custodian of a fund mistakenly paid by him to

the county treasurer, was not required to present a claim therefor to the county supervisors, as the claim was not one against the county nor against money belonging to the county; and mandamus against the treasurer individually was a proper remedy to compel its restitution.—Webster v. Wheeler, 119 Mich. 601.

¶ 514. A motion to adjourn the meeting of a village council was made, and before it was voted on relator appeared and filed an application for a saloon license. Held, that mandamus would not lie to force the council to issue the license, where it appeared that since its adjournment the council had not had time to consider the application.—Boos v. Scudder, 163 Mich. 678.

§ 77. Delegation or abdication of duty.

¶ 515. Mandamus will be granted to compel a ward board of registration to meet and hear the claim of a party to be registered as a voter; and it will be no answer to the application therefor that the case has been reserved for the consideration of the city board when it was the duty of the ward board to pass upon it.—People ex rel. Wood v. Detroit Board of Registration, 17 Mich. 427.

§ 78. Duty pertaining to other than respondent.

Proper party respondent, see post §§ 130, 131.

¶ 516. Mandamus to the secretary of state will not lie to compel him to issue patents to state lands; that is the duty of the governor. Crane v. Secretary of State, 51 Mich. 195.

¶ 517. A city police commissioner will not be compelled by mandamus to enforce section 11334, Comp. L. 1897, providing that it shall be the duty of designated officers to disperse persons assembling unlawfully, riotously, or tumultuously, by himself dispersing an assemblage witnessing and playing a game of Sunday baseball, since he is not one of the designated officers.—Yerkes v. Smith, 157 Mich. 557. (Per Hooker, J.; Montgomery and Ostrander, JJ., concurring.)

§ 79. Duty pertaining to respondent in non-official capacity.

Duty of treasurer improperly holding public money to repay it as individual to proper custodian, see ante ¶ 513.

¶ 518. Where a register of deeds who has received a conveyance not officially, but as a private person to hold it in escrow, is forbidden by the grantor to record it, the grantee cannot have a mandamus to compel him to do so.—People ex rel. Austin v. Curtis, 41 Mich. 723.

§ 80. Performance of official functions in general.

Existence and certainty of duty, see ante § 75.

Nature of compellable duties and obligation of respondent to perform, see ante §§ 74, 77-79.

Necessity of demand and refusal to perform, see ante § 76.

Particular duties and functions, see post §§ 82-109.

Duties of arresting and prosecuting for crime, see ante § 57.

To compel meeting of county board, see also Counties ¶ 23.

To compel service of criminal warrant, see ante § 57; and also Arrest ¶ 115.

Right of person entitled to sheriff's deed to compel it, see also Executions ¶ 253.

To compel release of person arrested in violation of privilege under Federal process, see also Courts ¶ 350.

¶ 519. Mandamus will not lie, at suit of a judgment debtor, to have the court order that an execution issued, as of a premature date, be returned and set aside or amended; since the plaintiff has another remedy.—Jennings v. Kalamazoo Circuit Judge, 44 Mich. 99.

¶ 520. Mandamus lies to compel the sheriff to imprison a person convicted under the bastardy act when necessary to compel him to contribute to the child's support.—Waite v. Washington, 44 Mich. 388.

¶ 521. Mandamus lies to compel the county treasurer to keep his office at the county seat.—Rice v. Shay, 43 Mich. 380.

¶ 522. Mandamus does not lie to compel aldermen to attend meetings of the common council, and to perform their general official duties regularly.—People ex rel. Fitzgerald v. Whipple, 41 Mich. 548.

¶ 523. Where certain members of a village council combined to prevent a quorum of the council from meeting, their attendance could not be compelled by mandamus.—Wilson v. Cleveland, 157 Mich. 510.

¶ 524. It is beyond the authority of a circuit judge to direct by mandamus that a village clerk shall attend the next meeting of the council.—People ex rel. Cady v. Ihnken, 129 Mich. 466.

¶ 525. Where a drain commissioner enlarging a drain fails to comply with the statute as to the filing of papers, mandamus will lie to compel compliance with the statute, to lay a foundation for the statutory writ of certiorari.—Auditor General v. Crane, 152 Mich. 94.

¶ 525a. Where a city, under Laws, 1869, Act No. 45, which was invalid, had issued bonds in aid of a railroad and deposited them with the state treasurer, who, on demand therefor, declined to deliver them back to the proper authorities of the city, such delivery was compelled by mandamus.—People ex rel. Bay City v. State Treasurer, 23 Mich. 499.

¶ 525b. Municipal aid bonds deposited with the state treasurer under a law held uncon-

stitutional are in his official custody until delivered up, and he is responsible for their safe-keeping and return to the makers when demanded, and a mandamus lies to compel such return when refused upon a reasonable demand.—People ex rel. La Grange Township v. State Treasurer, 24 Mich. 468.

§ 81. Ministerial or discretionary character of acts and decisions.

Duty depending on fact, see also post ¶ 595.
Ministerial or discretionary nature of particular duties, see post §§ 82-109.
Discretionary duties respecting public lands, see post § 100.
Construction of return as showing nature of power exercised, see post § 161.

¶ 526. The duty imposed upon the governor of this state by the act of congress making a land grant for the construction of the Portage Lake & Lake Superior ship canal and harbor, and by the state legislation on the subject, to issue his certificate of the fact when he shall be satisfied that the work has been done in conformity with the law, is not one of a purely ministerial character, leaving him no discretion; and mandamus will not lie to compel such issue.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

¶ 527. The action of the head of an executive department of the state is not judicial and therefore not subject to direct proceedings for review.—People ex rel. Ambler v. Auditor General, 38 Mich. 746.

¶ 528. Executive discretion cannot be judicially reviewed; and where the action of any officer to whom the state confides the auditing of claims against it is anything but ministerial, it cannot be reviewed.—People ex rel. Ambler v. Auditor General, 38 Mich. 746.

¶ 529. Whether mandamus lies to interfere with the action of the auditor general on matters of a purely public and executive nature, where it is not purely mechanical, but involves the exercise of mixed functions, quære.—People ex rel. Ambler v. Auditor General, 38 Mich. 746.

¶ 530. When a mayor and council have in good faith exercised the discretion conferred upon them by the statute in regard to licensing saloons, such discretion cannot be reviewed by mandamus.—Sherlock v. Stuart, 96 Mich. 193, citing Van Dann v. Uhl, October 29, 1891, unreported.

¶ 531. The discretion of the prosecuting attorney in refusing to attach to a petition for the removal of a public officer a statement that in his opinion the case demands investigation (How. St. § 653) is not reviewable on mandamus.—McLaughlin v. Burroughs, 90 Mich. 311.

¶ 532. The decision of the presiding officer of a city common council in declaring a resolution carried or lost does not involve the exercise of discretion but is ministerial, and mandamus lies to compel him to do his duty.—Tennant v. Crocker, 85 Mich. 328.

¶ 533. A city police commissioner is intrusted with discretion in determining how to distribute his police force, and cannot be coerced by mandamus to detail a portion of his force to watch certain saloons kept open in violation of law, and to arrest and prosecute the offenders. (Per Brooke, J., Montgomery, Hooker and McAlvay, JJ., concurring; Blair, C. J., Ostrander and Montgomery, JJ., concurring in the result; Grant, J., dissenting.)—Gowan v. Smith, 157 Mich. 443.

§ 82. Elections, nominations, and counting and recounting of votes.

Quo warranto and not mandamus as remedy to try title to office, see ante § 20.
Referendum elections on questions to voters, see post § 83.
Compelling certification of result and admission of person chosen to office, see post § 84.
Necessity of clear legal right in relator to name on ballot, see ante ¶ 29.
Necessity of refusal to perform duty, see also ante § 76.
Futility of writ as reason against issuance, see ante § 8.
Proper persons to be relators, see post § 127.
Allegations in petition for writ, see post ¶ 825.
Allegations in return as to improper condition of ballot boxes for recount, see post ¶ 852.
Ordinary and regular methods of regulating elections and count of votes, see Elections.
Judicial power in election matters, see also Elections § 93.
Ministerial nature of duty of canvassers of elections, see Elections § 53.
Mandamus to compel certification of proper nominee of party convention, see also Elections § 25.

¶ 534. The supreme court has jurisdiction of an application for a mandamus restraining the secretary of state from giving notices of election of state senators and directing him to issue them under a former act, on the ground that the later act is in violation of Const. art. IV, §§ 2, 4; the legislative discretion not being absolute.—Giddings v. Secretary of State, 93 Mich. 1.

¶ 535. Mandamus will issue compelling the secretary of state to issue notices as required by Comp. L. 1897, § 3606, relative to the election of senators under a senatorial apportionment act (Pub. Acts, 1895, No. 264), where later senatorial apportionment acts are held invalid.—Williams v. Secretary of State, 145 Mich. 447.

¶ 536. Mandamus was issued compelling the controller of Detroit to take the neces-

sary action to carry into effect the election law of 1889 (Laws 1889, Act No. 263).—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 537. Mandamus lies to compel a common council to designate at a lawful meeting chairmen of boards of inspectors of election and registration to take the place of those illegally appointed.—Dingwall v. Common Council of Detroit, 82 Mich. 568.

¶ 538. Mandamus will lie to compel a board of election commissioners, in making up the ballot for use at an election, to comply with Pub. Acts 1895, No. 271, § 14, by assigning to the ticket of the party having the greatest number of votes within the county at the last preceding general election the first place upon the ballot, and to the tickets of all other parties positions governed relatively by the same rule.—Baker v. Board of Election Com'rs of Wayne County, 110 Mich. 685.

¶ 539. Mandamus may be granted on petition of candidates for office duly nominated at a primary to prohibit the board of election commissioners from unlawfully placing the names of candidates of other political parties on the official ballot which parties did not cast at such primary 15 per cent of the vote cast by them in the last November election for secretary of state as required by Act 281, P. A. 1909, § 37.—Brown v. Board Election Com'rs Kent Co., 174 Mich. 477.

¶ 540. On petition for mandamus to compel the board of election commissioners to place relator's name on a ballot an order to show cause may be granted.—DeFoe v. Board Election Com'rs Bay City, 174 Mich. 472.

¶ 541. The common council of a village, when convened to determine the result of an election, as required by law, can act only upon the returns received from the board of inspectors, and the only remedy of a candidate, who is defeated by the improper rejection of ballots not stamped with crosses in the circles at their heads, is by quo warranto.—Johnson v. Board of Canvassers of Village of Casnovia, 101 Mich. 187.

¶ 542. Where a board of canvassers canvassed the votes cast for a certain office as reported by the inspectors of election in a second or substituted return, made after the filing of the original return, mandamus will lie to compel a recanvass from the original return.—Roemer v. Board of Canvassers of Detroit, 90 Mich. 27.

¶ 543. Where after making a recount under How. St. § 234a, the board of canvassers has declared the result and has adjourned, it becomes functus officio, and the remedy of an aggrieved party is by quo warranto, not by mandamus to compel the board to reassemble and to make a full and detailed report of all ballots, etc.—Packard v. Board of Canvassers of Menominee County, 94 Mich. 450.

¶ 544. Mandamus was granted to compel second recount where canvassers had recanvassed votes of a precinct not included in petition for recount.—May v. Board of Canvassers of Wayne County, 94 Mich. 505.

¶ 545. Mandamus was granted, after unauthorized recount of votes, to compel board to reconvene and recanvass votes according to original returns, and to report same to secretary of state.—Belknap v. Board of Canvassers of Ionia County, 94 Mich. 516; Vance v. Board of Canvassers of St. Clair County, 95 Mich. 462.

¶ 546. Where a board of election canvassers refuses to make a recount it may be compelled to proceed and make such recount, but when the board has acted, declared the result and adjourned mandamus will not lie to compel the board to reconvene and declare some other result which a court of justice may determine to be a more just one.—Dickinson v. Board of Canvassers of Cheboygan County, 148 Mich. 513.

¶ 547. Where a body is the judge of the election and qualifications of its own members, as in the case of legislators or aldermen, mandamus will be denied to compel a recount.—Naumann v. Board of City Canvassers of Detroit, 73 Mich. 252; Wheeler v. Board of Canvassers of Manistee County, 94 Mich. 448.

§ 83. ——On submission of questions to electors.

Proper persons to be relators, see post § 127. Allegations of petition, see post ¶ 821.

¶ 548. The duties charged upon the secretary of state relative to a petition for a referendum under the Constitution, art. V, § 1, as amended in 1913, being ministerial and not discretionary, he may be required to perform such duties by mandamus.—Thompson v. Secretary of State, 192 Mich. 512.

¶ 549. The decision of the board of supervisors in passing on a petition to submit to vote the question of prohibition, under the local option statute, may be reviewed on mandamus by the courts.—Crawford v. Board Sup'rs Gratiot Co., 160 Mich. 31.

¶ 550. A board of supervisors, after refusing to inquire into the genuineness of signatures on a local option petition, adjourned sine die without taking the necessary steps for the submission of the proposition to the voters. Mandamus was denied by the lower court to compel the board to reconvene and complete the work. Held, on certiorari, that mandamus should issue from the supreme court ordering the board to reconvene and determine the sufficiency of the petition by limiting their inquiry to its validity on its

face.—Kern v. Board Sup'rs St. Clair Co., 160 Mich. 11. (Ostrander, McAlvay and Brooke, JJ., concurring, in separate opinions.)

¶ 551. Mandamus will issue to compel a city council to do such acts as may be necessary to hold a special election to submit a proposed charter, though because of lapse of time certain statutory or charter provisions cannot be complied with, if no disfranchisement of electors will result, as in view of Pub. Acts, 1909, Act 279, sec. 26, How. 2nd Ed., § 5467, the provisions are not mandatory.—Attorney General ex rel. Baum v. City of Saginaw, 177 Mich. 432.

¶ 552. Mandamus lies to compel the state board of canvassers to convene and recanvass the votes cast for or against a proposed amendment to the constitution, where a palpable mistake has been committed by the previous board.—Rich v. Board of State Canvassers, 100 Mich. 453.

¶ 553. Mandamus is the proper remedy to compel a board of supervisors to reconvene and recanvass votes cast at a local option election.—Baldwin v. Board Sup'rs of Alger County, 189 Mich. 372.

¶ 554. Mandamus will lie to compel a board of supervisors to pass a resolution declaring for local option in a county after the electors have duly voted for prohibition.—Paul v. Benzie Circuit Judge, 169 Mich. 452.

¶ 555. The relator filed with the respondent board of supervisors a petition demanding a recanvass of the votes cast at a local option election held under Act No. 207, Pub. Acts 1889, as amended by Act No. 183, Pub. Acts 1899, on the grounds that certain ballots were improperly allowed by the inspectors and others improperly rejected, and for various irregularities at the polling places. The respondent declined to consider the petition, having made a regular canvass and entered the order making prohibition effective in the county. In mandamus to compel the board to make a recanvass, held, that its functions in making the canvass and tabulating the returns were purely administrative, and not subject to judicial review, and the writ was denied.—Haehnle Brewing Co. v. Board Sup'rs Jackson Co., 156 Mich. 498.

¶ 556. Where a board of supervisors, in canvassing the returns of an election on the question of prohibition, refuses to pass any resolution on the ground that it is not able to determine from the return whether it should declare for or against prohibition, and adjourns without taking any action, mandamus will lie to compel the board to reconvene and pass a resolution in accordance with the decree of the court.—Attorney General v. Board Sup'rs Genesee Co., 166 Mich. 61.

§ 84. Certification of election and admission to office.

Impropriety of mandamus to try title to office, see ante § 20.

Necessity of right in relator to office demanded, see ante § 6, ¶ 30.

Allegations of petition for writ, see post ¶ 824.

¶ 557. Mandamus lies to compel the board of supervisors to admit a member duly certified as elected.—Robinson v. Cheboygan Board Sup'rs, 49 Mich. 321.

¶ 558. Where the charter of Eaton Rapids provided that the mayor should represent that city in the county board of supervisors, mandamus was granted to compel the board to recognize him.—Smith v. Eaton Springs Sup'rs, 56 Mich. 217.

¶ 559. The charter of Port Huron makes the common council the final judges of the election of aldermen. Held, that mandamus would not lie to compel them to reinstate one whom they had excluded without a proper hearing on the merits.—People ex rel. Cooley v. Fitz Gerald, 41 Mich. 2.

¶ 560. Where the city board of canvassers of election in Detroit had refused to declare the result of the election of one candidate for alderman, and had declared elected others who had not received a majority of the votes cast, mandamus was granted to compel the respondents to meet and canvass the returns, declare the result, and issue certificates of election to the relators.—Coll v. City Board of Canvassers, 83 Mich. 367.

¶ 561. After a recount of ballots cast at a primary election by the county board of canvassers resulting in relator's favor, his opponents filed mandamus against the county board to compel it to reconvene and recount on account of the alleged illegal ballots. In that action the court found the existence of such illegalities but also that the net result was many more votes in relator's favor than he had theretofore. A copy of the record of that case was included in the return. Held, a writ of mandamus against the state board of canvassers to compel them to issue a certificate to relator could not be denied on the ground that the correctness of the recount was being questioned in the courts and was undetermined since the record showed a result in relator's favor.—Beakes v. Board State Canvassers, 172 Mich. 408.

§ 85. Appointments and confirmations and approvals.

¶ 562. Mandamus was granted to compel the common council of Detroit to consider and act upon the mayor's nominations made under the act establishing a board of public works.—People ex rel. Attorney General v. Detroit Common Council, 29 Mich. 108.

¶ 563. Mandamus is the proper remedy to compel a common council to approve an off-

cial bond offered by a duly appointed person whom the council cannot remove without charges and trial; and this, though the mayor who made the appointment seeks to recall it, and though quo warranto proceedings by the relator against a second appointee are pending.—Speed v. Common Council of Detroit, 97 Mich. 198.

¶ 564. Mandamus will not be granted upon the application of the moderator and a director of a graded school district to compel the assessor to meet with them and fill the vacancies caused by the resignation of the other two trustees, there being other methods of filling the vacancies also provided by statute and no reason shown why such other methods could not be followed.—Johnston v. Mitchell, 120 Mich. 589.

§ 86. Restoration of public officer or employee to service.

Impropriety of trying legality of removal by mandamus to pay salary, see post ¶¶ 904, 905.

¶ 565. Mandamus lies to a police board to compel the reinstatement of a policeman whom, upon acquitting of specific charges preferred against him, it has adjudged guilty of another offense not specified and has dismissed; and this, though the board has summary power of removal.—Wilkinson v. Board of Police Com'rs of Saginaw, 107 Mich. 394.

§ 87. Tax levies, assessments, and sales and deeds.

Duties pertaining to public funds after collection, see post § 88 et seq.

Mandamus or action on contract as proper remedy on claim, see also ante ¶ 108.

Doubtful legality of bonds to be paid as bar to writ, see ante ¶ 508.

Other remedy as bar, see also ante § 5.

Propriety of trial of title to the land, see also ante ¶ 19.

Laches and delay as reason against issuance of writ, see ante § 12.

Denial of writ because too late to be effectual, see also ante ¶ 55.

Allegations in petition for writ, see post ¶ 820.

¶ 566. Mandamus lies to compel the board of supervisors to apportion upon the taxable property of the county the sum properly certified to be due from the county to the state on account of taxes.—People ex rel. Auditor General v. Jackson County Sup'rs, 24 Mich. 237.

¶ 567. Mandamus is granted to compel the supervisors to spread upon the tax-rolls of their county a sum lost by the state in consequence of the failure of the county treasurer to account for moneys received at a tax sale conducted by him.—People ex rel. Attorney General v. St. Clair County Sup'rs, 30 Mich. 388.

¶ 568. Mandamus lies to compel a town clerk to issue the proper certificate for the levy of a tax to satisfy a judgment against the township, even though the cause of action arose in territory that was set off as a new township after it arose and before judgment.—Courtright v. Brooks Township Clerk, 54 Mich. 182.

¶ 569. Under Comp. L. 1871, § 477, How. St. § 483, it requires a popular vote to authorize a county to borrow or raise by tax for building purposes more than $1,000 in any one year; and mandamus is refused to compel provision to be made by taxation to pay warrants amounting to $2,640, purporting to have been issued by a board of supervisors for county building purposes between June, 1874, and January, 1875, where the question of raising or borrowing this money has never been submitted to a vote of the people and where the relator had notice of the invalidity of the warrants.—People ex rel. Pack v. Presque Isle Sup'rs, 36 Mich. 377.

¶ 570. Mandamus will not lie to compel a township to assess a tax to pay the uncollected part of a former assessment ordered to pay the amount then due on its bonds, until after the sale for delinquent taxes of the lands whereupon the former assessment was made.—Wayne County Sav. Bank v. Roscommon County Sup'rs, 97 Mich. 630.

¶ 571. Mandamus will lie to compel ministerial officers to discharge a duty imposed upon them by statute with reference to the assessment and collection of taxes, e. g., to lay a drain assessment before the board of supervisors, unless the circumstances are clearly such that justice requires that the writ should not issue.—Laubach v. O'Meara, 107 Mich. 29.

¶ 572. It being the duty of the board of supervisors to determine that drain taxes are authorized by law, a person injured by their error in such determination has a remedy by mandamus.—Zink v. Monroe County Sup'rs, 68 Mich. 283.

¶ 573. Township officials who refuse to reassess as required by §§ 4366 and 4369 Comp. L. 1897, §§ 3423 and 3426, How. St., 2nd Ed., a drain tax which had been set aside for other than jurisdictional reasons, may be compelled by mandamus to do so.—McDermott v. Alger, 186 Mich. 278.

¶ 574. Mandamus will not be granted to compel the assessors to deduct the amount of United States bonds included in the taxable assets of an insurance company where a larger amount of "reserve fund" had erroneously been deducted as liability.—Detroit Fire & Marine Ins. Co. v. Hartz, 132 Mich. 518.

¶ 575. Where a plaintiff is assessed for property owned by another, mandamus will

not lie against the taxing officers to strike the levy from the rolls, since the plaintiff has a complete remedy at law.—W. A. Sturgeon & Co. v. Board Assessors City of Detroit, 159 Mich. 199.

¶ 576. The court would not, on motion for mandamus, inquire into the exercise of the power—judicial in its nature—conferred upon the auditor general by the Act of 1843 (Sess. L., p. 81), authorizing him in certain cases to forbear to sell or to withhold a conveyance of lands sold for taxes.—People ex rel. Sweet v. Adam, 3 Mich. 427.

¶ 577. Mandamus will lie to compel the auditor general to issue a certificate of error where the original owner of lands sold at a tax sale tenders the full amount of taxes due and demands a certificate of error, though a void deed has been issued covering the lands.—Hubbard v. Auditor General, 120 Mich. 505.

¶ 578. The supreme court will not issue a writ of mandamus to compel the auditor general to issue a certificate of error canceling certain tax deeds conveying lands belonging to an estate of which relator is trustee, where the relator has filed a bill of complaint in the circuit court, involving substantially the same questions, making all the parties in interest defendants.—Lillie v. Auditor General, 173 Mich. 538.

¶ 579. The acts of the auditor general in issuing a certificate of error canceling a tax deed under Comp. L. 1897, § 3921, as amended by Pub. Acts 1903, No. 80, How. 2nd Ed. § 1868, on his own motion are ministerial and not judicial so that a writ of mandamus will lie to compel him to vacate and set aside a certificate of error wrongfully issued.—Plank v. Auditor General, 192 Mich. 313.

¶ 580. Mandamus will not issue at the instance of a railroad company to compel the auditor general to cancel the sale of land for delinquent taxes on the ground that the land was not locally taxable where it appeared that part of the land sold for taxes was taxable and the taxes had not been paid on that portion.—Grand Rapids & I. R. Co. v. Auditor General, 144 Mich. 77.

¶ 581. Mandamus will lie to compel the auditor general to refund the money paid by a purchaser at a void tax sale.—Gurd v. Auditor General, 122 Mich. 151.

¶ 582. Mandamus will not lie to compel the auditor general to refund taxes paid as a condition of purchase at a state bid at the tax sale where the action of assumpsit on the claim would have been barred by the statute of limitations.—McRae v. Auditor General, 146 Mich. 594.

¶ 583. Mandamus will lie to compel the recorder of a village to fulfil the duty, imposed upon him by the charter, of advertising and selling lands returned for delinquent paving taxes; and he cannot refuse to do so on the ground that he believes the action of the council in laying the particular tax to be illegal, especially if the proceedings are sufficiently fair on their face to protect ministerial action, and the work has been done and the tax in a great measure paid in.—Hudson Common Council v. Whitney, 58 Mich. 158.

§ 88. Application, appropriations, and disposal of public funds.

Correction of improper injunction against misapplication of funds, see ante § 45.
Illegality of proposed bonds as bar to mandamus to issue them, see also ante § 11.

¶ 584. A board of education is entitled to mandamus to compel its treasurer to pay its funds to the proper depository under the law.—Port Huron Board of Education v. Runnels, 57 Mich. 46.

¶ 585. A writ of mandamus will lie in favor of parties holding a judgment against a city, to compel the city treasurer to turn over certain moneys collected by means of a tax spread for the express purpose of paying a judgment against the city, although there was nothing in the tax roll to identify it as the judgment in question.—Montpelier Sav. Bank & Trust Co. v. Quinn, 149 Mich. 701.

¶ 586. The fact that the provisions of the statute were not strictly observed by the assessing officers will not prevent a mandamus from issuing to compel a city treasurer to turn over moneys collected and held by him, with full knowledge of the purpose for which it was collected, and to whom it belonged.—Montpelier Sav. Bank & Trust Co. v. Quinn, 149 Mich. 701.

¶ 587. Where a city has voted under Act No. 279, Pub. Acts 1909, to revise its charter, mandamus will lie to force the city council to appropriate money to meet the expenses of a charter commission, as provided for in said act.—Attorney General v. Mayor & Common Council City of Adrian, 164 Mich. 143.

¶ 588. The insurance money collected by the board of supervisors upon the burning of a county jail building was deposited pursuant to section 2544, Comp. L. 1897, with the general funds of the county, and such funds were never reduced below the amount of said insurance money. The electors of the county voted to expend said money for the building of a new jail. The site of the jail was duly established. Held, mandamus would lie to compel the board of supervisors to expend said insurance money in the erection of a jail building on said site.—Attorney General ex rel. Greenfield v. Board Sup'rs Alcona Co., 167 Mich. 666.

§ 89. Accounting for and paying over and refunding tax moneys and public revenues.

See also ante ¶ 13.

To compel adjustment on division of territory, see post § 90.

To compel repayment by improper to proper custodian, see also ante ¶ 513.

¶ 589. Mandamus does not lie to compel the auditor general to pay over to a county moneys which have been withheld from it in the annual settlements, under a mutual mistake of law and by authority of Comp. L. 1871, § 1090, by which the counties were charged with deficiencies on resales of state tax bids.—People ex rel. Ambler v. Auditor General, 38 Mich. 746.

¶ 590. Mandamus was not granted to compel the auditor general to accept delinquent tax-lists after July 1 (the day on which he is required by statute to list and advertise the lands for sale), and to credit the counties with the amount thereon.—People ex rel. Houghton County v. Auditor General, 36 Mich. 271.

¶ 591. Mandamus will not lie in behalf of a county to compel the auditor general to pay over to the county treasurer the taxes assessed for township, school and highway purposes in the relator's townships; such proceeding being in effect a suit against the state.—Ottawa County Sup'rs v. Auditor General, 69 Mich. 1.

¶ 592. Where money has gone into the state treasury as part of a general balance rightfully received, and not as a separate and independent item wrongfully received, mandamus will not lie to require its repayment, nor can any suit be maintained for it unless voluntarily allowed within the authority of some proper officer.—People ex rel. Ambler v. Auditor General, 38 Mich. 746.

¶ 593. Mandamus lies to compel the county treasurer to pay over to the proper local officers the amount of liquor taxes to which they are entitled by the law.—City of East Saginaw v. Saginaw County Treasurer, 44 Mich. 273.

¶ 594. A city collector who, upon settling his accounts between the city and the county, mistakenly included an item charged against the city for a soldiers' relief fund, which had not been spread on the rolls and had not been collected by the collector, was entitled by mandamus to compel the treasurer who knew of the circumstances, to repay the amount, although the latter had credited the amount to such relief fund; as he could balance the credit by a debit charge when he came to pay it.—Webster v. Wheeler, 119 Mich. 601.

¶ 595. Mandamus is not the proper remedy for compelling a township to refund the amount of a tax unlawfully levied if there is any issue involved which should go to the jury.—Byles v. Township of Golden, 52 Mich. 612.

¶ 596. Where a liquor tax belonging to a village was assessed and collected by township officers and used for township purposes, a mandamus was granted to compel its payment over to the village authorities.—People ex rel. Village of Decatur v. Decatur Township Board, 33 Mich. 385.

¶ 597. Mandamus is not the proper remedy to compel payment by a county to a township of an unliquidated demand arising from a county treasurer's default.—Township of Cumming v. County of Ogemaw, 93 Mich. 314.

¶ 598. When it appears in mandamus to compel a county treasurer to pay over to a city the amount due from a collection of delinquent taxes, that the treasurer claims a set-off for an amount alleged to be due the county for the dishonor of a check given to the county treasurer by the city treasurer for taxes due, that the dishonored check was for $4,066.70, and that the county owes the city $5,349.85, the mandamus will issue.—City of Sault Ste. Marie v. Hotten, 171 Mich. 265.

§ 90. ——On division of territory or consolidation.

Sufficiency of record showing, see post § 161.

¶ 599. Where, after the division of a township, the town boards have met and determined the amount of the township indebtedness to be paid by the new township, such amount is a fixed and liquidated demand against the new township, which it is the duty of its town board to allow and issue orders for. If the town board refuse to perform this duty, mandamus is the proper remedy, and not an action against the township.—Township of Marathon v. Township of Oregon, 8 Mich. 372.

¶ 600. A township issued plank-road bonds which were invalid. The bonds were negotiated and the township was afterwards divided. Held, that the judgment, in a subsequent action on the bonds to which the new township was not a party, was not binding on it; and mandamus will not lie to compel the township board of the new township to meet with the township board of the old one to apportion the indebtedness arising on the bonds.—Hale v. Baldwin Tp. Board, 49 Mich. 270.

¶ 601. Mandamus lies on relation of a school-district assessor to compel the clerk of a township to which the district formerly belonged to certify to the supervisor of the township to which it now belongs the amount liquidated by the school inspectors as due to the relator's district from what remained of the old district out of which it was erected.

—Ramsey v. Everett Township Clerk, 52 Mich. 344.

¶ 602. Where after a county has been divided the whole of a state tax has, through the auditor general's error, been paid by the old county, mandamus will not lie to compel a settlement between the respective boards of supervisors; the old county's remedy is by action at law against the new county to recover back its proportionate share paid for it by plaintiff.—Ontonagon County Sup'rs v. Gogebic County Sup'rs, 74 Mich. 721.

¶ 603. Mandamus will not lie to compel a county organized from the territory of another county to refund the amount of state taxes paid by the old to the use of the new in consequence of an erroneous apportionment, where the amount of the claim is in dispute, since other adequate legal or equitable remedies exist.—Bay County Sup'rs v. Arenac County Sup'rs, 111 Mich. 105.

§ 91. Auditing of state claims.

Amenability of state auditors to mandamus, see ante § 72.

Compelling payment of claims against the state, see post § 98.

Mandamus or assumpsit as proper remedy, see also ante § 15.

What are proper state claims, see State of Michigan.

¶ 604. Mandamus denied to compel the state board of auditors to consider relator's claim for extra services in compiling the statutes.—People ex rel. Dewey v. Board of State Auditors, 32 Mich. 191.

¶ 605. Mandamus will not lie against a public board at the suit of an employee thereof for redress for a breach of contract, but he may have a claim for damages.—Portman v. State Board of Fish Com'rs, 50 Mich. 258.

¶ 606. Under Comp. L. 1897, § 12, providing compensation for clerks and assistants of the House of Representatives and Senate and including 10c for every mile actually traveled, and section 13 prescribing what officers shall certify and that the auditor shall countersign the certificate for compensation, the auditor has the duty of determining the proper allowance and cannot be compelled by mandamus to countersign certificates made by the proper officer including mileage when there has been no actual travel.—Cook v. Auditor General, 129 Mich. 48.

¶ 607. The fact that the legislature has for many years fixed the amount of mileage for its employees and members does not make it compulsory on the auditor general to countersign certificates for such mileage when wrongfully allowed, as by Comp. L. 1897, § 12, mileage is allowed only for actual travel and by section 13 a certificate must be countersigned by the auditor.—Cook v. Auditor General, 129 Mich. 48.

§ 92. ——Of municipal, township, and county claims.

Compelling issuance of warrants and payment of claims, see post 93 et seq.

Necessity of request for audit or presentment of claim, see ante § 76.

What are proper county, municipal, township, or school claims, see Counties, IV, VI; Municipal Corporations, XIV; Townships, III, VI; Schools, IV.

What are proper claims for expenses and compensation in administration of health laws and regulations, see Health.

Mandamus as proper remedy to compel payment of health department expenses, see also Health ¶ 73.

Denial of writ to compel audit of claim because payment without vote of electors would be unlawful, see also Counties ¶ 107.

¶ 608. Mandamus lies to compel a board of supervisors, when a claim is made against the county, to give claimant a hearing and to decide the claim.—Peck v. Kent County Sup'rs, 47 Mich. 477; Cicotte v. County of Wayne, 59 Mich. 509.

¶ 609. Mandamus lies to compel a board of supervisors to allow a claim that is by law made a charge upon the county.—People ex rel. Bristow v. Macomb County Sup'rs, 3 Mich. 475; People ex rel. Schmittdiel v. Wayne County Auditors, 13 Mich. 233.

¶ 610. The board of auditors cannot be compelled by mandamus to allow a demand rejected by it on the ground of nonperformance of the services charged for.—People ex rel. Kuhn v. Wayne County Auditors, 10 Mich. 307.

¶ 611. Mandamus will not lie to control the action of the supervisors, when they have only used their lawful discretion, e. g., where their determination is conclusive not only as to the propriety of making an allowance, but as to the amount.—People ex rel. Mixer v. Manistee County Sup'rs, 26 Mich. 422.

¶ 612. On mandamus to compel the Wayne County Auditors to audit and allow a claim for services rendered by the sheriff where the evidence shows that the claim was disallowed in toto, on advice of counsel that the auditors had no power to audit and allow the claim, the board will be compelled to act if there is any item of the claim which they had power to allow.—Chipman v. Wayne County Auditors, 127 Mich. 490.

¶ 613. Mandamus was denied on an application to require the supervisors to audit and allow an attorney fee of $10, taxed by the justice but not collected, where the prosecution under the prohibitory liquor-law was instituted by a private citizen and the attorney was not the prosecuting attorney, and where the supervisors had prescribed no rule in advance, but in acting upon the claim af-

terwards had allowed the relator $2 and refused to allow any more.—People ex rel. Videto v. Jackson County Sup'rs, 31 Mich. 116.

¶ 614. A sheriff, without first obtaining the authority of the supervisors for the purpose, employed a night watchman for the jail and boarded him at the jail while he was so employed. The board of supervisors paid the watchman, and the sheriff then presented a bill against the county for boarding him. This bill the board refused to allow. The sheriff also hired an office for himself, claiming that the one provided by the county was wholly insufficient and unsuitable, and, also, that his action was sanctioned by a committee of the board of supervisors. The board refused to allow his bill for the rent. Held, that such bills are within the exclusive discretion of the board, and that allowance thereof cannot be compelled by mandamus.—Peck v. Kent County Supervisors, 47 Mich. 477.

¶ 615. Mandamus will not be granted to compel the board of supervisors to audit and allow the county clerk's fees for issuing subpoenas to delinquent taxpayers.—Sherman v. Sanilac County Sup'rs, 84 Mich. 108.

¶ 616. Mandamus lies to compel the board of auditors of Wayne County to allow the expenses necessarily incurred by the board of health of a township in providing for the safety of its inhabitants by removing, etc., any indigent person infected with a contagious disease.—People ex rel. Bristow v. Macomb County Supervisors, 3 Mich. 475.

¶ 617. Mandamus is the proper remedy to compel a board of supervisors to allow a physician's account for services rendered during an epidemic under direction of the board of health, which account the board has certified to be correct.—McKillop v. Cheboygan County Sup'rs, 116 Mich. 614.

¶ 618. Mandamus will lie to compel a public board to award compensation for damages resulting from its official action, where the duty to pass upon the amount of compensation is established, and it refuses to make any award.—Safford v. Detroit Board of Health, 110 Mich. 81.

¶ 619. Mandamus was the proper remedy for a claimant for services rendered to the city of Detroit at the request of the board of health to compel such board to audit such claim, as provided in Local Acts 1897, No. 413; and until such claim was so audited claimant had no remedy at law.—Boyd v. Detroit Board of Health, 140 Mich. 306.

¶ 620. In mandamus by the Board of Water Commissioners of Detroit to compel the Commissioners of Parks and Boulevards to audit an account for water furnished, Long and Grant, JJ., hold the writ should issue, notwithstanding the board of estimates made no provision for raising the money necessary to pay for the water and that the council may refuse to pay; Hooker, J., holds that the writ should be denied on the ground that there was no appropriation and the park board is prohibited from incurring obligations beyond appropriation; Montgomery, C. J., and Moore, J., hold the writ should be denied because the board of water commissioners are bound to furnish water free.—Board of Water Commissioners of Detroit v. Commissioners of Parks and Boulevards, 126 Mich. 459.

¶ 621. Assumpsit and not mandamus lies in favor of the director of a school district upon a disputed claim against the district which the moderator and assessor have declined to pass upon as an entirety.—Van Wert v. Adams Township School Dist. No. 8, 100 Mich. 382.

§ 93. Issuance of warrants and payment of claims and judgments.

Salary claims, see post § 94.
Invalidity of claim or defense or objection to it as bar to mandamus, see post § 95.
Existence and sufficiency of fund for payment as condition, see post § 96.
Effect of levy on claim or transfer or assignment of it, see post § 97.
Claims and debts against the state, see post § 98.
Accounting and payment of tax moneys among political divisions of the state, see ante §§ 88-90.
Compelling appropriation of money for expense of office, see ante ¶ 587.
Compelling payment of money into proper fund for payment, see ante ¶ 585.
Necessity of clear legal right in relator or demandant, see also ante § 6.
Want of provision for interest as bar to writ to compel it, see ante ¶ 509.
To compel allowance and payment of claims made binding on county by law, see also Counties ¶ 175.
Mandamus to compel payment of drain order, see Drains § 54.

¶ 622. Mandamus for the payment of money can issue at the instance of one municipal corporation against another only when there are statutory or legal relations between them to authorize it, and the obligation to pay has been legally liquidated.—Midland School Dist. No. 9 v. Midland School Dist. No. 5, 40 Mich. 551.

¶ 623. In order that the payment of a claim by a municipal corporation may be enforced by mandamus it is essential that the amount thereof shall have been determined either by judgment, statute, authorized officer or board, or by agreement between the parties.—Waterman-Waterbury Co. v. Cato Township School Dist. No. 4, 183 Mich. 168.

¶ 624. Mandamus is the proper remedy to enforce the payment of city orders drawn

upon a specific fund, where the fund is supplied.—Second Nat. Bank v. City of Lansing, 25 Mich. 207.

¶ 625. Mandamus is the remedy against a municipal corporation for its improper refusal to pay orders properly drawn upon it for the payment of liquidated claims.—Peterson v. City of Manistee, 36 Mich. 8.

¶ 626. Mandamus does not lie to compel a city to pay an unliquidated demand, such as a claim on a quantum meruit for the value to the city of services performed and materials furnished on a contract which was afterwards forfeited.—People ex rel. Michigan Paving Co. v. Detroit Common Council, 34 Mich. 201.

¶ 627. Mandamus against the town officers in case of their neglect to do their duty is the proper remedy to compel the payment of an established demand against a township.—Township of Dayton v. Rounds, 27 Mich. 82.

¶ 628. Mandamus, and not an action against the township, is the proper remedy to enforce payment of orders regularly drawn by the highway commissioners upon the township treasurer.—McArthur v. Township of Duncan, 34 Mich. 27; Just v. Township of Wise, 42 Mich. 573.

¶ 629. Mandamus lies to compel a school-district moderator to countersign order on township treasurer.—People ex rel. Burns v. Bender, 36 Mich. 195.

¶ 630. Mandamus to compel a school-district assessor to pay a school order was allowed where the court was satisfied there was no valid defense.—Martin v. Tripp, 51 Mich. 184.

¶ 631. Mandamus was granted to compel a board of supervisors to provide for the payment of a balance credited upon the books of the county to a certain township which belonged, with another, to a county set off from the first, the credit having been made in pursuance of a mutual agreement between the townships and the county indebted.—Township of Higgins v. Midland County Sup'rs, 52 Mich. 16.

¶ 632. The Wayne county board of auditors may be compelled by mandamus to refund a fine, the judgment under which it was imposed having been reversed on certiorari, and the fine having been paid to avoid imprisonment.—McMahon v. Wayne Auditors, 41 Mich. 223.

¶ 633. Mandamus to compel a common council to order payment of a judgment against the city denied, relator's proper course being to proceed under the statute requiring judgments so recovered to be spread upon the tax-roll.—Griswold v. Common Council of Ludington, 117 Mich. 317.

¶ 634. A judgment in condemnation proceedings to open a street in Detroit which had become final may be enforced by mandamus directing the city to pay the amount awarded from funds already in its hands, or, if that cannot be done, to proceed to levy an assessment for that purpose, under the general law in force before the passage of Local Acts 1895, No. 467, which provided a procedure specially applicable to that city.—Balch v. City of Detroit, 109 Mich. 253.

§ 94. ——Claims for salaries and compensations of office.

Legislative employees, see also ante § 91.
Of legislative employees, see also ante § 91.
Mandamus to judge to allow coroner's fee bill, see ante ¶ 366.
Invalidity in or objection to claim as bar to the writ, see post § 95, and see also ante § 11.

¶ 635. Mandamus is the proper remedy to enforce the payment by a municipal corporation of an official salary, the amount of which is fixed.—McBride v. City of Grand Rapids, 47 Mich. 236; Speed v. Common Council of Detroit, 100 Mich. 92; Granger v. French, 152 Mich. 356; Chase v. Hart, 162 Mich. 74.

¶ 635a. The fact that the general fund, out of which salaries are usually payable, has been overdrawn, will not prevent the issue of a mandamus to compel the payment of a fixed salary, where it appears that the amount of uncollected taxes is largely in excess of said overdraft, and that the city council has authorized a loan in anticipation of the collection of said taxes, and that the salary in question has not been anticipated in the annual budget, and is therefore contingent, and, under the charter, payable out of the contingent fund, which is amply sufficient for that purpose.—Speed v. Common Council of Detroit, 100 Mich. 92.

¶ 636. Where a board of park commissioners declines to authenticate the demand of an engineer for services, and the common council regards the action as final and therefore refuses to allow the claim, the only way that the claim can be liquidated is by suit, and mandamus will not lie to compel payment of the claim.—Bloomshield v. City of Bay City, 192 Mich. 488.

¶ 637. Where a board of park commissioners performs its legal duty by authenticating the claim of an engineer for services so that the demand becomes liquidated, payment by the city can be enforced only in mandamus proceedings.—Bloomshield v. City of Bay City, 192 Mich. 488.

¶ 638. Mandamus will not lie to compel the payment of an assistant visitor of schools for services under Laws 1891, Act No. 147, where the commissioner has not determined the assistant's compensation, as required by

section 10 of the act.—Hicks v. Board of Auditors of Wayne County, 97 Mich. 611.

¶ 639. Mandamus is not the proper remedy to secure payment for services rendered after hours by a clerk in a municipal office.—Goodson v. Detroit Board of Health, 114 Mich. 345.

¶ 640. Where the court has, in a previous mandamus proceeding brought by the police commissioners of a city, ordered the mayor and common council to make an appropriation for the support of the police department, the court will sustain a mandamus proceeding to compel the mayor and council to allow the pay roll presented by the police department, in pursuance of the appropriation ordered.—Board Police Com'rs City of Wyandotte v. Mayor & Common Council of Wyandotte, 154 Mich. 495.

¶ 641. Respondent hired relator to teach in the public schools for one year, beginning in September. On December 18th she was served with a copy of a resolution adopted by the committee on teachers, which provided that she be relieved from further duty pending the action of the school board. At its next meeting the board approved of the committee's action, and provided that the release from duty be continued during the term for which she had a contract with the board. The relator's salary was paid to January 1st, but at the meeting of the board in January it was resolved to discontinue it. Mandamus proceedings were thereafter instituted to compel the payment of the salary fixed by the contract. Respondent answered, claiming that it had discharged the relator in the exercise of its power to discharge teachers for good and sufficient reasons. Held, that mandamus was improperly granted, for the reason that the usual action at law afforded an adequate remedy.—Coffin v. Board of Education of Detroit, 114 Mich. 342.

§ 95. ——Invalidities, defenses, and defects in claim.

Denial of writ to aid or further illegality, see also ante § 11.
Staleness or limitations on claim as reason against writ, see also ante § 12.
Alleging invalidity as justification, see post § 144.
Estoppel to enforce claim against fund, see also ante ¶ 64.

¶ 642. Mandamus to compel one municipality to pay an indebtedness to another as agreed upon by representatives of both was denied where the proceedings to determine the debt did not clearly appear to be those prescribed by statute. (Local L. 1883, Act No. 38.)—Portsmouth Township v. Bay City, 57 Mich. 420.

¶ 643. Mandamus will not lie to compel the auditor general to pay a bill of inquest allowed by the circuit court, where such bill contains illegal items on its face.—Edwards v. Auditor General, 161 Mich. 639.

¶ 644. Mandamus was granted to compel payment of a proper order made upon the township treasurer by a commissioner of highways who was performing the duties of his office though he had not filed an official bond.—Mackenzie v. Baraga Township Treasurer, 39 Mich. 554.

¶ 645. Mandamus will lie to compel the county treasurer to honor an order of the supervisors to pay a de facto supervisor without passing upon the question of title to the office in dispute.—Friedman v. Horning, 128 Mich. 606.

¶ 646. Mandamus lies to compel a township treasurer to pay to relator so much of the money in his hands as is covered by the warrant of a school director drawn in relator's favor and in proper form, even though it does not specify a precise sum, but is for all such money in his hands as was raised for the purposes of the school district and belonged thereto.—Bryant v. Moore, 50 Mich. 225.

¶ 647. Mandamus should not issue to compel the payment of a municipal warrant, where the city objects to such payment on the ground that the warrant was issued as an advance payment on a contract which had not been performed and which the contractor had failed since issuance to perform as agreed, and that there is a remedy open to the contractor by action upon the bond given to secure payment for the work, in which the city's defense may be asserted.—Barber Asphalt Paving Co. v. Village of Highland Park, 156 Mich. 178.

¶ 648. Mandamus to compel a township supervisor to sign a warrant for the purchase of site for a town hall where no contract exists, should be denied.—Wilhelm v. Fagan, 90 Mich. 6.

¶ 649. Mandamus will not lie to compel the common council of Grand Rapids to order the payment of invalid claims certified by the board of police commissioners under a contract by said board for the board of persons who are to testify for the people in a criminal prosecution.—Tucker v. Grand Rapids Common Council of Grand Rapids, 104 Mich. 621.

¶ 650. Upon mandamus to compel a village president to sign orders for payment of one hired to look after city property, the failure to observe certain formalities in the presentation of the account to the council will not prevent the issuing of the writ where the president put his refusal on other grounds.—Clapp v. Titus, 138 Mich. 41.

¶ 651. In mandamus by the board of road commissioners to compel the board of county

officers and the county treasurer to audit and pay a warrant on the road fund, where proceedings are pending to try their title to office, and great confusion might result if it were held that warrants drawn by them must be paid, their right to office being a serious question, courts are clothed with considerable discretion in determining whether or not a mandamus should issue.—Board of Road Com'rs of Wayne County v. Board of Auditors of Wayne County, 148 Mich. 255.

¶ 652. Mandamus to compel a village to levy a special assessment to pay certain warrants due on a contract between the parties respecting the relinquishment of certain rights of the plank road company within the village limits under Pub. Acts 1903, No. 159, will not issue during the pendency of an action brought by taxpayers against both parties where the principal contention is that the contract between them and the warrants issued under it are invalid, and both parties are enjoined from doing anything thereunder.—Detroit & Birmingham Plank Road Co. v. Village of Highland Park, 142 Mich. 326.

¶ 653. Mandamus is properly refused to compel a township to levy a tax to pay for a road machine bought under the provisions of Comp. L. 1897, §§ 4193, 4194, when it appears that the signatures to the petition were fraudulently procured by the town clerk; and it matters not that the road machine had been delivered to the district and used by it, and that one instalment had been paid before the fraud had been discovered.—Indiana Road Machine Co. v. Keeney, 147 Mich. 184.

¶ 654. Even though mandamus is the only remedy open and the issuance of it is discretionary, it cannot be allowed to a relator to compel township officers to levy tax to pay for a road machine on a record showing fraud on relator's part in procuring a contract to purchase the machine under form of law, but void because the law was not complied with.—Indiana Road Machine Co. v. Keeney, 147 Mich. 184.

§ 96. ——Existence and sufficiency of fund.

Invalidity in claim or objection thereto as bar to writ, see ante § 95.

¶ 655. When a demand against a municipal corporation is liquidated, and evidenced by a proper warrant upon a proper officer, requiring upon the part of such officer the official action of paying it, such action, there being funds, may be compelled by mandamus.—Ullman v. Sandell, 158 Mich. 496.

¶ 656. Mandamus to compel a township treasurer to pay a certain sum upon the order of the township board was withheld where the treasurer set forth in his return to the order to show cause that the township had by resolution directed him not to pay, and that there were no moneys in his hands with which to pay.—Murphy v. Reeder Township Treasurer, 56 Mich. 505.

¶ 657. Section 251 of the City Charter of Detroit required that, in order to make valid a contract for expenditure for any public work, a certificate by the controller that the money was in the treasury, or appropriated therefor, should be indorsed thereon. Held that, in the absence of such certificate, and of any fund for the purpose, mandamus would not lie to compel the controller to issue a warrant for the payment of work completed in building sidewalk intersections, despite the approval by the council of the work done.—Garner v. Doremus, 154 Mich. 328.

¶ 658. Where no provision has been made, by taxation or by issuing bonds as required by a city charter, for the payment of an indebtedness contracted for a city hall site, mandamus will not lie to compel the mayor to sign a warrant on the city treasury to pay such indebtedness.—Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193.

§ 97. ——Effect of levy or transfer.

Impropriety of mandamus to try title to warrant, see post ¶ 900.

Alleging uncertainty of title to warrant as defense, see post § 144.

¶ 659. Mandamus may be granted to compel the board of auditors of Wayne county to deliver their warrant on the county treasurer to the person in whose favor an account has been allowed. And it is no answer to the application that such a warrant was made out, but, before delivery, was taken on execution against the payee, and the money received thereon by the officer from the county treasurer,—such a warrant not being the subject of levy on execution.—People ex rel. Martin v. Wayne County Auditors, 5 Mich. 223.

¶ 660. One Norman held a warrant upon the treasurer of a township for work and labor rendered. A creditor of Norman garnisheed the township and secured judgment. Held, mandamus by a transferee of the warrant would not lie against the treasurer to order him to pay to said indorsee the amount of the warrant.—Ullman v. Sandell, 158 Mich. 496.

§ 98. ——State claims and debts.

¶ 661. Mandamus will not lie, since Laws 1887, Act No. 142, to compel the auditor general to issue a warrant for the payment to a county of the money collected under Laws 1885, Act No. 222, to pay the interest money due under How. St. § 5394 on sales of swamp lands.—Sanilac County Sup'rs v. Auditor General, 68 Mich. 659.

¶ 662. Mandamus lies to compel the auditor general to draw his warrant upon the

state treasury for the account—allowed by the circuit court—of a justice of the peace for expenses incurred in holding an inquest over the dead body of a stranger under How. St. § 9593.—Lachance v. Auditor General, 77 Mich. 563.

¶ 663. Mandamus will not lie to compel the auditor general to draw his warrant on the state treasury in payment of the war bounty of $100 due a soldier under Laws 1864, Act No. 23, there being no money in the treasury out of which such warrant could be lawfully paid, and none appropriated for that purpose.—Smith v. Aplin, Auditor General, 80 Mich. 205.

§ 99. Making, letting, and performance of public contracts.

Payment of claims against the public, see ante § 93 et seq.
Compelling payment for road machines, see also ante § 95.
Impropriety of mandamus to enforce mere contract, see also ante ¶ 110.
Delay and intervening performance of contract as bar to mandamus to let to other lower bidder, see also ante ¶¶ 93, 94.
Proper persons to be relators, see post § 127.
Proper remedy for enforcement of contracts and debts of municipalities, see Municipal Corporations, XVI, A; Municipal Bonds, VI; Townships, VIII.

¶ 664. The state board of auditors called for proposals for all kinds of printing as one bid, without any estimate of the different kinds of work, and without indicating any basis on which the board might determine who was lowest bidder. The relator and others sent in bids, and the board awarded the contract to another than the relator, professing to ascertain which bid was lowest by taking as a basis the printing for the two preceding years. The relator, on a showing that the public and the bidders had no means of making estimates on such a basis, and no reason to suppose it was to be adopted, and on a claim that its bid on any fair estimate was lowest, and that the letting was void, applied for a mandamus to compel the board to invite new proposals. On the showing, it appearing that the board had followed the practice of its predecessors. Held: (1) That as there was nothing to impeach the good faith of the board, and as there was no reason to believe the difference in favor of relator's bid, if any, was insignificant, the court on that ground might decline to interfere. (2) That the relator, having participated in the lettings and made no objections until after the board had announced its decision, was not then in position to dispute, in his own interest, the validity of the previous action. (3) That the court might properly refuse to interfere by mandamus, since the effect might be indirectly to annul a contract; and mandamus is not a proper proceeding for that purpose.—Detroit Free Press Co. v. State Board of Auditors, 47 Mich. 135.

¶ 665. The writ of mandamus is not ordinarily designed as a remedy for the collection of debts, and will not lie to enforce the private contracts of municipalities.—Waterman-Waterbury Co. v. Cato Township School Dist. No. 4, 183 Mich. 168.

§ 100. Disposal, sale or patent of state lands.

Proper officer to issue patents, see ante ¶ 516.
Rights and duties in respect to the public lands, see Public Lands.

¶ 666. Mandamus was granted to compel the commissioner of the state land office to issue certificates of purchase pursuant to application and tender.—People ex rel. Parkhurst v. Pritchard, 17 Mich. 338.

¶ 667. The writ issued to compel the commissioner of public lands to issue patents to a county for selections of swamp lands appropriated to it by statute for the construction of a state road.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 668. Mandamus lies to compel the state land office commissioner to issue a certificate entitling a purchaser of state swamp lands to a deed, although the taxes have not been paid.—Robertson v. State Land Office Com'r, 44 Mich. 274.

¶ 669. Mandamus will not issue to compel the state land commissioner to sell, in 1872, at an appraisal made in 1850, school lands conveyed by void deed in 1850.—People ex rel. Chapman v. State Land Office Com'r, 26 Mich. 146.

¶ 670. Where the evidence is conflicting as to the character of land as submerged land, within the intent of the Swamp Land Act of 1850 (9 U. S. Stat. 519), mandamus will not issue to permit its location as swamp land.—Olds v. Commissioner State Land Office, 150 Mich. 134.

¶ 671. Mandamus will not lie to compel the commissioner of the state land office to issue a certificate showing a homestead entry where the return shows that the commissioner was satisfied that the application to homestead was not made in good faith since the General Tax Law, § 131, vests in him a discretion and requires him to issue the certificate only when "in his judgment the application is made in good faith."—Beebe v. Commissioner of State Land Office, 137 Mich. 48.

§ 101. Acceptance or approval of plats.

Necessary respondents, see post ¶ 798.
General law as to plats and dedication, see Dedication.
To compel approval of submitted plat, see also Dedication ¶ 86.

¶ 672. The commissioner of public works of Detroit may be compelled, by mandamus,

to approve a plat of land within the city though the plat does not include nor dedicate land lying within the limits of proposed streets between parcels of land platted.—Owen v. Moreland, 132 Mich. 477.

¶ 673. Under Pub. Acts 1915, No. 251, where a proposed plat conforms to streets and alleys of adjoining plats and does not interfere with any general plan for streets, the plattor is entitled to an approval and if it is disapproved by the board of county auditors because relator has not provided for, and has refused to provide for, a certain street across his land, mandamus will issue to compel the approval of such plat by a board of county auditors.—Campau v. Wayne County Board of Auditors, 198 Mich. 468.

§ 102. Bridge and highway construction and repairs.

Mandamus to review certiorari proceedings against highway commissioner, see ante ¶ 444.
Proper persons to be relators, see post § 127.
Necessary respondents, see post § 130.
Necessity and sufficiency of allegations, see post ¶ 816.
Compelling erection and repair of bridges over highways, see also Bridges § 27.
General law of highways and bridges, see Highways; Bridges.

¶ 674. Mandamus does not lie to compel a board of supervisors to take action for the construction of a bridge over a navigable stream between townships.—Osborne v. Lindow, China Township Sup'r, 78 Mich. 606. See Township Board of Ecorse v. Wayne Township Sup'rs, 75 Mich. 264.

¶ 675. On the petition of private citizens, the circuit court has the power to mandamus the township highway commissioners to rebuild a bridge where the necessary appropriation is within the power of the commissioners and the road has never been vacated.—Brophy v. Schindler, 126 Mich. 341.

¶ 676. A township board will not be compelled by mandamus to repair a public bridge.—Perrine v. Hamlin Tp. Board, 48 Mich. 641.

¶ 677. Highway commissioners will not, under Comp. L. 1871, § 1306 (How. St. § 1379), be compelled by mandamus to cause a bridge that has been destroyed to be replaced where the cost greatly exceeds the amount prescribed by the statute. And where the cost is within the statutory sum, whether prosecution for misbehavior in office would not be the proper remedy for refusal to act, quære.—People ex rel. Goodsell v. Post, 30 Mich. 358.

¶ 678. Repair of a bridge by a highway commissioner will not be compelled by mandamus where his return shows that in his opinion the cost of repairing will exceed $1,000, the limit of the amount which the statute permits him to expend for repairs in one year; under How. St. § 1331, his opinion controls.—Travis v. Skinner, 72 Mich. 152.

¶ 679. Mandamus will not issue to compel two adjoining counties to rebuild a bridge over a stream between them upon its former site, where the legislature has by special act authorized the counties to rebuild upon a site to be selected by the boards of supervisors of the two counties, though the two boards have failed to agree upon a site.—Attorney General v. Board of Supervisors of Kalkaska and Antrim Counties, 120 Mich. 357.

¶ 680. Mandamus was not properly issued to compel a highway commissioner to repair a bridge, where there was a serious dispute as to whether the bridge could be made reasonably safe by an expenditure within the power of the highway commissioner and township board to make.—Kingsley v. Nyland, 136 Mich. 535.

§ 103. School administration and duties.

Compelling payment of claims, see ante § 93 et seq.
Sufficiency of relator's interest to sustain the writ, see post § 126.
Sufficiency of allegations, see post ¶ 817.

¶ 681. Mandamus may issue on petition of a school district against the superintendent of public instruction to compel such superintendent to include proper children of school age in the census as a basis for the apportionment of primary school funds without costs to either party.—Public Schools of City of Muskegon v. Wright, 176 Mich. 6.

¶ 682. Mandamus granted to compel the reinstatement in a public school of relator's son who had negligently broken a window-pane in the school-building.—Holman v. Avon Township School Dist. No. 5, 77 Mich. 605.

¶ 683. The action of the superintendent of public instruction in striking the names of children from the census list of a school district in making the apportionment of the primary school fund, as provided by Comp. L. 1897, secs. 4642-4644, How. St., 2nd Ed., §§ 9863-9865, is subject to review by mandamus.—Public Schools of City of Muskegon v. Wright, 176 Mich. 6.

¶ 684. Where a school district under Act 83, Pub. Acts 1909, sec. 20, sub-sec. 11, How. 2nd Ed., § 9886, discontinues its school, relator, who resides in the district and has two children of school age, will be granted a writ of mandamus compelling the school board to provide transportation for his children to and from the school house in the adjoining district.—Dennis v. Wrigley, 175 Mich. 621.

§ 104. Keeping of and access to public records and files.

Compelling clerk to deliver transcript of testimony, see ante ¶ 392.
Compelling filing of papers to admit of taking certiorari, see ante ¶ 525; see also Drains § 119.
Compelling access to private record required by law, see post ¶ 714.
Proper relator to compel acceptance of instruments for filing, see post ¶ 783.
Allegations in petition for writ, see post ¶ 819.
Incidental trial of title of relator and respondent to office, see ante § 20.

¶ 685. Under Comp. L. 1897, § 2731, providing that the village clerk shall be clerk of the council, attend its meetings and record all the proceedings, a clerk may be compelled to enter the record of council proceedings as authenticated by the president and he cannot refuse on the ground that the member of the council purporting to have acted as clerk pro tem was not actually present at the council meeting; it is the province of the council alone to determine the correctness of the record.—People ex rel. Cady v. Ihnken, 129 Mich. 466.

¶ 686. Mandamus is not the proper remedy to compel a county clerk to return to the supreme court files that have been remitted to him by mistake.—Wright v. Huron County Clerk, 48 Mich. 642.

¶ 687. Mandamus lies to compel a county treasurer to permit the inspection of liquor bonds filed in his office (How. St. § 9347).—Brown v. County Treasurer, 54 Mich. 132.

¶ 688. Mandamus does not lie at the suit of a grantee to compel a register of deeds to record a deed delivered to him in escrow and withheld by the grantor's order.—People ex rel. Austin v. Curtis, 41 Mich. 723.

¶ 689. Mandamus requiring a register of deeds to allow relators and their clerks to inspect and copy the records for the purpose of making a set of books of abstracts of title was refused.—Webber v. Townley, 43 Mich. 534.

¶ 690. A foreign corporation claiming to have and to be constantly purchasing large interests in lands in a certain county, and to need a complete system of abstracts for the sake of protecting its rights, was denied a mandamus to compel the register to allow it to copy the records, where it showed no charter power to deal in land titles.—Diamond Match Co. v. Powers, 51 Mich. 145.

¶ 691. Mandamus denied to compel a county clerk to furnish to a newspaper reporter for inspection and publication the record and files in a case suppressed on request of complainant's solicitor and not yet brought to hearing.—Schmeddling v. May, 85 Mich. 1.

¶ 692. Mandamus may properly be granted to compel a city treasurer to permit relator to examine sales-books of delinquent tax lands.—Burton v. Tuite, 78 Mich. 368.

§ 105. Prison regulations, labor, and discipline.

Persons qualified as relators, see post ¶ 776.

¶ 693. The constitution provided that "No mechanical trade shall hereafter be taught to convicts in the state prison, in this state, except the making of those articles of which the chief supply for the consumption of the country is imported from other states or countries." What trades are within the spirit of this provision it is for the agent of the state prison to determine, and the supreme court cannot, on mandamus, control him in this regard.—People ex rel. Russell v. State Prison Inspectors, 4 Mich. 187.

§ 106. Issuance of licenses and permits and franchises.

See also ante ¶ 7.
Discretionary duties, see also ante § 81.
Illegality of license as bar to mandamus to compel it, see also ante § 11.
Mandamus to compel performance of duties relating to local option elections, see ante § 83.
Mandamus to review certiorari to board revoking license, see ante ¶ 443.
Necessity of allowing time for action before application, see also ante ¶ 514.
Allegations in petition for writ, see post ¶¶ 822, 823.
Sufficiency of allegations as to reasons for refusal, see post ¶ 828.

¶ 694. Mandamus will not issue to compel the approval of a liquor-dealer's bond by the council of a village organized under the general incorporation law of 1883, which empowers such villages to suppress saloons.—Post v. Village of Sparta, 58 Mich. 212.

¶ 695. Where the supreme court has rendered an opinion holding that relator has the right to a license for the wholesaling of liquors in a village, and the lower court then declines so to hold, mandamus will issue to compel the village council to issue the license.—Boos v. Scudder, 163 Mich. 678.

¶ 696. The respondent village was allowed by law to have a maximum of nine saloons. One Stivonski applied for the ninth license, but failed to file his bond in time. Before he reapplied, relator put in his application for said license and his application was rejected improperly on moral grounds and Stivonski's second application granted. Held, mandamus would lie to compel respondent to revoke Stivonski's license and to grant a license to relator.—Hanold v. Common Council Village of Stambaugh, 163 Mich. 242.

¶ 697. Mandamus to compel a city council to act upon an application for a liquor license

is properly denied where it appears that the number of applications for retail liquor licenses exceeds the maximum number which can be issued, and that applicant's license was refused in good faith because of the character of saloon which applicant had previously conducted.—Frey v. Common Council City of Jackson, 167 Mich. 238.

¶ 698. A statute which provides that the board of trustees of a certain village is "authorized and empowered" to accept the bond of a surety company in lieu of the bond required of liquor dealers by the provisions of Pub. Acts 1887, Act No. 313, is not mandatory, and mandamus will not lie to compel the acceptance of such a bond.—Hicks v. Perry Board of Trustees, 151 Mich. 88.

¶ 699. Mandamus will lie to compel a village council to approve a liquor dealer's bond, where such dealer has complied with the requirements of the statute and where no material facts are shown by such council as ground for the refusal to approve such bond.—Potter v. Common Council of Village of Homer, 59 Mich. 8.

¶ 700. The determination of a board of trustees of a village, refusing to approve a liquor bond, will not be reversed by mandamus, where the board has acted in good faith, instead of arbitrarily, there being a fair question as to whether conveyances to one of the sureties were made for the purpose of enabling him to become a surety, and there being a difference in opinion as to whether such surety was of financial ability to act as bondsman.—Divine v. Board of Trustees of Village of Lakeview, 121 Mich. 433.

¶ 701. Mandamus will not be granted to compel a village board of trustees to rescind the approval of a liquor bond, under the claim that a sufficient investigation was not made as to the financial responsibility of the sureties, where the trustees had in good faith by a majority vote approved the bond. —Briggs v. McKinley, 131 Mich. 154.

¶ 702. The judgment of a board of village trustees as to the sufficiency of a liquor bond was not final, under Comp. L. 1897, § 5386, and the trial court, having on mandamus found bad faith and arbitrary action on the part of the trustees in refusing to approve the bond, its finding was affirmed.—Farr v. Anderson, 135 Mich. 485.

¶ 703. Where a township board has come to a deliberate conclusion on the testimony concerning the pecuniary responsibility of a surety in a liquor bond, mandamus will not lie to review the judgment thus exercised.— Wolfson v. Rubicon Township Board, 63 Mich. 49.

¶ 704. Mandamus to compel a village board to approve a liquor bond will be denied where a surety thereon was irresponsible.—Palmer v. President, etc., Village of Hartford, 73 Mich. 96.

¶ 705. Under a franchise for the construction of a street railway in various villages and townships of a county, where the fair inference from the record was that the line in question was contemplated as finally constructed, and that the franchise granted to the company the right to make connections at some convenient and proper place, the common council was required by mandamus to permit the making of the connection in question.—Houghton County St. Ry. Co. v. Common Council of Village of Laurium, 135 Mich. 614.

¶ 706. Under an ordinance granting the right to use streets, lanes and alleys for laying and maintaining gas pipes subject to rules and regulations prescribed by the city council, with a further provision that "said main pipes shall be laid in alleys whenever practicable and when so ordered by the council" and that permission from the council must be obtained before pipes are laid, mandamus will not, in the absence of a showing that laying pipes in alleys is not practicable, lie to compel the council to meet and grant the right to lay pipes in the street instead of in the alleys, since the council has power to require the main pipes to be laid in the alleys though this is more expensive and less convenient for the gas company.— Traverse City Gas Co. v. Mayor, etc., City of Traverse City, 130 Mich. 17.

§ 107. Corporate filings, approvals, and permits.

Necessity of right in relator, see also ante § 6, ¶ 31.

Duty to admit foreign investment corporation, see also Banking ¶ 5.

¶ 707. Mandamus to compel the secretary of state to file articles of association of a foreign corporation organized not only to carry on a mining business but for other purposes not covered by How. St., ch. 123, was denied.—Isle Royale Land Corporation v. Osmun, 76 Mich. 162.

¶ 708. Mandamus will not issue to compel the Secretary of State to file articles of association of a foreign mercantile tontine company, where subsequent to the institution of the proceedings, a law was passed abrogating the rights claimed by the company under the law as it stood before the passage of such act.—Preferred Tontine Merc. Co. v. Secretary of State, 133 Mich. 395.

¶ 709. Where it appears on the record that a life insurance company is not complying with the law the discretionary writ of mandamus cannot be had of right to compel the commissioner of insurance to issue a certificate reviewing the relator's authority to do business.—Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85.

§ 108. Regulations for public service and rates.

Mandamus to compel compliance by corporation to rate regulations, see post §§ 111, 112.

Compelling judicial action in rate cases, see ante II.

Mandamus to put order of Railroad Commission into force pending Federal suit to vacate same, see Abatement ¶ 50.

¶ 710. Where the Michigan Railroad Commission orders a steam railroad company to install a connection with an interurban railway, and said railroad fails to institute proceedings to test the validity of said order by chancery proceedings within the time limited by Act 312, Pub. Acts 1907, § 26, the supreme court will not on mandamus review questions relating to the practicability of the physical connection and interchange of traffic ordered or the reasonableness of the service required.—Michigan Railroad Commission v. Michigan Cent. R. Co., 168 Mich. 230, aff'd in 236 U. S. 615, 59 L. ed. 750, 35 Sup. Ct. Rep. 422.

§ 109. Institution of actions and defenses on behalf of public.

¶ 711. Mandamus denied to review the discretion of the attorney general in refusing to file an information in the nature of a quo warranto against a corporation.—People ex rel. Yates v. Attorney General, 41 Mich. 728.

¶ 712. Whether the writ would, under any circumstances, be issued to compel the attorney general to file an information against his own judgment, quære.—Coon v. Attorney General, 42 Mich. 65.

IV. COMPULSION OF PRIVATE CORPORATIONS' AND INDIVIDUALS' DUTIES.

[Note. For a treatment of the general duties and rights pertaining to corporations, see Corporations; Foreign Corporations; Fraternal Associations; Insurance; Religious Societies; Railroads; Street Railways; Carriers.]

§ 110. In general; compellable private duties.

Original or appellate nature of mandamus, see ante § 2.

Necessity of duty, right to performance, exigency or benefit, efficaciousness, and equity or legality to support issuance of writ, see ante § 4 et seq.

Propriety of mandamus to coerce performance of private duties, see also ante § 19.

Corporate duties, see post §§ 111-118.

Duties of corporate officers, see post § 119.

Duties of foreign corporations, see post § 120.

Duties of joint stock companies (partnership associations), see post § 121.

Duties of representatives and trustees, see post § 122.

Procedure for issuance of the writ and on the writ, see post V.

Mandamus as remedy to compel escrow depositary to act, see Escrows § 9.

¶ 713. The general rule is that mandamus will not run against a private individual.—Thomas v. Hamilton, 101 Mich. 387.

¶ 714. Mandamus will not lie, at the instance of a private individual, to compel a druggist to allow relator to examine the record of sales of liquor which the druggist is required by the statute to keep, the same to be open for examination to all persons during business hours.—Thomas v. Hamilton, 101 Mich. 387.

¶ 715. Mandamus does not lie to compel a private corporation to perform contract obligations; hence it will not lie at the instance of a student to compel an incorporated institution of learning to continue him as such, in accordance with the terms of the implied agreement by which he was received.—Booker v. Grand Rapids Medical College, 156 Mich. 95.

¶ 716. Where a fund has been mistakenly paid by a city collector to the county treasurer, so that he does not legally hold it as county treasurer, mandamus lies against him individually to restore it.—Webster v. Wheeler, 119 Mich. 601.

§ 111. Duties of corporations to the public.

Duties to members or private persons, see post §§ 112-116.

Duties of corporate officers, see post § 119.

Duties of foreign corporations, see post § 120.

Original or succeeding corporation as respondent, see post § 131.

Effect of appeal from order of the Railroad Commission to suspend duty to put rate regulation into effect, see Public Service.

¶ 717. A mandamus will be granted on behalf of the insurance department to compel an insurance company to submit to an inspection of its affairs.—People ex rel. Secretary of State v. State Ins. Co., 19 Mich. 392.

¶ 718. Mandamus is the proper remedy to compel a street railway company to repave the street between its tracks, obedient to an order made in pursuance of a reserved power in the ordinance granting its franchise and prescribing the conditions thereof.—Lansing v. Electric St. R. Co., 109 Mich. 123.

¶ 719. Mandamus is the proper remedy to compel a street railway to comply with the conditions of its franchise obtained from a township under Comp. L. 1897, § 6446, such condition being as binding as if imposed by statute.—Township of Grosse Pointe v. Detroit & L. St. C. Ry., 130 Mich. 363.

¶ 720. A provision of a franchise granted by a city to an interstate electric railway, requiring it to maintain a specified car service, may be enforced by mandamus.—City of

Monroe v. Detroit, M. & T. S. L. Ry., 187 Mich. 364.

¶ 721. Where a township has granted a franchise to an interurban railway with certain regulations contained therein, and accepted by said railway, with respect to the stopping of cars and the rates of fare to be charged, the township may properly bring mandamus in the circuit court to compel the observance of said regulations. (Hooker, Moore, Brooke, and Stone, JJ., dissenting.)—Township of Ross v. Michigan United Rys. Co., 165 Mich. 28.

¶ 722. A suit in mandamus by a township to compel an interurban railway to conform to the provision of a franchise relating to rates is not open to the objection that in asking the court to compel the railway to charge not in excess of a specified rate, it is seeking injunctive relief. (Hooker, Moore, Brooke and Stone, JJ., dissenting.)—Township of Ross v. Michigan United Rys. Co., 165 Mich. 28.

¶ 723. A township granted a franchise to an interurban railway which was accepted by said railway and contained a provision that said railway should not charge more than two cents per mile for each passenger carried. Other townships through which said railway ran granted franchises containing the same provision and all said townships acted with knowledge that said provision was being incorporated in the franchise granted by each township. Said railway for a period of several years did not charge in excess of two cents per mile on any part of its line. It then proceeded to charge the rate of ten cents to passengers boarding its cars outside of the territory of the relator township and riding to a point within the limits of relator township, a distance of only three miles. Held, relator township was entitled by mandamus to prevent the respondent railway from charging over two cents a mile for carrying passengers over the said three-mile route.—Township of Ross v. Michigan United Rys. Co., 165 Mich. 28.

§ 112. Duties of corporations to members or private persons.

See also ante ¶ 715.

Various private duties and duties to members, see post §§ 113-116.

Internal rights and duties of corporations and their officers and members, see Corporations; Associations; Fraternal Associations; Religious Societies.

¶ 724. The supreme court will not interfere with the internal regulation of private corporations in the enforcement of their rules unless under very peculiar circumstances of substantial wrong.—Hargnell v. Lafayette Benevolent Society, 47 Mich. 648.

¶ 725. Mandamus is a discretionary writ and will not usually lie to settle the controversies of private corporations where the facts are not important on public grounds, or would not justify the interference of the court if corporate authority did not exist.—Lamphere v. Grand Lodge of United Workmen, 47 Mich. 429.

¶ 726. Mandamus is not a proper remedy to compel a private corporation to pay dividends which it has declared; still less when any other question exists as to the rights of the person claiming to be entitled to them.—People ex rel. Van Norman v. Central Car & Mfg. Co., 41 Mich. 166.

§ 113. ——Of public service corporations.

To compel compliance with terms of franchise, see ante § 111.

Public service duties, see Public Service: Carriers; Gas; Electricity; Railroads; Street Railways; Telegraphs; Waters, VI.

¶ 727. Mandamus is a proper remedy to compel a telephone company to furnish connections to a private person through its exchange as required by the ordinance under which it is operating.—Mahan v. Michigan Tel. Co., 132 Mich. 242.

§ 114. ——Of associations or membership corporations.

Internal rights and duties of membership corporations, see Associations; Fraternal Associations; Religious Societies.

¶ 728. An incorporated voluntary society may be compelled by mandamus to restore to one of its members a substantial right of which he has been deprived by the action of the society in violation of its constitution.—People ex rel. Roehler v. Mechanics' Aid Soc., 22 Mich. 86.

¶ 729. The only ground on which the supreme court can interfere with organized bodies by mandamus in aid of a member is that, as corporations, they are subject to judicial oversight to prevent their depriving members of corporate privileges illegally. The writ will not lie where such bodies are not corporations, or where the question presented does not involve tangible and valuable corporate privileges.—Burt v. Michigan Grand Lodge of Free & Accepted Masons, 66 Mich. 85.

¶ 730. The purely social relations which members of a corporation hold, not by virtue of their corporate condition, but because of their connection with a general fraternal body, cannot be regulated by mandamus. So held where an incorporated Masonic lodge undertook to discipline by expulsion therefrom a Mason who had never belonged to that lodge.—Burt v. Michigan Grand Lodge of Free & Accepted Masons, 66 Mich. 85.

¶ 731. Mandamus granted to compel the recognition of a member of a subordinate lodge of the grand lodge of the Ancient Order of United Workmen, incorporated under

Comp. L. 1871, § 2829 (How. St. § 3949), who had been suspended for refusing to pay a relief assessment made under the orders of the supreme lodge, a Kentucky corporation.—Lamphere v. Grand Lodge of United Workmen, 47 Mich. 429.

¶ 732. Mandamus to compel a religious corporation to restore to membership a person whom it had expelled was refused in the discretion of the court, where the society had no property and it would be destroyed if the relator were restored to membership, and where he had acted in hostility to its interests and given grounds for regular removal.—Meister v. Anshei Chesed Congregation of Bay City, 37 Mich. 542.

¶ 733. Mandamus lies to restore to membership in a Michigan corporation one who has been expelled for a nonpayment of a fine imposed upon him in consequence of his disobeying a resolution of a national body of which such corporation is a component.—Meurer v. Detroit Musicians' Benev. & Prot. Ass'n, 95 Mich. 451.

¶ 734. Mandamus lies to restore to membership in a mutual benefit society one who has been deprived thereof for nonpayment of a fine different from that authorized by the by-laws to be imposed for the acts complained of.—Meurer v. Detroit Musicians' Benev. & Prot. Ass'n, 95 Mich. 451.

§ 115. ——Assessments on members.

¶ 735. Mandamus does not lie to compel a mutual benefit company to levy an assessment to pay the amount falling due upon the death of a member; the proper course is to bring suit upon the undertaking of the company; nor does it make any difference that the company has no funds to pay the judgment.—Burland v. Northwestern Mut. Ben. Ass'n, 47 Mich. 424; Bates v. Detroit Mut. Ben. Ass'n, 47 Mich. 646.

¶ 736. Mandamus will not lie to compel the officers of a mutual benefit association to levy an assessment on its members for the payment of a judgment rendered upon a certificate of membership. The remedy is in equity.—Miner v. Michigan Mut. Ben. Ass'n of Hillsdale, 65 Mich. 84.

§ 116. ——Access to books, papers, and records.

To compel delivery of books and papers to successor in office, see post § 119.
Expiration of director's office as bar to mandamus by him, see ante § 6, ¶ 33.
Sufficiency of allegations, see post ¶ 827.
Mandamus to compel access to corporate books in aid of suit in Federal court, see also Corporations ¶ 683.
Right to inspect corporate books as affected by discontinuance of suit in which information was desired and institution of other suit in different court, see Corporations ¶ 683.

¶ 737. A corporator may apply for a mandamus to compel the custodian of the corporate records and documents to allow him an inspection of them. But he must show that he has made a proper demand for such inspection, at a proper time and place, and for a proper reason. The writ will not be granted to enable a corporator to gratify idle curiosity.—People ex rel. Bishop v. Walker, 9 Mich. 328.

¶ 737a. Mandamus lies to compel the secretary of a corporation to allow inspection of the books by a stockholder to ascertain if the assets have been secretly transferred to another corporation.—Eldred v. Elliott, 161 Mich. 262.

¶ 738. Mandamus is the proper remedy for compelling a corporation to allow a director to inspect the books and papers of the corporation.—Leach v. Davy, 199 Mich. 378.

§ 117. Duties of principal or grand and subsidiary associations.

Necessary respondents, see post § 130.
Compelling grand lodge of benefit society to vacate order revoking charter of local lodge, see also Fraternal Associations § 13.

¶ 739. The officers of a grand lodge organized under Comp. L. 1897, § 212, are subject to a writ of mandamus brought by a subordinate lodge to compel them to vacate an order revoking the relator's charter without proper ground.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

¶ 740. Where a grand lodge has without cause revoked the charter of a subordinate lodge, and damages at law would be indefinite, mandamus will lie to vacate the order.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

§ 118. Election of remedy within association or by agreement.

¶ 741. If a member of a corporation voluntarily subjects himself to arbitration, the supreme court will not undertake to review the action of extrajudicial bodies and intermeddle with their action in the course of delegated power.—Allnutt v. Subsidiary High Court of A. O. F., 62 Mich. 110.

¶ 742. A motion for an order to show cause why mandamus should not issue to compel the reinstatement of relator in a Masonic lodge from which he had been expelled was refused where he had previously appealed for redress to the tribunal established by the order for hearing such complaints and the expulsion had been confirmed.—Burt v. Grand Lodge of Free & Accepted Masons, 44 Mich. 208.

¶ 743. Mandamus will not lie to compel the reinstatement of a minister, who has been suspended from his office, on the ground

that he had no proper notice of trial, where it appears that he had actual notice of the time and place of trial, and was present with his counsel, and participated therein.—Dempsey v. North Michigan Conference, 98 Mich. 444.

¶ 744. The interruption of relator and his witnesses, and the incidental irregularities of the trial before church tribunals are not subject to review in a mandamus proceeding to reinstate him as minister.—Dempsey v. North Michigan Conference, 98 Mich. 444.

§ 119. Duties of corporate officers.

Officers as respondents to mandamus against corporation, see post § 130.

Incumbent, succeeding, or preceding officers as proper respondents, see post § 131.

¶ 745. Mandamus will not lie to compel the cashier of a bank to pay the taxes assessed against its stockholders under the tax-law of 1889, the remedy provided by the act for the collection of such taxes being clear and specific.—Eyke v. Lange, 90 Mich. 592.

¶ 746. Mandamus will not lie to compel the cashier of a national bank to pay taxes assessed under the law against a stockholder upon his stock in the bank, though How. St. § 1170d2 imposes that duty; for the tax may be collected by distress or by action against the bank.—Eyke v. Lange, 104 Mich. 26.

¶ 747. Mandamus will lie in behalf of a corporation to compel its former secretary, who has resigned, to deliver up its books, records and papers, where at the time of the demand the same are in the possession of respondent at the place of hearing the suit, since a subpoena duces tecum does not afford an adequate remedy.—Coldwater Copper Min. Co. v. Gillis, 170 Mich. 126.

§ 120. Duties of foreign corporations.

¶ 748. Mandamus will not lie to compel a foreign corporation to perform an act which is a prerequisite to its right to do business in this state; the proper remedy is quo warranto, or the imposition of the penalty for doing business without complying with the law.—Secretary of State v. National Salt Co., 126 Mich. 644.

§ 121. Duties of joint stock companies (partnership associations).

¶ 749. 1897 C. C. Rule 46 providing that circuit courts shall have jurisdiction of mandamus proceedings involving the action of any private corporation, includes joint stock associations, wherefore such court has jurisdiction of a proceeding to compel an express company to carry goods.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682, reversed in 177 U. S. 404, 44 L. ed. 823, 25 Sup. Ct. Rep. 695.

¶ 750. Mandamus is the proper remedy to compel an express company to carry goods, the company being vested with the exercise of public functions under the permissive power of the state.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682, reversed in 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695.

§ 122. Duties of representatives, trustees, and guardians.

General duties of personal representatives and trustees, see Estates of Decedents; Guardianship; Trusts.

¶ 751. Mandamus will lie to compel an administrator to pay interest upon a judgment for costs in favor of an appellant from the probate of a will, where the estate is conceded to be solvent.—Hayden v. Hefferen, 99 Mich. 262.

¶ 752. Mandamus does not lie to compel a guardian to pay a claim against his ward which the probate court has adjudged valid; the proceeding must be by action.—Smith v. Burton, 48 Mich. 643.

V. PARTIES, PROCEDURE AND RELIEF, AND ENFORCEMENT OF WRIT.

§ 123. In general; jurisdiction and powers of courts to issue writ.

Propriety of application to supreme court in first instance, see post § 124.

Discretion of court to grant or deny the writ, see ante § 3.

Other adequate remedy as consideration for discretion rather than element in jurisdiction, see ante ¶ 107.

General law of courts and jurisdiction, see Courts.

Mandamus from circuit to probate court, see also Courts ¶ 181.

Statutory power of supreme court to issue writ, see Jud. Act, chap. I, § 9; Comp. L. 1915, § 12014.

Statutory powers of circuit court, see Jud. Act, chap. VI, § 1, ¶ 2; Comp. L. 1915, § 12299, ¶ 2.

Jurisdiction of circuit courts in mandamus, see 1916 C. C. Rule 50, § 1.

¶ 753. The supreme court has plenary jurisdiction in mandamus.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479; Hosier v. Higgins Township Board, 45 Mich. 340.

¶ 754. The writ cannot be issued by the circuit court except when necessary to execute the power of supervisory control over inferior tribunals, and when actually required to affect the ends of jurisdiction in cases brought under cognizance by other means.—McBride v. Grand Rapids Common Council, 32 Mich. 360.

¶ 755. The circuit court has power to issue writs of mandamus to the probate court.—

Seilnacht v. Wayne Probate Judge, 190 Mich. 461.

¶ 756. The term "inferior courts," as used in section 8 of article VI of the State Constitution, providing that circuit courts shall have power to issue mandamus to inferior courts, is used in the sense of grade and means "lower courts"; therefore mandamus will issue from the circuit court to the probate court upon good cause shown.—Mitchell v. Bay Probate Judge, 155 Mich. 550.

¶ 757. Upon a proper showing and in a proper case the circuit court may issue a writ of mandamus to a justice of the peace. —People ex rel. Dota v. McKay, How. N. P. 103.

§ 124. Application to supreme court in first instance.

Proper respondent in case of refusal of circuit court to issue mandamus, see post ¶ 797.

Statement of case on application to supreme court, see post § 138.

Trial of issues of fact in supreme court, see post § 153.

Supreme court practice in mandamus cases, see Sup. Ct. Rules 12, 13, 56.

¶ 758. Where it appears that a defendant in a divorce proceeding was imprisoned under a contempt order for nonpayment of temporary alimony at the time he petitioned the supreme court to issue a writ of mandamus to compel the judge to set aside such order for irregularities in the proceedings, the court will entertain the petition.—Lake v. Houghton Circuit Judge, 172 Mich. 660.

¶ 759. Where it appears that the public interests require the case to be disposed of immediately without the delay of awaiting an opportunity to apply to the circuit court, the supreme court will grant an order to show cause. (This was an application for a mandamus to compel respondent to turn over to relator the money, books, papers, and effects belonging to township treasurer's office.)—Loranger v. Navarre, 97 Mich. 615.

¶ 760. An application for a mandamus to compel a probate judge to vacate an order setting aside an order disallowing a claim, and granting a rehearing, is properly made to the supreme court, where the circuit judge was, before taking his seat upon the bench, one of the attorneys in the matter.—Hitchcock v. Genesee Probate Judge, 99 Mich. 128.

¶ 761. An order against a township treasurer to show cause why he should not pay an order was denied on the ground that application should have been made to the circuit court under First C. C. Law Rule 107: Jenney v. Holland, 97 Mich. 615 (note). So, where it was sought to compel a justice of the peace to issue a criminal warrant: Chamberlain v. O'Hara, 97 Mich. 615 (note). So, where the application was to compel a street railway to use a certain kind of rails: City of Detroit v. Detroit Citizens' St. R. Co., 97 Mich. 615 (note). Also to compel the chairman of a board of supervisors to sign an order: Wickham v. Kelley, 97 Mich. 615 (note). Also to compel a county treasurer to pay the prosecuting attorney's salary: Wickham v. Browne, 97 Mich. 615 (note). Also, to compel the board of supervisors to allow a bill.—Senate of Happy Homes Clubs v. Alpena County Sup'rs, 97 Mich. 615 (note).

¶ 762. An application for mandamus to compel an official stenographer of the circuit court to deliver a transcript of testimony upon the payment or tender of the statutory fees therefor must be made to the circuit court and not to the supreme court.—Lyle v. Sherman, 147 Mich. 424.

¶ 763. Since circuit courts have, under section 8 of article VI of the State Constitution, power to issue mandamus to probate courts, the supreme court will not issue mandamus to such court in the absence of an exigency.—Mitchell v. Bay Probate Judge, 155 Mich. 550.

¶ 764. The supreme court will not ordinarily review upon mandamus the action of the probate court where resort may be had to the circuit court.—Seilnacht v. Wayne Probate Judge, 190 Mich. 461.

¶ 765. The supreme court will not entertain a proceeding by mandamus to compel a probate judge to grant a petition for revival of a commission on claims, since the circuit court has power to issue such writ.—Seilnacht v. Wayne Probate Judge, 190 Mich. 461.

§ 125. State and Federal jurisdiction.

Relative state and Federal jurisdiction, see Courts, V.

Judgment as essential bases for Federal mandamus, see also Courts ¶ 348.

Reviewableness of state judgment in mandamus by United States Supreme Court on Federal question involved, see Courts § 91, ¶ 339.

¶ 766. A mandamus from the state supreme court to compel an inferior state court to remove a cause to the United States circuit court upon the application of a defendant who is a citizen of another state is not the appropriate writ for that purpose; and whether it has any jurisdiction to interfere in such cases, quære.—People ex rel. Glens Falls Ins. Co. v. Jackson Circuit Judge, 21 Mich. 577.

§ 126. Relators; sufficiency of private relator's interest.

Special interest where duty is to public, see post § 127.

Corporations as qualified relators, see post § 128.
Relation of attorney general where interest is private, see also post ¶ 794.
Sufficiency of interest or exigency to warrant issuance, see also ante §§ 3-9.
Equities or conduct or delay affecting propriety of writ, see ante §§ 10-12.
Necessity of clear legal right in relator, see ante § 6.
Effect of levy or transfer of claim as affecting mandamus to compel payment, see also ante § 97.
Necessary and proper respondents, see post § 130.
Interventions by private persons or attorney general, see post § 132.
Amendments as to parties, see post § 134.
Right of father to apply for mandamus without appointment of guardian ad litem when infant is denied admission to school, see Guardian ad Litem ¶ 1.
Action by trustee in bankruptcy to compel payment of claim due from public constituting assets of bankrupt, see Bankruptcy § 18.

¶ 767. Respondents in mandamus proceedings are entitled to insist that they shall not be drawn into litigation by any one who cannot properly be relator, nor deprived of the responsibility of an actual proper party to the record.—People ex rel. McBride v. Kent County Sup'rs, 38 Mich. 421.

¶ 768. A private citizen cannot, in a matter where he is not directly injured, apply for a mandamus to compel the performance of an omitted duty by a public board; though cases might arise where the court would permit it, in the absence of the attorney general or prosecuting attorney, or his refusal without good cause to act.—People v. Regents of University of Michigan, 4 Mich. 98.

¶ 769. An appellee who has recovered judgment before a justice has a right to have a pretended appeal dismissed for nonperformance of the statutory condition precedent that the fees for the return be paid, and hence has a right to mandamus to compel the circuit court to vacate an order compelling a return.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 770. The father may be relator in an application for the writ to compel the admission of his child to the public schools.—People ex rel. Workman v. Detroit Board of Education, 18 Mich. 400.

¶ 771. The child's mother is a proper relator in a writ to compel the sheriff to imprison a person convicted under the bastardy act when necessary to compel him to contribute to the child's support.—Waite v. Washington, 44 Mich. 388.

¶ 772. A city collector being the proper custodian of a fund which he was unjustly deprived of by the county treasurer, and which was withheld by the latter, was not on mandamus to compel its payment, required to proceed in the name of the city, nor was he required to name the treasurer as such treasurer.—Webster v. Wheeler, 119 Mich. 601.

¶ 773. The fact that a warranty deed excepted taxes for a given year and subsequent years, and all claims arising therefrom, did not preclude the grantee in such deed who had purchased at a sale for certain of the years excepted in the deed, from prosecuting mandamus against the auditor general to cancel a subsequent tax deed and permit redemption, where when he purchased at such tax sale he was incorrectly informed by the officer making the sale, that there were no outstanding taxes.—Hoffman v. Auditor General, 136 Mich. 689.

¶ 774. Under the Tax Law, § 98, subd. 4 (Comp. L. 1897, § 3921), authorizing the auditor general to issue a certificate of error when a certificate that no taxes were charged against lands has been given by the proper officer within the time limited for the payment or redemption thereof, a purchaser who was incorrectly informed by the officer conducting the sale that the lands were not held for any other years, was entitled to mandamus compelling the auditor general to cancel a subsequent sale and permit a redemption by the relator.—Hoffman v. Auditor General, 136 Mich. 689.

§ 127. ——To enforce duties toward public.

See also ante ¶¶ 772, 796.
Attorney general or prosecuting attorneys as proper public representatives, see post § 129.

¶ 775. A private individual can apply for a writ of mandamus only in a case where he has some private or particular interest to be subserved, or some particular right to be protected by the aid of this process, independent of that which he holds in common with the public at large.—People ex rel. Russell v. State Prison Inspectors, 4 Mich. 187.

¶ 776. Whether a private individual can apply for the writ to restrain the agent of the state prison from teaching the trade of or the manufacture of the articles made by the relator, quære.—People ex rel. Russell v. State Prison Inspectors, 4 Mich. 187.

¶ 777. A private citizen does not possess the right, without permission of the court, to apply for a writ of mandamus to compel a public board to perform an omitted duty.—Sterling v. Regents of University, 110 Mich. 369.

¶ 778. Mandamus will not lie to compel the performance of public duties by public officers except where a specific right is in-

volved not possessed by citizens generally.—Wilson v. Cleveland, 157 Mich. 510.

¶ 779. The fact that the mayor of a village was its chief executive officer, and required to preside at council meetings, and cast the deciding vote in cases of equal division, and to exercise supervision over the affairs of the village, did not vest him with any specific right, distinguished from the rights of citizens generally, which would entitle him to mandamus to compel attendance of members of the council at meetings.—Wilson v. Cleveland, 157 Mich. 510.

¶ 780. One who is not shown to have sustained any grievance other than that sustained by other citizens, is not a proper relator in mandamus to compel a police commissioner to enforce the laws against Sunday baseball playing.—Sweet v. Smith, 153 Mich. 674.

¶ 781. A county officer removed his office to a place to which he claimed the county seat had been removed by action of the supervisors and electors; application being made by a private individual for a mandamus to compel him to return to the former county seat, and there being no showing that the proper public officer, on being requested, had refused to make any application himself, or that the relator had any special interest in the matter not common to citizens generally, it was refused. If mandamus can be resorted to for such a purpose, the proper public officer to apply for it in the supreme court is the attorney general.—People ex rel. Delbridge v. Green, 29 Mich. 121.

¶ 782. The rule rejecting the intervention of private complainants against public grievances is one of discretion and not of law, and a private person who would be a competent bidder under a state law for letting a contract may appear as relator by his own counsel in a proceeding by mandamus to compel state officers to carry out the law, if the public interest requires prompt action and the attorney general declines to appear for him.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 783. On the refusal of the proper officer to file a chattel mortgage, and of a justice of the peace to issue an execution, the mortgagee and judgment creditor have such a special interest as entitles them to apply for mandamus to compel such action on the part of said officers.—Pistorius v. Stempel, 81 Mich. 133.

¶ 784. Private individuals have such an interest as will support mandamus to compel the building of a bridge where the river divides their respective farms and where the schoolhouse is on the opposite side of the river.—Brophy v. Schindler, 126 Mich. 341.

¶ 785. Resident free-holders are the proper parties to institute proceedings to compel a commissioner of highways to erect a bridge. The duty sought to be enforced is not one due to the government as such.—Berube v. Wheeler, 128 Mich. 32.

¶ 786. A mandamus determining the constitutionality of a statute consolidating two cities will not be granted on the application of a private citizen who has no interest other than as a resident and tax-payer.—Smith v. Mayor, etc., of City of Saginaw, 81 Mich. 123.

¶ 787. A proceeding on the relation of a private citizen to compel the secretary of state to give notice under a prior law apportioning senatorial districts is properly sustained where the attorney general, by appearing for the respondent, shows that he would not have instituted such proceeding if requested.—Giddings v. Secretary of State, 93 Mich. 1.

¶ 788. The signer of a local option petition, who is a qualified voter, has a sufficient special interest in the matter to entitle him to bring mandamus to compel the board of supervisors to submit the question to the voters, the petition being sufficient.—Flanders v. Board Sup'rs Van Buren Co., 160 Mich. 27.

¶ 789. Electors of the state who are interested in the proper administration of the law have such an interest as entitles them to appear as relators in mandamus proceedings to compel the secretary of state to recanvass a petition filed by him under the referendum clause of the Constitution, art. V, § 1, as amended in 1913.—Thompson v. Secretary of State, 192 Mich. 512.

¶ 790. It is a matter of discretion for the court, and not of law, as to whether relators have such interest as entitles them to institute mandamus proceedings.—Thompson v. Secretary of State, 192 Mich. 512.

¶ 791. Individual electors, in the discretion of the court, may appear as relators in an action of mandamus to compel a board of supervisors to reconvene and recanvass votes cast at a local option election.—Baldwin v. Board Sup'rs of Alger County, 189 Mich. 372.

¶ 792. The court properly exercised its discretion in allowing individual electors to appear as relators in an action of mandamus to compel a board of supervisors to reconvene and recanvass votes cast at a local option election where the electors were almost equally divided on the question in issue at the election, and the attorney general refused to act or permit his name to be used, although the county prosecuting attorney had not been asked to act, and officially held no views adverse to the proceeding.—Baldwin v. Board Sup'rs of Alger County, 189 Mich. 372.

§ 128. ——Corporations as relators.

Board of education as relator, see also ante ¶ 584.

Municipality as relator against another municipality, see also ante ¶ 622.

Amendment to name county as relator instead of supervisors, see post ¶ 812.

¶ 793. The board of water commissioners of East Saginaw is a proper relator to an application to compel the common council to levy a tax to pay bonds issued by the board and about to mature.—People ex rel. Board of Water Com'rs v. East Saginaw Common Council, 33 Mich. 164.

§ 129. Attorney general and other attorneys to represent public.

Sufficiency of private person's interest to be relator, see also ante § 127.

Intervention by attorney general, see post § 132.

Attorney general as law officer to represent state officers, see Attorneys § 61.

Representation of state officials in mandamus, see Attorneys § 61.

¶ 794. The attorney general is not a proper relator in proceedings by mandamus to compel a justice of the peace to entertain a complaint where the offense charged is against individual interests and does not affect the public welfare.—Attorney General v. Detroit Police Justice, 41 Mich. 224.

¶ 795. The prosecuting attorney is authorized to bring mandamus proceedings to compel a village council to vacate proceedings whereby liquor bonds were approved notwithstanding a protest filed by a majority of the electors of the village under Public Acts 1907, No. 321.—Covell v. Common Council of Village of Fife Lake, 179 Mich. 151.

¶ 796. A mandamus proceeding by private parties to compel a city and its officers to refrain from submitting amendments to a city charter, under Local Acts 1899, No. 452, will not be dismissed on the ground that the remedy is improper, and that there is no intervention of the attorney general, where it is apparent that an injunction would have been granted, if requested by the petitioners as taxpayers interested in the expenditure of public moneys, the intervention of the attorney general not being essential as it is in cases of a purely public nature, and such intervention being obtainable if demanded, and where the time intervening before the election is short so that the court should review the questions presented.—Elliott v. City of Detroit, 121 Mich. 611.

§ 130. Necessary and proper respondents.

Successors and transferees as proper respondents, see post § 131.

Amenability of aggregate body to mandamus, see ante § 71.

Compellable duties, duty of another officer, see ante § 78.

Restriction of relief to respondent parties, see post § 172.

Intervention, see post § 132.

Parties respondent to mandamus to enforce payment of municipal or public bonds, see Municipal Bonds, VI.

¶ 797. Where a circuit judge illegally refuses to hear application for mandamus, the relator should apply to the supreme court for an order to compel him to do so; application to the supreme court for an order to the original respondent to show cause will be denied.—Backus v. Carleton, 97 Mich. 624.

¶ 798. Mandamus to compel the board of public works of Detroit to vacate its approval of a plat was denied where neither of the makers of the plat nor the purchasers of the lots designated upon it were before the court.—Campau v. Board of Public Works of Detroit, 86 Mich. 372.

¶ 799. Where the incorporators of a mutual insurance company, pursuant to authority lodged in them, by the act under which the company is organized, to fix the number of directors and the manner of electing them, have vested the power to call the stockholders together for election purposes exclusively in the board of directors, the president and secretary of the company are not the proper respondents in mandamus proceedings to compel the reconvening of the stockholders for an election in compliance with the stockholders' minority law, after an election in which the rights of the minority under such law have been disregarded.—Dusenbury v. Looker, 110 Mich. 58.

¶ 800. Under a statute which requires such commissioner to submit a proposed expenditure for the construction of a bridge and to obtain the approval of a township board, where the commissioner of highways has done so, and the board has refused its approval, the township board is a necessary party in a mandamus proceeding to compel the erection of the bridge.—Berube v. Wheeler, 128 Mich. 32.

¶ 801. The clerk of the Detroit recorder's court was properly impleaded with the judge of such court, in mandamus to compel the delivery to the sheriff of Wayne County of a venire facias to summon jurors for said court; where he acted under the direction of such judge in refusing to make delivery to the sheriff.—Dickson v. Judge of Recorder's Court of Detroit, 136 Mich. 479.

¶ 802. In a mandamus suit by a subordinate lodge against the grand lodge, for wrongfully revoking a charter, it is proper to include as defendants all officers whose duty it was to recognize the rights of relator.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

§ 131. ——Successors and transferees.

Abatement of writ by change in office and retirement of respondent, see post § 133.

Rights and duties of successor corporations and officers, see Corporations, XXII; Officers, VI; Judges § 7.

¶ 803. Mandamus to settle a case for review will not issue to a judge who has resigned since filing his answer to the order to show cause. Relief should be asked from his successor.—De Haas v. Newaygo Circuit Judge, 46 Mich. 12.

¶ 804. The directors, in office and whose right to office is attacked, are the necessary persons to be made defendants to mandamus to compel calling of a legal election.—Dusenbury v. Looker, 110 Mich. 58.

¶ 805. Mandamus will not lie against a street railway company which has sold its railroad, franchise rights and property to another company which has taken possession, to compel it to comply with the conditions of its franchise.—Township of Grosse Pointe v. Detroit & L. St. C. Ry., 130 Mich. 368.

§ 132. Intervention of parties or public attorneys.

See also ante ¶ 796.

¶ 806. A prosecuting attorney instituted a bill to enjoin a village from accepting saloon bonds. The village and others brought mandamus against the circuit judge to compel him to vacate an order refusing to dissolve a temporary injunction. The attorney general intervened as a respondent. Held, that, as the issuance of the writ of mandamus was discretionary, no substantial objection could be urged against the appearance of the prosecuting attorney as a respondent.—Village of Wolverine v. Cheboygan Circuit Judge, 162 Mich. 713.

¶ 807. A petition for writ of mandamus to compel the cancellation by a township board of a liquor license granted by it, is sufficient, although the name of a private individual and not that of the prosecuting attorney appears as relator, where the latter signs the petition in his official capacity and represents the relator both in the lower and in the supreme court.—Osborne v. Township Board of Richland, 183 Mich. 220.

§ 133. Abatement of writ and effect of cessation of office.

Pendency of motion for same relief as bar to mandamus, see ante ¶ 139.

Abatement of actions in general, see Abatement.

Effect of expiration of office to abate action, see also Abatement § 5.

¶ 808. A mandamus directing the action of a judicial tribunal is to be regarded as directed to the judge officially, and as binding the incumbent, whoever he may be, and not merely the judge who denied the application and has since ceased to hold the office.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

¶ 809. Mandamus proceedings against an officer, merely as an official, are not affected by a change of incumbency.—People ex rel. Reeder v. Wexford County Treasurer, 37 Mich. 351.

¶ 810. Proceedings in mandamus do not abate by expiration of defendant's office, where there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the corporation is attached.—Thompson v. United States ex rel. Cambria Iron Co., 108 U. S. 490, 26 L. ed. 521.

¶ 811. It seems that evidence is admissible to show that an attempted resignation of an officer who is a defendant in mandamus proceedings was simulated and fraudulent.—Thompson v. United States ex rel. Cambria Iron Co., 108 U. S. 490, 26 L. ed. 521.

§ 134. Amendment as to parties or capacity of parties.

Additions and changes to meet possible transfers pendente lite, see also post ¶ 861.

Retaining cause to bring in further parties, see post ¶ 871.

General law of amendments of parties, see Parties.

Amendments of the petition or answer, see post § 149.

¶ 812. Where mandamus to compel the county treasurer to deposit county funds in the depository designated by the board of supervisors under the provisions of Act No. 461, Local Acts 1907, is brought in the name of the board of supervisors instead of the county, the objection can be cured by amendment.—Board Sup'rs Gratiot Co. v. Munson, 157 Mich. 505.

§ 135. Application or petition.

Delay and laches as bar, see ante § 12.

Allegations as to demand and refusal to perform duty, see post § 136.

Sufficiency of prayer of petition, see post § 137.

Statement of facts accompanying petition to supreme court, see post § 138.

Replications and further pleadings, see post § 148.

Burden of proof and presumptions as to matters alleged, see post § 163.

Implications or presumptions from facts averred, see post § 163.

Taking petition as true for want of traverse in answer, see post § 164.

Right of opposing party to be heard on application, see post § 150.

Dismissal for defects of petition or application, see post § 146.

Denial of writ without prejudice or with leave to renew application, see post § 173.

Applicability of statute of limitations to mandamus actions, see Limitations § 19.

Retention of ill chosen prohibition application as application for mandamus, see Prohibition, Writ of.

Supreme court clerk's fees on docketing mandamus, see Sup. Ct. Rule 2.

Fee payable to clerk of circuit court on filing of application for writ, see Jud. Act, chap. XLVI, § 2; Comp. L. 1915, § 13670.

¶ 813. Where one seeks by mandamus to compel a public officer to perform a duty prescribed by statute, he must show by his application that all the conditions necessary to create the duty exist. It is not sufficient to show facts from which their existence may be inferred.—People ex rel. Colby v. Woodhull Township Board, 14 Mich. 28; People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296.

¶ 814. Mandamus to set aside an order of the circuit court quashing an information will not be granted where it is not made to appear in the petition that any different result would be reached if the order were set aside.—Clute v. Ionia Circuit Judge, 139 Mich. 337.

¶ 815. A relator or respondent who relies on official records to establish his right must produce such records or certified copies thereof with his petition or answer; it is not enough to refer to the originals.—Cronin v. Kalkaska County Sup'rs, 58 Mich. 448.

¶ 816. A petition in mandamus to compel the building of a bridge on a township line directed against the two townships is not indefinite because it alleges a duty in the alternative on one township or on the other or on both.—Brophy v. Schindler, 126 Mich. 341.

¶ 817. Where a child was refused admission to the public schools on account of his color, it will be no answer to his application for this writ that he does not show himself otherwise entitled.—People ex rel. Workman v. Detroit Board of Education, 18 Mich. 400.

¶ 818. Mandamus will not lie to compel the trial court to grant a motion for a new trial in a criminal case, where the petition fails to show that any evidence was produced in favor of the motion.—O'Brien v. Chambers, 97 Mich. 607.

¶ 819. Mandamus will not issue to compel the clerk of the court to permit one employed in making abstracts of title to examine and copy a file in an action relating to land between private parties, upon a petition which negatives constructive notice of the pendency of the action, and does not assert actual notice, or state that the examination and copying of the file is pertinent to the title under investigation or necessary to the interests of his employer, although it does state that it is "necessary to the completion of the relator's work."—Burton v. Reynolds, 110 Mich. 354.

¶ 820. A petition for mandamus by the state board of tax commissioners to compel a city board of assessors to turn over assessment rolls of the city to the petitioner to enable it to use the same need not affirmatively allege that an order requiring the turning over to the petitioner of such rolls was based on an inspection of such rolls.—Board of State Tax Com'rs v. Kohler, 193 Mich. 420.

¶ 821. On certiorari to review the action of a circuit judge in denying a petition for writ of mandamus requiring a board of supervisors to reconvene and rescind their action in passing a resolution for the submission of the local option question to the voters, the petition for mandamus held to state sufficient facts so as to require the allowance of an order to show cause why the writ of mandamus should not issue.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

¶ 821a. Where a petition for a mandamus to compel the sale of public land alleges that, when the relator applied to purchase it, the commissioner of the state land-office assigned, as his reason for refusing to sell, the existence of a former deed which turned out to be void, this is not equivalent to an allegation that but for the deed the lot was subject to sale, or that when the deed was executed it was subject to sale at an appraisal made before that; the commissioner's omission to assign any other reason is only circumstantial evidence.—People ex rel. Chapman v. State Land Office Com'r, 26 M. 146.

¶ 822. The petition for the order to show cause, in mandamus proceedings to compel a municipal council to approve a liquor seller's bond, must make it appear what was the reason, if any, given by the respondent for refusing, and the circumstances of the refusal; otherwise the reason must be presumed sufficient and the order may be refused.—Goss v. Common Council of Vermontville, 44 Mich. 319.

¶ 823. Peremptory mandamus to compel the common council of a city to issue a liquor license is properly denied where the petition does not set up the number of licenses permitted by Act 291, P. A. 1909, How. 2nd Ed. § 5055, as amended, or that the maximum number which might be granted thereunder were not granted and does not allege a vacancy in the maximum number of licenses which may be granted under such act.—Wojnowski v. Common Council of City of Detroit, 176 Mich. 349.

¶ 824. An application made by one justice of the peace in behalf of another justice to compel a township board to admit such justice to a seat must be denied where no authority for making the application is shown.—Grondin v. Logan, 88 Mich. 247.

¶ 825. On an order to show cause why mandamus should not issue to a board of supervisors to reconvene and recanvass a vote their answer acting as board of canvassers averring that they had not refused but had adjourned to await a further return by a township board and praying mandamus against it, was treated as a petition, and an order to show cause why true returns were not made was issued against inspectors of election.—Double v. McQueen, 96 Mich. 39.

§ 136. ——Showing as to demand and refusal to perform duty.

See also ante ¶ 426.

¶ 826. A petition for mandamus must show a clear legal duty resting upon the persons or tribunal against whom the remedy is sought, which they refuse, on request, to perform; and it does not show this if the request embraces anything which it would be illegal for them to do.—People ex rel. Butler v. Saginaw County Sup'rs, 26 Mich. 22.

¶ 827. Where a corporator demanded of the secretary of the corporation an inspection of its books, records and papers, and the demand was not shown to have been made at the office of the corporation, and no excuse was given for not making it there, and the only ground stated for the application was that the corporator had a desire "to ascertain the rights, duties, privileges and liabilities, and for the protection" of the corporator, the writ was refused.—People ex rel. Bishop v. Walker, 9 Mich. 328.

¶ 828. Where mandamus is sought to compel a municipal council to approve a liquor-seller's bond, the petition for the order to show cause should show respondent's reason for refusing, if any was given, and the circumstances of refusal; otherwise the reason must be presumed sufficient and the order may be refused.—Goss v. Vermontville, 44 Mich. 319; Negley v. Sturgis, 44 Mich. 1.

¶ 829. Mandamus will not lie to vacate an order setting aside a judgment where the petition fails to show that an application has been made to the circuit judge to set aside such order.—Hitchcock v. Wayne Circuit Judge, 97 Mich. 614.

¶ 830. For the reason that the petition showed no application to the court below for proper action an order to show cause was denied where it was sought to compel a circuit judge to vacate an order substituting attorneys in a pending case.—Galloway v. Wayne Circuit Judge, 97 Mich. 614 (note).

§ 137. ——Prayer.

Judgment and peremptory writ, see post § 171 et seq.

¶ 831. An objection that the prayer of a petition for mandamus to compel a village, incorporated under the general village incorporation act, to levy a tax sufficient to pay the amount due on a contract to furnish a water supply for the prevention of fires, is not sufficiently definite, in that it is not ascertainable from said prayer whether a special or a general assessment is asked for, is untenable, as the court can and will direct as to the nature of the assessment, if a mandamus is granted.—East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201.

§ 138. Statement of case on application to supreme court.

Dismissal for defective showing, see post § 146.

Objections and waiver of same by omission from brief and argument, see post § 145.

Matters in statement not presented below, see post § 156.

¶ 832. Order to show cause denied without prejudice for failure to furnish a brief statement of the case as required by Supreme Court Rule 58.—Loree v. Lenawee Circuit Judge, 97 Mich. 614 (note); People's Mut. Ben. Soc. v. Wayne Circuit Judge, 97 Mich. 614 (note).

§ 139. Propriety of alternative writ or order to show cause.

Nature and terms of the order to show cause, see post § 140.

Propriety of granting peremptory writ, see post § 171 et seq.

¶ 833. An order to show cause why a peremptory mandamus should not issue has, in the supreme court, been uniformly substituted for an alternative mandamus.—People ex rel. Anderson v. La Grange Township Board, 2 Mich. 187; Township of Roscommon v. Midland County Sup'rs, 49 Mich. 454.

¶ 834. The writ of mandamus is meant to be a speedy and summary remedy, whose chief value would be destroyed by the delays and complications of special pleadings, authorized under the practice of alternative or double writs.—Township of Roscommon v. Midland Board Sup'rs, 49 Mich. 454.

¶ 835. Where a petition for a writ of mandamus, upon its face, fails to state facts entitling the petitioner to the writ, an order to show cause may properly be denied.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

¶ 836. The allowance of an order to show cause, upon the filing of a petition asking for a mandamus, is a matter of judicial discretion, and not a matter of right.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

§ 140. Order to show cause or alternative writ, and amendments thereof.

Peremptory writ, see post §§ 171-175.

Proper mode of pleading to the order to show cause, see post § 142.

Propriety of mandamus as remedy as an issue to be tried on hearing of the return, see post ¶ 884.
Amendments of petition or answer, see post § 149.
Propriety of allowing amendment after refusal of order so as to support further application, see post ¶ 862.
Power of judge in vacation to make order to show cause, see 1916 C. C. Rule 50, § 2.
When writ is to be made returnable, see 1916 C. C. Rule 50, § 1.

¶ 837. An order to show cause why mandamus should not issue to compel a circuit judge to set aside a verdict does not necessarily imply personal censure of the respondent; since the review of judicial action is confined to legal errors, and the action itself is presumably conscientious.—Churchill v. Alpena Circuit Judge, 56 Mich. 536.

¶ 838. The entry of an order on the respondent in mandamus to show cause, is not a ruling that mandamus was the proper remedy.—Reed v. St. Clair Circuit Judge, 122 Mich. 153.

¶ 839. On a motion for a peremptory mandamus the court will not allow the relator to amend his order on the respondent to show cause, where it is too broad and asks more than he is entitled to, so as to include that only to which he is entitled.—People ex rel. Anderson v. La Grange Township Board, 2 Mich. 187.

§ 141. Service or appearance to writ.

General law of service of process and appearance, see Process, II; Appearance.

¶ 840. The plea of nonservice of the writ is inadmissible where the defendant appears and makes return.—Edwards v. United States, 103 U. S. 471, 26 L. ed. 314.

§ 142. Mode of pleading or response to writ or order to show cause.

Objections to petition or return and waiver of objections, see post § 145.
Motion to strike, see post § 145.
Replication or further pleadings, see post § 148.
Responsive affidavits, see also post § 168.
Demurrer as admission of facts in petition, see post § 165.
Answering or making return as an appearance to the writ, see ante ¶ 840.

¶ 841. The better practice is to answer a petition for mandamus, and not to demur to it.—Schouwink v. Ferguson, 191 Mich. 284.

¶ 842. Quære, whether under 1897 C. C. Rule 46, regulating procedure on mandamus, requiring an answer and that it shall be taken as admitting allegations not answered, and providing that the cause shall stand for hearing on the return day without notice, any demurrer or dilatory pleading is permissible.—Lauzon v. Board of Supervisors of Chippewa County, 129 Mich. 269.

¶ 843. An alternative mandamus is answered by a return, which is in the nature and performs the office of a plea; while the order to show cause is answered by affidavit.—People ex rel. Anderson v. La Grange Township Board, 2 Mich. 187.

§ 143. Requisites, time, and sufficiency of return or answer.

Answer, demurrer, or affidavit as proper mode of response to petition or order to show cause, see ante § 142.
Alleging matters of defense or justification of respondent, see post § 144.
Construction and effect of the record and intendments and presumptions thereon, see post §§ 161-164.
Conflicts in returns by several corespondents, see post ¶ 929.
Sufficiency of the record to sustain the writ, see post § 161 et seq.
Admissions by failure to answer or respond, see post § 164.
Assumed truth of answer and conclusiveness where not traversed, see post §§ 166, 167.
Correction and amendment of answer, see post § 149.
Mode of making objections to return and waiver of objections, see post § 145.
Motions to strike, see post ¶ 856.
Affidavits in response to order to show cause, see post § 168.
Framing issues of fact for trial, see post § 152.
Practice for settlement of return on mandamus to review judicial order, see Jud. Act, chap. XXXVI, § 1; Comp. L. 1915, § 13437.
Requisites of answer in supreme court and printing of record, see Sup. Ct. Rules 13, 56.
Power of courts or judges to enlarge time for return and pleadings thereto, see Jud. Act, chap. XXXVI, § 7; Comp. L. 1915, § 13443.

¶ 844. If the return states that the respondent has no knowledge concerning a fact necessary to the relator's case, it will be sufficient to put such fact in issue.—People ex rel. Portage School Dist. No. 1 v. Ryan, 17 Mich. 159.

¶ 845. Record issues should be set forth as they stand, in showing cause in cases involving a settlement of public accounts between townships and counties.—Township of Higgins v. Midland County Sup'rs, 52 Mich. 16.

¶ 846. Upon mandamus to compel a circuit judge to settle the testimony in a chancery case and to approve an appeal bond, the printed record filed by relator is sufficient if it contains all that is necessary to present the points raised.—Haney v. Allegan Circuit Judge, 167 Mich. 489.

¶ 847. An answer to an order to show cause is disregarded if only drafted by the attorneys in the case without being submitted to the respondent and approved by him. But the case may be treated as on demurrer to the relator's showing.—Douglass v. Manistee Circuit Judge, 42 Mich. 495.

¶ 848. In mandamus proceedings the answer should be signed by respondents or some one duly authorized in their behalf and not merely by their attorney.—DeFoe v. Board Election Com'rs Bay City, 174 Mich. 472.

§ 144. ——Allegations of defense or justification.

Sufficiency of showing on the record to justify or excuse, see post § 162.
Denial of writ on offer to perform, see post § 175.

¶ 849. An order to show cause why a township should not pay a town order is fully met by a return showing that it was fraudulently issued without consideration and without any allowance by the proper authorities.—Noble v. Township of Paris, 56 Mich. 219.

¶ 850. A person who claimed to be the holder and owner of certain ditch orders asked for a mandamus to compel the board of supervisors to provide for their payment. The board answered that they had no knowledge as to whether the relator was holder and owner of the orders as claimed. Held, that the answer was proper.—Brownell v. Gratiot County Sup'rs, 49 Mich. 414.

¶ 851. Respondents should set forth in their return to an order to show cause the facts relied upon in justification of the nonaction complained of, and not in individual affidavits appended to return, which are properly no part thereof.—Potter v. Common Council of Village of Homer, 59 Mich. 8.

¶ 852. An answer of the common council acting as a convassing board to mandamus to compel a recount of votes cast at a mayoralty election is insufficient to show cause against recount, where it does not show that the ballot boxes in one ward had not been sealed and kept in a condition to recount, and shows doubt as to another, and as to others no mention is made at all of the ballot boxes and ballots.—Ward v. Culver, 144 Mich. 57.

§ 145. Objections to pleadings and waiver of objections.

Practice on evasion of writ or order to show cause, see post § 147.
Amendments of pleadings, see post § 149.

¶ 853. Objections stated in the petition for mandamus, but not noticed in relator's brief, are considered waived.—Feek v. Township Board of Bloomingdale, 82 Mich. 398.

¶ 854. Where on a petition for mandamus to compel a circuit judge to vacate an order denying a motion to extend the time for settling a bill of exceptions, a question as to the sufficiency of the notice of settlement of respondent's return is raised, but counsel for relator files a reply brief and enters no motion to dismiss the proceedings, the return will be treated as properly before this court.—Carrier v. Emmet Circuit Judge, 155 Mich. 344.

¶ 855. Upon mandamus to compel the respondent to settle the testimony in a chancery case and to approve an appeal bond, respondent moved before the supreme court to strike the printed record from the files on the ground that it was insufficient to inform the court of the facts involved. It appeared that in said record certain paragraphs were omitted from the exhibits attached to respondent's answer, and also parts of said answer, and that the omitted matter tended to show improper conduct on the part of relator's counsel. The record as printed, however, was sufficient to present the questions raised in the mandamus proceeding. Held, respondent's motion should be denied.—Haney v. Allegan Circuit Judge, 167 Mich. 489.

¶ 856. The court will not strike from the answer in mandamus against a circuit judge all matter not shown to be within the personal knowledge of the respondent or based on the records and files in the case; the better practice is to bring to the attention of the court on the hearing all matters not entitled to consideration.—Erikson v. Alpena Circuit Judge, 138 Mich. 108.

§ 146. ——Dismissal for defects.

¶ 857. Where in mandamus to compel respondent judge to settle a case on appeal and to approve relator's bond the relator fails to comply with Rule 56 (154 Mich. xxx) by omitting material portions of respondent's return in making up the printed record, a motion to dismiss the petition for mandamus will lie.—Haney v. Allegan Circuit Judge, 164 Mich. 581.

§ 147. Practice on evasion or disobedience of writ or order.

General law of contempt, see Contempt.
Provision that omission to answer shall be a contempt, see Jud. Act, chap. XXXVI, § 1; Comp. L. 1915, § 13437.
Supreme court practice on failure to answer order, see Sup. Ct. Rule 13.

¶ 858. Evasion of an order to show cause, where no alternative order is granted, is not, upon the return thereto, open to any further redress than the issue of a peremptory writ, with costs.—Potter v. Homer Common Council, 59 Mich. 8.

¶ 859. The fine provided by Comp. L. 1871, § 7110, How. St. § 8669, for not obeying a

mandamus cannot be imposed for failure merely to make return to an order to show cause.—People ex rel. Fletcher v. Kalamazoo Circuit Judge, 39 Mich. 301.

§ 148. Replication or further pleadings.

See also ante ¶ 875.

Plea to answer to traverse same under Judicature Act, see post ¶¶ 957-959.

Declination to consider unnecessary pleadings, see post ¶ 887.

Provision for plea to return, see Jud. Act, chap. XXXVI, § 4; Comp. L. 1915, § 13440.

¶ 860. A replication in a mandamus proceeding filed on relator's own motion without any suggestion of the necessity of framing an issue or any order of the court, may be stricken from the files, since C. C. Rule 46c, which provides that "all material allegations of the petition in mandamus proceedings not specifically answered by the respondent, may be taken as admitted by the respondent as true as alleged," and subd. d providing that the proceeding "shall stand for hearing upon the return day of the writ without notice of trial or hearing, unless the court for cause shown shall order a postponement of such hearing," do not contemplate the filing of a replication as a matter of right.—Wagner v. Gladwin Circuit Judge, 131 Mich. 129.

§ 149. Amendments of petition or answer.

Amendments as to parties, see ante § 134.

Amendment of order to show cause, see also ante ¶ 839.

General law of amendments to pleadings at law, see Pleading, VI.

Provisions for amendments to proposed return by respondent judge, see Jud. Act, chap. XXXVI, § 1; Comp. L. 1915, § 13437.

¶ 861. Although the petition for mandamus gave property owners their day in court, and the order of the supreme court, overruling the order of the superior court, is conclusive and binding upon them as to all questions raised by their answers; inasmuch as it is possible that, since the original petition was filed, other parties may have acquired interests in the premises by transfer, mortgage, or otherwise, the relator should be allowed to amend said petition by making such persons, if any there are, parties.—City of Grand Rapids v. Burlingame (Judge Superior Court, Grand Rapids), 102 Mich. 321.

¶ 862. The refusal of an order to show cause does not operate as a final disposition of an application for a writ of mandamus, but such application may be amended, if that is warranted by the facts, or a new one may be filed.—Anker v. Board Sup'rs of Iosco County, 190 Mich. 610.

¶ 863. An "amended petition" for the writ of mandamus will not be considered by the supreme court, where respondent has never answered, and has never been called upon to answer it.—McMeekin v. Saginaw Probate Judge, 150 Mich. 354.

¶ 864. Where on mandamus to review the refusal to set aside a sale of realty under execution, the record showed that the execution was not delivered to the sheriff until a day after the levy, the relator was permitted to correct the return, if the error was one of fact; as the point had neither been argued nor passed upon below.—Flynn v. Kalamazoo Circuit Judge, 136 Mich. 23.

¶ 865. Where relator in a petition for mandamus files an amended petition, and asks in his brief "that if necessary a further return be ordered to this amended petition," his request will be refused, for this court will not decide any case piecemeal, especially a mandamus case, where the proceeding should be expeditious.—McMeekin v. Saginaw Probate Judge, 150 Mich. 354.

¶ 866. A fact which has arisen since the return was made—e. g., the appointment of a successor to the respondent officer, whose return stated that he had resigned—cannot avail as matter of defense unless set up by a plea puis darrein continuance or its equivalent.—Thompson v. United States ex rel. Cambria Iron Co., 103 U. S. 480, 26 L. ed. 521.

§ 150. Calling up and hearing cause.

Framing issues of fact for trial and trial of them, see post § 152.

Matters considered or open for consideration on hearing, see post §§ 154-160.

Calendaring and noticing causes in general, see Calendar.

Calendaring and setting causes in supreme court, see Appeal § 134.

When cause shall stand for hearing, see 1916 C. C. Rule 50, § 4.

¶ 867. Where cause has been shown in opposition to an application for a mandamus, and an argument is not had until a subsequent term, the case must be noticed and placed upon the docket for argument as a calendar case, and printed briefs furnished.—People ex rel. Plugger v. Fillmore Township Board, 11 Mich. 197; People ex rel. Detroit & H. R. Co. v. Salem Township Board, 19 Mich. 11.

¶ 868. It was left an open question whether C. C. Rule 19(b) requiring four days' notice of argument and a copy of the motion or petition and affidavits to be served applies in mandamus cases.—Webster v. Wheeler, 119 Mich. 601.

¶ 869. An objection that the four days' notice required by C. C. Rule 19(b) in mandamus was not given came too late after the denial of a motion to dismiss, and after respondent had answered and the case had

gone to a hearing.—Webster v. Wheeler, 119 Mich. 601.

¶ 870. In a mandamus proceeding against commissioner of highways of a township to compel the erection of a bridge the case was at issue upon the filing of an answer to the petition, and was not a calendar case requiring 14 days' notice of trial.—Berube v. Wheeler, 128 Mich. 32.

¶ 871. Where a party had been ordered to show cause in a proceeding to compel the issue of patents to certain lands, but there was no proof of the service of the order and no reason given why it was not served, the court, in order not to prejudice any of his rights before he had an opportunity to be heard, permitted the case to be retained for further proceedings as to parties not yet notified so that they might be brought in, if the relator desired.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 872. In mandamus cases the party interested is permitted to be heard in resisting the application.—Beecher v. Anderson, 45 Mich. 543.

§ 151. Opening and closing.

¶ 873. On the hearing of an application for a mandamus, the party showing cause is entitled to open and close the argument.—People ex rel. Detroit Board of Education v. Wayne County Treasurer, 8 Mich. 392.

¶ 874. Where, in mandamus causes, the relator formally demurs to the respondent's answer, the former has the affirmative and is entitled to open and close the argument on the hearing.—People ex rel. Harrington v. Wands, 23 Mich. 385.

§ 152. Framing issues and trial thereof.

Failure to make up issues as admitting truth of answer, see post § 167.
Burden of proof and presumptions, see post § 163.
Findings and conclusions, see post § 170.
Mode of making up and trying special issues of fact in other extraordinary actions, see also Quo Warranto; Prohibition.
Proper county in which to try issues of fact, see Jud. Act, chap. XXXVI, § 4; Comp. L. 1915, § 13440.

¶ 875. On petition for mandamus to compel the payment of highway orders the parties should frame their issues on the answer, if it denies the validity of the orders; it is immaterial to reply that in a certain suit the judge had made a finding sustaining the orders, and to rejoin that a full finding was not requested, and make surrejoinder that it was, and similiter.—Just v. Township of Wise, 47 Mich. 511.

¶ 876. If by its return a board of registration denies relator's right to be registered as a voter, an issue will be directed to determine the fact.—People ex rel. Dean v. Nankin Board of Registration, 15 Mich. 156.

¶ 877. The relator is not entitled to have an issue framed as to the good faith of the township board in rejecting a drug bond where the return in mandamus states facts which show that the board acted within its discretionary power and in good faith.—Bailey v. Van Buren Circuit Judge, 128 Mich. 627.

¶ 878. On mandamus to compel the secretary of state to set aside his order submitting Pub. Acts 1915, No. 324, to a vote of the electors under the Constitution, art. V, § 1, as amended in 1913, and to recount and recanvass the petitions because of irregularity therein, held that a motion to frame issues should be granted unless the facts were settled by agreement, as the action of the respondent should be confined to the petitions as presented, and the issues so framed should be tried in the supreme court.—Thompson v. Secretary of State, 191 Mich. 303.

§ 153. Sending issues down to circuit for trial.

Trial of facts in supreme court, when proper, see also ante ¶ 878.

¶ 879. Comp. L. 1871, chap. 226, How. St., chap. 299, provides that in mandamus proceedings there may be a trial of certain issues of fact in the county where the facts arose, in the same way as in an action on the case for false return. Held, that this relates to cases where a writ of mandamus has been first issued and a return made under which issues of fact or law are framed—a practice which is not customary here.—Township of Roscommon v. Midland Board Sup'rs, 49 Mich. 454.

¶ 880. Such issues of fact as are introduced by or under the return are disposed of specifically, not by sending down the entire case on the record, but in the same way as are particular issues sent down in chancery cases to be passed on.—Township of Roscommon v. Midland Board Sup'rs, 49 Mich. 454.

¶ 881. Where a mandamus was petitioned for to compel payment upon certain orders issued upon estimates made under a grading contract, and the supreme court did not regard the estimates as final, it directed the framing of an issue to be tried by jury below to determine the exact amount of work done under the contract, the whole amount of orders issued under it, and the difference, if any, between the sum earned and that included in the orders.—People ex rel. Whitly v. Lansing Common Council, 27 Mich. 131.

¶ 882. Whether the statute concerning the submission of special questions to the jury applies to cases where the issue of fact is made up in the supreme court, and specific

questions are sent down to the circuit to be determined by the jury, quære. The circuit judge cannot restrict the scope of the inquiry ordered, and it is not certain that he can enlarge it.—Miner v. Vedder, 66 Mich. 101.

¶ 883. Where the petition for a writ of mandamus to compel the payment of an account, and the answer thereon, presented issues involving the investigation of long accounts between a township and county, the matter was remanded to the circuit court for a statement of account; and it was suggested that the case might properly be referred by the circuit court to a referee under How. St. § 7878.—Haines v. Saginaw County Sup'rs, 87 Mich. 287.

§ 154. Issues and questions for consideration.

Restriction to matters presented by the return or record, see post § 155.
Questions not presented to or considered by respondent, see post § 156.
Questions affecting strangers, see post § 157.
Questions antecedent or collateral to the duty alleged, see post § 158.
Merits or regularity of proceeding out of which judicial duty arises, see post § 159.
Collateral review of judicial acts, see post § 160.
Trial of title to land, see also ante ¶ 19.
Trial of title to office, see ante § 20.
Appellate or original nature of mandamus, see ante § 2.
Improper amendments as matter beyond consideration, see also ante ¶ 863.
Scope of inquiry on issues sent down to circuit for trial, see ante ¶ 882.
Sufficiency of answer or return to join issues, see also ante § 143.
Necessity or propriety of replication or further pleadings, see ante § 148.
Admissions by the pleadings and responses, see post §§ 164-167.
Framing the issues of fact, trial, and sending them down to circuit court for trial, see ante §§ 152, 153.
Rendition of advisory opinion or suggestion in improper or defective mandamus proceeding, see post § 174.
Issues open on mandamus to vacate contempt order, see also Contempt ¶ 7.
Issues before court on mandamus to compel revival of claims commission, see Estates of Decedents ¶ 564.
Provision for hearing on petition and return in absence of plea to return, see Jud. Act, chap. XXXVI, § 4; Comp. L. 1915, § 13440.

¶ 884. Whether a mandamus is the proper remedy in a case is not determined by an order to show cause why the writ should not issue. That point may be finally examined and determined at the hearing on the return of the writ, when both parties can be heard. —Olson v. Muskegon Circuit Judge, 49 Mich. 85.

¶ 885. On an application for mandamus to compel the raising of a tax to pay warrants purporting to be issued by a board of supervisors, the question of the validity of the proceedings to organize the county was not determined where it was not essential to the decision of the case.—People ex rel. Pack v. Presque Isle Sup'rs, 36 Mich. 377.

¶ 886. In mandamus to compel a circuit judge to enter an order in accordance with the prayer in an intervening petition for the removal of a receiver, the subsequent change of condition and passing of the opportunity for receiver's misconduct renders the determination of a question whether he should be restrained an unnecessary one.—Moran v. Wayne Circuit Judge, 125 Mich. 6.

¶ 887. Under Sup. Ct. Rule 13, and 1897 C. C. Rule 46c, neither replication nor rejoinder are authorized in mandamus proceedings, though a replication may be permitted, and hence a rejoinder in such case need not be examined for the purpose of finding issues not made by the petition and answer.—Lewis v. Board of Education of City of Detroit, 139 Mich. 306.

¶ 888. In mandamus to compel a circuit court judge to set aside an order quashing a writ of capias ad respondendum where the return does not deny and thereby admits the allegation that the judge limited his decision to the ground specified, other grounds for quashing the writ will not be considered under the Supreme Court Rule No. 13.—Clark v. Kent Circuit Judge, 125 Mich. 449.

¶ 889. In mandamus to compel the Railroad Crossing Board to approve relator's map of its railroad, the reasons for the refusal to approve the map assigned by respondents on the hearing were not considered; but the issuance of a writ was ordered directing the board to proceed to approve or disapprove the map as required by statute (How. St. § 3321) and to set forth its reasons for its action.—Wisconsin, M. & N. Ry. Co. v. State Railroad Crossing Board, 119 Mich. 505.

¶ 890. The question how far courts should go in compelling an administrator, by mandamus, to disburse the fund in his hands for which he is answerable in the probate court was not considered, not having been discussed by counsel.—Hayden v. Hefferen, 99 Mich. 262.

¶ 891. Mandamus proceedings to compel the restoration of an alderman to a seat from which he has been wrongfully removed by the council do not concern the legality of his title.—Doran v. De Long, 48 Mich. 552.

¶ 892. The determination of the question of set-off in mandamus to compel a county treasurer to turn over to a city delinquent taxes collected will be left to be considered in an action where the facts can be fully

brought out.—City of Sault Ste. Marie v. Hotten, 171 Mich. 265.

§ 155. ——Restriction to record and return.

¶ 893. Upon an application for mandamus to require a circuit judge to grant a motion made upon a showing of facts before him and which upon the showing he denied, the case must be heard on the facts disclosed on the hearing of the motion in the circuit, and not on new facts brought into the case on this application.—People ex rel. McCarthy v. Monroe Circuit Judge, 36 Mich. 274.

¶ 894. In determining whether a trial court reaches a right conclusion and acts within discretionary powers in requiring a plaintiff to give security for costs under Pub. Acts 1915, No. 314, chap. 13, § 8, the court is not limited to the reasons returned to a writ of mandamus to compel such judge to vacate such order.—Jensen v. Oceana Circuit Judge, 194 Mich. 405.

§ 156. ——Questions not presented to or considered by respondent.

See also ante ¶ 893.

¶ 895. In mandamus to reverse an order denying extension of time for appeal the stenographer's minutes cannot be considered, where not embodied in the petition below and therefore not passed on below.—Roberge v. De Lisle, 158 Mich. 16.

¶ 896. Upon mandamus to compel the granting of a motion for change of venue, such matter contained in the evidence and brief for relator as was not presented to respondent, and not within the grounds assigned in the motion for a change, will not be considered.—Glazier v. Ingham Circuit Judge, 153 Mich. 481.

¶ 897. The probate court in a proceeding to probate a will has no jurisdiction and does not have the proper parties before it to enter upon an inquiry as to whether the testator actually owned the real estate devised and such a question cannot be raised in a proceeding in mandamus brought in the supreme court to compel the probate court to proceed in the hearing.—Bliss v. Macomb Probate Judge, 129 Mich. 127.

¶ 898. A probate court in a proceeding to probate a will has no jurisdiction to determine whether or not the sole beneficiary is entitled to the property if he murdered the testator and such a question cannot be raised on mandamus in the supreme court to compel the probate judge to proceed with the hearing which he has postponed until after the trial for murder.—Bliss v. Macomb Probate Judge, 129 Mich. 127.

§ 157. ——Questions affecting persons not parties.

¶ 899. The question of whether an owner can redeem her property in the hands of a tax purchaser, by paying such proportion of the amount bid as her parcel bears to the tract assessed and sold as a whole, cannot be raised on mandamus to the auditor general to which the purchaser is not a party.—Kennedy v. Auditor General, 134 Mich. 534.

¶ 899a. In mandamus to compel the issue of patents to certain lands, it was held that, where patents had already issued to parties who had disposed of the lands so patented to other parties who had not appeared to show cause, and upon whom no process had been served, the rights of such latter parties would not be passed upon, nor would the circuit court order the issuing of another patent for such lands. Whether, in such proceeding, the court could invalidate the prior patent, and whether it could be done in any way except by scire facias for that special purpose, or by bill in chancery, quære.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 900. One Erick Norman held a warrant upon the treasurer of a township for work and labor rendered. One Sinna Norman notified the treasurer that she was the undisclosed principal of Erick Norman. Held, that the rights of Sinna Norman, as undisclosed principal could not be litigated in a mandamus proceeding brought by an indorsee of the warrant to compel the township treasurer to pay it.—Ullman v. Sandell, 158 Mich. 496.

§ 158. ——Questions antecedent or collateral to duty alleged.

See also ante ¶ 645.
Impropriety in mandamus to judicial officer of examination into merits of case whence duty arose, see post § 159.
Unnecessary antecedent question, see also ante ¶ 885.
Trial of right to office collaterally to main issues, see also ante § 20.

¶ 901. The question of the validity of Local Acts 1889, No. 445, consolidating two cities, will not be considered upon applications for mandamus to compel the proper officers of one of the former cities to file a chattel mortgage and issue an execution, which such officers refused to do after their offices had been abolished by the act; and such applications must be refused where the rights of the applicant would have been protected by applying to the proper officer of the new city.—Pistorius v. Stempel, 81 Mich. 133.

¶ 902. Whether a strip of land, described in a resolution of a city common council authorizing its purchase for the purpose of widening a street, is a public highway by user, or not, cannot be determined on mandamus to compel the presiding officer of the council to reverse his decision declaring such resolution carried.—Tennant v. Crocker, 85 Mich. 328.

¶ 903. On mandamus to compel issuance of a certificate to a candidate excluded by counting an improper ballot, which being rejected gives a majority to relator, the other questioned ballots will not be examined.—Christopherson v. Common Council of Manistee, 117 Mich. 125.

¶ 904. Mandamus to compel the payment of salary is not the proper remedy to inquire into the regularity of proceedings which resulted in the suspension and removal of a street commissioner by the city council.—Hartwig v. Mayor and Common Council of Manistee, 134 Mich. 615.

¶ 905. Mandamus to compel the payment of salary cannot be made the proper remedy to test the proceedings of a city council, in suspending and removing the street commissioner, by inferring that there was not some person performing the duties of this office against whom quo warranto could have been brought.—Hartwig v. Mayor and Common Council of Manistee, 134 Mich. 615.

¶ 906. In a mandamus proceeding brought by a property owner to strike an alleged improper assessment from the rolls, the court will not decide whether or not a certain item of property, apparently admitted by both parties to be taxable, shall be subjected to taxation.—W. A. Sturgeon & Co. v. Board Assessors City of Detroit, 159 Mich. 199.

¶ 907. Upon an application for a mandamus to compel a township board to approve the sureties in a liquor bond, it is not the province of this court to decide as matter of fact whether the sureties offered were pecuniarily responsible, but merely whether the board acted in good faith and not arbitrarily or unjustly.—Post v. Sparta Township Board, 64 Mich. 597.

¶ 908. Where mandamus is brought to compel a city council to accept a saloon bond, the court will not go into the question of the sufficiency of the bond, but will only inquire whether the council acted in good faith.—Knabush v. Common Council Village of Britton, 158 Mich. 577.

¶ 909. Plaintiff brought mandamus to compel defendant city council to accept a saloon bond. Held, that the court, on the question whether the council wrongfully rejected the bond, properly refused to permit an inquiry to be made of the members of the council as to whether they would accept a surety company bond.—Knabush v. Common Council Village of Britton, 158 Mich. 577.

¶ 910. In mandamus to compel a county treasurer to pay over to a city delinquent taxes collected where a set-off is claimed of the amount of a check accepted from the city treasurer, the question of diligence of the county treasurer in presenting the check so received for payment, and of lack of notice of the dishonor of the check, should not be considered.—City of Sault Ste. Marie v. Hotten, 171 Mich. 265.

§ 159. ——Merits or regularity of proceedings to which judicial duty pertains.

Reviewing antecedent or foundation proceedings collaterally, see also post § 160.
On mandamus to correct improper injunction, see also ante § 45.

¶ 911. The merits will not be tried on application and return of an order to show cause why judicial action should not be compelled.—Chesebro v. Kent Circuit Judge, 70 Mich. 650.

¶ 912. Upon an application for mandamus to vacate an order granting a new trial the questions involved in the trial of the cause will not be reviewed.—Chicago & G. T. R. Co. v. Genesee Circuit Judge, 89 Mich. 549.

¶ 913. The question of the validity of an assignment for creditors will not be tried on an application for mandamus to vacate an order adjudging the relator guilty of contempt in filing, in a circuit court other than that having jurisdiction of the assignment proceedings, a bill to enjoin a sale of the assigned property.—Smith v. Wayne Circuit Judge, 84 Mich. 564.

¶ 914. On a mandamus to compel punishment of contempt in failing to pay over to an ancillary receiver funds of a corporation, it will not be inquired whether there was a legal incorporation in the domicile state, where its courts recognized that there was one by entertaining winding up proceedings and appointing a domiciliary receiver.—Baldwin v. Wayne Circuit Judge, 101 Mich. 119.

¶ 915. Questions arising during the course of a proceeding will not be reviewed on mandamus, at least where the decision of the lower court was not made on the merits after full consideration, but for the sole purpose of obtaining a ruling by the supreme court.—Walsh v. St. Clair Circuit Judge, 107 Mich. 26.

¶ 916. Defects in an affidavit for an attachment will not be reviewed by the supreme court in a mandamus proceeding to require the allowance of a motion to set aside a service thereof on person and property.—Nederlander v. Wayne Circuit Judge, 55 Mich. 411.

¶ 917. Executors who are restrained by an order of a chancery court from paying moneys to a legatee until a further order of court cannot, upon petition for mandamus to set aside such order, raise the question of insufficiency of service upon the legatee in the chancery suit.—Craig v. Wayne Circuit Judge, 192 Mich. 106.

¶ 918. It will not be determined in mandamus proceedings by a citizen to set aside an order of the recorder's court of the City of Detroit restraining contractors from doing any more work on a building until a case in such court relating to a violation of the Building Code is decided whether the department of building works has acted wisely in neglecting to commence a proceeding in a court of equity.—Adler v. Detroit Recorder's Court Judge, 197 Mich. 81. (Ostrander, J., dissenting.)

§ 160. ——Collateral review of judicial acts.

General law of collateral attack on judgments, see Judgments, VII.

¶ 919. The sufficiency of an injunction bill cannot be reviewed in collateral proceedings; as upon mandamus to compel a court to proceed with a trial that has been enjoined.—Ives v. Muskegon County Circuit Judge, 40 Mich. 63.

¶ 920. Where a defendant had been sued on a promissory note and had been garnisheed in a suit against the plaintiff and the court directed a stay bond to be given by plaintiff under How. St. § 8105 to protect him as such garnishee and held the case over until the next day, mandamus will not lie to compel the vacation of the order staying the proceedings on the ground that the garnishment suit was instituted for delay and annoyance, as such issues cannot be tried in such a proceeding, nor can it be assumed that this was the object or purpose of the parties litigating upon the mere assertion of a petitioner for mandamus.—Burt v. Wayne Circuit Judge, 82 Mich. 251.

¶ 921. The decree of a circuit court setting aside the charge fixed by the tax law, section 59 (Pub. Acts 1899, No. 262), of $1 for each tax description for each year the lands are delinquent and permitting redemption without payment of such charge, cannot be attacked collaterally in a mandamus proceeding where the court had jurisdiction of the subject matter.—Warren v. Auditor General, 131 Mich. 263.

¶ 922. Mandamus on the ground that an order changing the venue of trial was without jurisdiction will not be granted to compel the circuit court judge to vacate an order in a case removed to his circuit. The proper remedy would be a motion to vacate the order changing the venue and mandamus to review the denial of such motion.—Bradfield v. St. Clair Circuit Judge, 148 Mich. 366.

§ 161. Sufficiency, construction and effect of showing on the record.

Showing as to justification, excuse or readiness to perform, see post § 162.

Burden of presenting case by the record, see post § 163.

Presumptions and intendments on the record, see post § 168.

Admissions made by the pleadings or by failure to plead, see post §§ 164-167.

Construction of affidavits, see also post § 168.

Findings made needless by the record, see post § 170.

Judicial notice of facts not returned, see Evidence, I.

Showing as to qualifications of delegate in political convention, see also Elections ¶ 89.

Matters to be contained in printed record in mandamus cases in supreme court, see Sup. Ct. Rule 56.

¶ 923. Mandamus to a circuit judge is denied where the record fails to show upon what papers or showing respondent based the action which it is sought to review.—People ex rel. Jones v. Kent Circuit Judge, 34 Mich. 373; People ex rel. McCarthy v. Monroe Circuit Judge, 36 Mich. 274.

¶ 924. Mandamus to compel a police justice to receive a complaint and issue a warrant for violation of the liquor-law was denied where the justice's returns showed no captious disregard of duty.—Sadler v. Sheahan, 92 Mich. 630.

¶ 925. A writ of mandamus to compel a circuit judge to order testimony before a notary in support of a motion for a new trial will be denied on appeal where the record fails to show that the nature of the testimony was disclosed in the motion for a new trial other than to say that it was based on testimony taken and to be taken.—Eikhoff v. Wayne Circuit Judge, 129 Mich. 150.

¶ 926. Mandamus will not lie to compel a judge to grant a change of venue on the ground that a fair and impartial jury cannot be obtained in the county where the case is pending, where the record does not establish this fact.—Campbell v. Jackson Circuit Judge, 155 Mich. 326.

¶ 927. Upon petition for mandamus to compel a county board to pay to a township which had been set off from the county a balance shown by the county books to be due, the answer stated no facts from which error in the books could be inferred. The writ was granted.—Township of Roscommon v. Midland Board Sup'rs, 49 Mich. 454.

¶ 928. Under Pub. Acts 1899, No. 107, § 127, providing for the placing of lands upon the state tax homestead list, the existence as matter of record of all enumerated essential facts except as to the pendency of suits is sufficient to justify the denial of a writ of mandamus to desist from such action where the answer signifies an intention not to include lands against which suits are or may be pending.—Alcona County Sup'rs v. Auditor General, 138 Mich. 491.

¶ 929. Where the fairness of a recount had in a case not within the statute providing for recounts was denied by relator and

by nine of the twenty-one members of the board of canvassers, the others making a conflicting return, mandamus was granted to compel the issue of a certificate to the candidate originally declared elected.—Belknap v. Board of Canvassers of Ionia County, 94 Mich. 516.

¶ 930. Mandamus will lie to compel the vacation of a judgment by default where the sworn statement of the judgment debtor that there was no personal service upon him is contradicted only by a return of service made by a private person, and the relator further shows that he had no knowledge of any of the proceedings in the cause until after the expiration of the time allowed for suing out a writ of error, and that he moved to set them aside as soon as he did learn of them, and the testimony brought up with the petition fails to disclose any liability on his part to plaintiff in the action.—Campbell v. Wayne Circuit Judge, 111 Mich. 247.

¶ 931. A return that in fixing the conditions of a liquor bond respondents, a common council, determined that to require four sureties "would operate as a wholesome salutary restraint against the well known vicious tendencies of such places," shows that its action in rejecting a bond with only two sureties was not grounded on their insufficiency.—Power v. Common Council of Village of Litchfield, 141 Mich. 350.

¶ 932. On an application for mandamus to require the county treasurer to pay an order drawn by persons claiming to be superintendents of the poor, the legal title of the officers will not be tried; but it appearing on the record that their appointment was unauthorized, mandamus will not be granted unless it appears that, notwithstanding the want of title, they have got actual possession and are generally reputed to be such officers, and are hence officers de facto.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416.

§ 162. ——Justification, excuse, or readiness to perform.

¶ 933. Mandamus to compel judicial action will not issue where the return to the order to show cause reveals that respondent has been ready and willing on showing and motion to make a proper interlocutory decree, and that after service on him of the order a motion for final decree was made on which action is withheld only because of the pendency of the mandamus application.—Chesebro v. Kent Circuit Judge, 70 Mich. 650.

¶ 934. A highway commissioner is not compelled by mandamus to repair a bridge where his return to the writ states that in his opinion the cost would exceed $1,000.—Travis v. Skinner, 72 Mich. 152.

¶ 935. Mandamus in behalf of persons accused of murder will not be granted to compel the sheriff to bring relators before a certain circuit commissioner in order that they may be admitted to bail, where the answer shows that respondent has good reason to believe that such commissioner is disqualified, and where no issue is asked to try the question; there appearing to be another commissioner and a circuit judge, by either of whom, it is presumed, relators may be admitted to bail.—Elder v. Garner, 97 Mich. 617.

¶ 936. Where a request by bill by the relator for a preliminary injunction was denied by the circuit judge, and in his return to a mandamus proceeding to compel him to issue such preliminary injunction the judge shows there is no present necessity for the same, and that he will proceed to hear the bill on its merits, the writ of mandamus will not issue.—Mahon v. Wayne Circuit Judge, 154 Mich. 497.

§ 163. Burden of proof, presumptions and intendments.

Construction and effect of the record, see ante §§ 161, 162.
Restriction of matters considered to the record as returned, see ante § 155.
Presumptions as to available relief from other judicial officers, see also ante ¶ 935.
General presumptions of law and fact, see Evidence, II.
General presumption as to due and regular performance of duty, see Evidence §§ 37, 38.
Presumption that official action will be duly and regularly completed by proper order and entry, see also Evidence ¶ 229.
Presumptions on writ of error as to matters not disclosed by record, see Appeal, XII, C.
Presumptions on certiorari as to matters not stated or disclosed in return, see Certiorari § 59.
Presumption as to correctness of public service rates as based on reported earnings, see Public Service.

¶ 937. In mandamus proceedings to enforce the payment of money, as in any other, the claimant must make out his own case unless it is admitted expressly or by implication; the burden is not on the respondent to show that the demand is illegal.—Hosier v. Higgins Township Board, 45 Mich. 340.

¶ 938. Matters stated in the application for a mandamus which are neither admitted nor denied by the answer cannot be insisted on by the relator on the argument if he goes to a hearing without proofs.—People ex rel. Estabrook v. Pritchard, 19 Mich. 470.

¶ 939. In mandamus to the supreme court to compel a circuit judge to grant a temporary injunction, the burden is upon relators to show that in refusing said injunction the circuit judge did not use proper discre-

tion.—Early v. Ingham Circuit Judge, 166 Mich. 517.

¶ 940. On application for a peremptory mandamus, commanding the state treasurer to pay the relator such sum as he was entitled to as holder of some of the circulating notes of the Government Stock Bank, out of the avails of the stocks deposited with the state treasurer, it was not necessary that the affidavits should show that the notes were countersigned as required by law. The averment that they were issued by the bank necessarily implied this.—People ex rel. Duffield v. Holmes, 3 Mich. 544.

¶ 941. Mandamus to compel a municipal board to approve a liquor dealer's bond will be denied if there is nothing to show that the refusal to approve it was capricious, or to rebut the presumption that the board has fairly passed upon all the questions which determine the sufficiency of the bond and the reliability of the sureties.—Parker v. Portland Board of Trustees, 54 Mich. 308; Post v. Sparta Township Board, 64 Mich. 597; McHenry v. Township of Chippewa, 65 Mich. 9.

¶ 942. When, upon an order to show cause, no reason is given for the rejection of a liquor bond, it may be assumed to have been rejected arbitrarily.—Amperse v. Kalamazoo Common Council, 59 Mich. 78.

¶ 943. Mandamus to compel a city clerk to issue a warrant will not be refused because of failure of the petition to allege that there are sufficient funds available to pay it where the refusal was not based on such ground and there is no showing that there is not in fact funds available.—Smedley v. Kirby, 120 Mich. 253.

¶ 944. In mandamus to compel the payment of a street commissioner's salary for the time during which he was suspended in the alleged violation of the law, it will be assumed that his subsequent dismissal shows that he was incompetent and thus not entitled to the salary during the period of his suspension.—Hartwig v. Mayor and Common Council of Manistee, 134 Mich. 615.

¶ 945. An injunction not made part of the record in contempt proceedings for an alleged violation thereof will not be assumed on mandamus to have been broader than the prayer of the bill.—Detroit & B. P. R. Co. v. Detroit Citizens' St. R. Co., 97 Mich. 583.

¶ 946. A chancery order which does not purport upon its face to have been made by consent, and therefore beyond the power to vacate, and which was not considered by the circuit judge as having been so made on the hearing of a motion, which he granted, to vacate it, will not be treated as such on an application for a mandamus to compel him to vacate an order granting said motion.—Fifth National Bank v. Clinton Circuit Judge, 100 Mich. 67.

¶ 947. Under Comp. L. 1897, § 11163, providing for taxation of costs on judgment for defendant in forcible entry and detainer in the same manner as provided for costs of a complainant recovering judgment, the taxation of costs by the commissioner is presumed regular; and the complainant is not entitled to mandamus to compel the commissioner to make a return for an appeal, refused on account of nonpayment of costs, although the costs were apparently taxed without notice to the complainant and subsequent to his taking an appeal.—Stuart v. Corlette, 129 Mich. 611.

§ 164. Admissions by failure to answer, deny or make return.

Presumptions as to matters not alleged, see ante § 163.
Admissions by demurrer to petition, see post § 165.
Taking answer as true, see post §§ 166, 167.
Rule in supreme court cases, see Sup. Ct. Rule 13.
Rule in circuit courts, see 1916 C. C. Rule 50, § 3.

¶ 948. A failure to make answer to the order to show cause admits the facts set forth in the petition, and if sufficient for relief the writ will issue thereon.—People ex rel. Davis v. Common Council of Lansing, 31 Mich. 490.

¶ 949. A statement of fact in a petition for mandamus must be taken as true unless denied in the answer.—Berube v. Wheeler, 128 Mich. 32; Hoffman v. Auditor General, 136 Mich. 689; Barlow v. Riker, 138 Mich. 607.

¶ 950. An averment in a petition for mandamus not expressly denied, but admitted to be true in part, in the answer, will be taken as true.—Jones v. Board of Education of City of Detroit, 88 Mich. 371.

¶ 951. Under Supreme Court Rule 63 (new rule 13), which provides that "In proceedings for mandamus, where an order to show cause has been made, respondent must answer fully every material allegation of the petition, and every material averment not so answered may be taken admitted by respondent to be true as alleged, and, in case no answer is made and filed as required by such order, the court, upon due proof of service of the order, will award a peremptory mandamus as prayed for, or enforce obedience to the order by process for contempt," the failure of the judge of the superior court of Grand Rapids to answer an order to show cause why he should not be compelled to vacate an order by him made dismissing the petition of the city of Grand Rapids for the establishment of permanent dock, safety, sanitary, and building lines along the shores

and margins and in the waters and on the bed of Grand river, as provided by Act 358, Local Acts of 1891, on the ground that said act is unconstitutional, amounts to an admission by respondent and the contesting property-owners that all of the material averments of the petition for the writ are true, and a peremptory mandamus should issue as prayed.—City of Grand Rapids v. Burlingame (Judge of Superior Court, Grand Rapids), 102 Mich. 321.

§ 165. Admissions by demurrer to petition.

Admission of facts in answer by demurrer thereto, see post § 167.

¶ 952. Where a petition for a mandamus to compel a sale of certain public land simply alleged that the land in question was subject to entry at a specified sum on July 1, 1850, a demurrer thereto did not admit that it was subject to such entry at any subsequent time.—People ex rel. Chapman v. State Land Office Com'r, 26 Mich. 146.

§ 166. Assumed truth and conclusiveness of answer.

Assumed truth of affidavits, see post § 168.

Taking return as true in certiorari, see Certiorari § 56.

Taking answer to petition as true where whole mandamus record goes up in certiorari, see Certiorari § 56, ¶¶ 206, 207.

¶ 953. Where a circuit judge is called upon to show cause against a mandamus, his return, stating the facts as to his own action, and what occurred in connection therewith within his own knowledge, must be conclusively taken to be true, and as issue of fact cannot be made upon it.—People ex rel. Orr v. Wayne Circuit Judge, 23 Mich. 536.

¶ 954. In mandamus cases where the matter is heard on petition and answer, the answer is to be taken as true; and where the answer states that certain officers who, it was claimed, had been illegally removed, have retained the files and records of their offices, have constantly denied the right to make the removal, and have continued to act as officers, is conclusive against the claim of the new appointees that they have acted as such officers with general acquiescence in their right.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416.

¶ 955. On an application for mandamus where the answer is responsive or does not admit relator's case, and he sees fit to go to a hearing on the pleadings, the answer is taken as true, and determines the propriety of issuing the writ.—Merrill v. Gladwin County Treasurer, 61 Mich. 95.

¶ 956. In mandamus to compel the lower court to vacate an order dissolving an injunction, on the ground that the court acted arbitrarily and did not employ its discretion, the return of the lower court that he did exercise his discretion will not be disputed where the facts indicate the probable correctness of his decision.—McQuater v. Wayne Circuit Judge, 158 Mich. 46.

§ 167. ——Admissions by demurrer or failure to take issue on return.

See also ante ¶ 27.

Demurring to petition as admitting truth, see ante § 165.

Statutory provision for taking answer or return as true in absence of issue taken thereon, see Jud. Act, chap. XXXVI, § 4; Comp. L. 1915, § 13440.

¶ 957. Under the Judicature Act, Pub. Acts 1915, No. 314, chap. 36, § 4, all material facts stated in the return or answer in a mandamus proceeding that are not specifically denied by plea are taken as admitted to be true.—Michigan R. Commission v. Detroit & M. Ry. Co., 192 Mich. 426.

¶ 958. Under the Jud. Act, chap. XXXVI, § 4; Comp. L. 1915, § 13440, providing that all material facts stated in a return to a writ of mandamus, not specifically denied by plea, shall be taken as admitted to be true, where no issue is joined in such proceedings the answer of respondent is conclusive as to the facts.—Yerkes v. Antrim Circuit Judge, 200 Mich. 443.

¶ 959. An answer to a writ of mandamus which is not traversed must be accepted as true.—Marsh v. Kent Circuit Judge, 200 Mich. 579.

¶ 960. If in mandamus proceedings, no issues are framed, the proceeding will be disposed of on the issues raised by the petition and answer and under 1897 C. C. Rule 46, subd. c, all averments of fact in the answer and all material allegations in the petition not specifically answered will be assumed to be true.—Lewis v. Board of Education of City of Detroit, 139 Mich. 306.

¶ 961. The facts stated in the answer or the return to an order to show cause are taken as true if no issue is made upon it.—Murphy v. Reeder Township Treasurer, 56 Mich. 505; Farnsworth v. Kalkaska County Sup'rs, 56 Mich. 640; Hickey v. Oakland County Sup'rs, 62 Mich. 94; Post v. Sparta Township Board, 63 Mich. 323; Detroit Tug & Wrecking Co. v. Wayne Circuit Judge, 75 Mich. 360; Smith v. Auditor General, 80 Mich. 205; Fort Street Union Depot Co. v. State Railroad Crossing Board, 81 Mich. 248; Auditor General v. Midland County Sup'rs, 84 Mich. 121; Village of Grosse Pointe v. Treasurer of Wayne County, 85 Mich. 44; Smith v. Board of State Auditors, 85 Mich. 407; Grondin v. Logan, 88 Mich. 247; Tyler v. Oceana County Sup'rs, 93 Mich. 448; Double v. McQueen, 96 Mich. 39; City of Benton Harbor v. St. Joseph & B. H. St. R. Co., 102 Mich. 386; Porter v. Edwards,

114 Mich. 640; Smith v. Livingston County Sup'rs, 115 Mich. 202; Keeler v. Deo, 117 Mich. 1; Indiana Road Machine Co. v. Keeney, 147 Mich. 184; Attorney General v. State Board of Agriculture, 152 Mich. 689; Bauer v. Township Board of Denmark, 157 Mich. 395; McNamara v. Kent Circuit Judge, 173 Mich. 602; Alderson v. Newaygo Circuit Judge, 173 Mich. 608.

¶ 962. The return, if demurred to, must be taken as true.—Edwards v. United States, 103 U. S. 471, 26 L. ed. 314.

¶ 963. Facts set up by respondent in his return to an order to show cause are admitted by the relator if, when an issue is framed, they are not submitted to the jury. —Loomis v. Rogers Township Board, 53 Mich. 135.

¶ 964. Where a mandamus proceeding is left to stand upon the answer to the order to show cause, the answer must be taken as true.—Farnsworth v. Kalkaska County Sup'rs, 56 Mich. 640.

¶ 965. Where the facts appearing upon the face of its records and proceedings show that the statements of a respondent board of supervisors made in its answer to a mandamus proceeding are not true, the answer will not be taken as true, although no issues were framed.—Lewis v. Board Sup'rs Montmorency Co., 164 Mich. 595.

¶ 966. Mandamus was brought to compel the county board of supervisors to allow a bill for board of certain jurors, and the board made return alleging that they had considered the claim, found it exorbitant and allowed a lesser sum which was reasonable compensation. Issue was not joined upon this question and the writ was denied. On certiorari, held that such return was conclusive.—Thornton v. Gratiot County Sup'rs, 131 Mich. 539.

¶ 967. In mandamus where no issue is joined, the answer of the respondent must be taken as conclusive of the facts, and therefore of the existence of the grounds urged and defenses offered to a stockholder's bill on which respondent refused to continue an injunction against corporate acts.—George N. Fletcher & Sons v. Alpena Circuit Judge, 136 Mich. 511.

¶ 968. In mandamus to compel the state railroad commissioner to vacate an order requiring an overhead crossing, the return of the commissioner that he viewed the premises and determined the necessity, must be taken as true where no issue is made.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 969. Where in a proceeding against a county board of canvassers to compel it to reconvene and change the result of its recount of primary election votes had before them, no issue is asked for by the relator on the defendant's answer, the statement of facts stated in such answer must be taken as true.—Abbott v. Board Canvassers Montcalm Co., 172 Mich. 416.

¶ 970. An answer stating that an alleged insane is not a "resident" of the state will be taken as true against petitioner seeking to compel admission to a state asylum, where petitioner's contention is that under Pub. Acts 1897, No. 44, and those preceding it, excluding all but "citizens" of the state from such commitments the legislature used "citizen" in the sense of "resident."—Porter v. Edwards, 114 Mich. 640.

§ 168. Affidavits and effect thereof.

Affidavit as proper mode of answer to order to show cause, see ante § 142.

Impropriety of affidavits attached to return as pleadings of justification, see ante ¶ 851.

¶ 971. It seems that affidavits in answer to an order to show cause cannot be assumed to be evasive, and if so in fact the respondent will be bound by them according to the interpretation evidently intended.—Attorney General v. Sanilac County Sup'rs, 42 Mich. 72.

¶ 972. Ex parte affidavits returned by a circuit judge in response to an order to show cause why he should not grant a motion will not be received if they were not used on the motion.—Churchill v. Alpena Circuit Judge, 56 Mich. 536.

¶ 973. An answer in mandamus should not be contradicted by affidavits, but if the relator desires to dispute the answer issues should be settled and tried in an orderly manner.—Webster v. Wheeler, 119 Mich. 601.

§ 169. Admissibility and sufficiency of evidence.

[Note. Owing to the nature of mandamus the facts are established by the pleadings and the allegations therein taken as true or admitted in the majority of cases, and the precedents on the application of the rules of evidence in ordinary sense are few. For the propriety of matter contained in the petition or answer and return and its sufficiency as proof, see ante §§ 135-138, 143, 144, 161-168. For the issues open to consideration, see ante §§ 154-160. For the general law of evidence, see Evidence.]

Evidence to show expiration of respondent's office, see also ante ¶ 811.

Sufficiency of record showing, see also ante § 161 et seq.

Effect of contradictions in the record, see ante § 161.

¶ 974. In a mandamus proceeding to compel the commissioner of highways of a town-

ship to erect a bridge, opinion evidence as to the necessity of a bridge over the stream is not competent.—Berube v. Wheeler, 128 Mich. 32.

¶ 975. In mandamus to compel a school board to issue a warrant for money appropriated to the payment for construction, evidence that the treasurer, at the annual meeting, reported the surplus over the previous year as part of the school fund on hand, and that thereupon the meeting passed a resolution to raise by tax, a definite sum for school purposes, is not sufficient to show an intent to appropriate the surplus mill-tax for school purposes in the absence of definite action to that effect.—Banhagel v. School Board of Dist. No. 1 of Bronson and Bethel Townships, 134 Mich. 455.

§ 170. Findings and conclusions.

Effect of order to show cause and implications of fact thereon, see ante § 140.
Issuance of peremptory writ on the verdict, see post ¶ 977.
General law of findings and conclusions, see Verdicts and Findings.

¶ 976. On mandamus to compel a common council to pass on a liquor bond with the statutory number of sureties, where it appeared from the return that it rejected the proffered bond on an untenable ground not replated to the sufficiency of it, a finding that its rejection was in good faith is immaterial.—Power v. Common Council of Village of Litchfield, 141 Mich. 350.

§ 171. Judgment and disposal of cause and peremptory writ.

Findings and conclusions, see ante § 170.
Character and terms of command and extent of relief, see post § 172.
Denial of writ on terms or without prejudice, see post § 173.
Rendition of advisory opinion, see post § 174.
Sustaining right action of respondent though based on bad reasons, see also ante ¶ 894.
Denial of writ on performance or offer to perform, see post § 175.
Suspension, recall or stay of writ, see post § 176.
Review of proceedings, see post § 177.
Dismissal of action for defects in petitioner's pleadings or statement, see ante § 146.
Denial of writ on demurrer admitting immaturity of right, see also ante ¶ 27.
Allowance of peremptory writ on evasion of order or failure to obey, see ante § 147.
Allowance of mandamus to vacate appeal with leave to apply instead for certiorari, see also ante ¶ 490.
Fines for disobedience, see also ante ¶ 859.
Grant of peremptory writ on admissions in answer, see ante ¶ 951.
Rules for awarding costs, see Costs, II, C.
Right to costs and party entitled and liable, see Costs §§ 9, 40-48.
Costs on mandamus to compel placing of names on ballot, see Costs § 40, ¶ 141.
Costs on certiorari to quash mandamus for compelling placing of names on ballot, see Costs ¶ 572.
General law of judgments, see Judgments.
Contempt proceedings for disobedience, see Contempt.
Mandamus judgment as estoppel on the facts, see Former Adjudication § 86.
Defenses not interposed in mandamus as concluded by the decision, see Former Adjudication § 50.
Finality of decision in mandamus to operate as bar, see Former Adjudication § 15.
Decision in mandamus as res adjudicata in equity, see Former Adjudication § 9.
Peremptory writ for failure to answer order, see Sup. Ct. Rule 13.
Provision for issuance of peremptory writ on incoming of verdict for relator on trial of issue of fact, see Jud. Act, chap. XXXVI, § 5; Comp. L. 1915, § 13441.
Discretion of court to give or deny costs, see Jud. Act, chap. XLVII, § 27; Comp. L. 1915, § 13708.
Provision for imposition of fine for neglecting official duty specially imposed by law, see Jud. Act, chap. XXXVI, § 8; Comp. L. 1915, § 13444.
Judgment for fine and payment as bar to further official liability, see Jud. Act, chap. XXXVI, § 9; Comp. L. 1915, § 13445.
Provision for recovery of damages and costs on allowance of writ as in action on the case for a false return, where trial of issue of facts was had, see Jud. Act, chap. XXXVI, § 5; Comp. L. 1915, § 13441.
Recovery of damages as bar to further action for making false return, see Jud. Act, chap. XXXVI, § 6; Comp. L. 1915, § 13442.

¶ 977. How. St. § 8666, in providing that a peremptory mandamus shall be granted at once where a verdict is found for relator, does not apply if material issues have not been submitted to the jury and found in his favor (Pub. L. 1883, Act No. 63).—Loomis v. Rogers Township Board, 53 Mich. 135.

§ 172. ——Character and terms of command and extent of relief.

Amendment of order to show cause, see ante § 140.

¶ 978. As obedience to a mandamus is to be enforced by process for contempt the writ should point out the precise thing to be done.—Diamond Match Co. v. Powers, 51 Mich. 145.

¶ 979. The supreme court in a mandamus case may grant relief where a case is made out in part, even if it fails in other respects.—Hosier v. Higgins Township Board, 45 Mich. 340.

¶ 980. Judicial discretion is always involved in mandamus cases, concerning the relief as well as other questions.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 981. The relator in mandamus is not usually granted greater relief than is claimed in his application for the writ.—People ex rel. Reeder v. Wexford County Treasurer, 87 Mich. 351.

¶ 982. Relief cannot be given as against the interests of any person not made a party to the proceeding and duly notified.—People ex rel. Austin v. Curtis, 41 Mich. 728.

¶ 983. Upon an application for a mandamus to compel the circuit court to set aside defective attachment proceedings, the supreme court cannot grant leave to amend the sheriff's return of sale.—People v. Calhoun Circuit Judges, 1 D. 417.

¶ 984. Mandamus to compel the payment of money may be granted so far as concerns a portion of the demand, while as to the rest the application is dismissed.—Bryant v. Moore, 50 Mich. 225.

¶ 985. A writ of mandamus will not issue to vacate an order of the circuit court where the relator is only entitled to a modification of the order.—Flint & P. M. R. Co. v. Wayne Circuit Judge, 108 Mich. 80.

¶ 986. In mandamus proceedings to compel the council of a village to approve a liquor bond, where the action of the council appears to have been taken in good faith and without passing upon the sufficiency of the sureties, the circuit court, in granting the relief, should compel the council to approve the bond only after examining into the sufficiency of the sureties and upon finding them sufficient.—Hawkins v. Common Council of Village of Litchfield, 120 Mich. 390.

¶ 987. A writ of mandamus issued to compel an express company to carry goods, and requiring the company to pay the war stamp tax imposed by the Act of June 13, 1898, should not be limited to affect only the parties to the suit, it appearing that the express company was attempting to compel all customers to pay the tax.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682, reversed in 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695.

¶ 988. Although mandamus will lie to compel a city council to appropriate money to meet the expenses of a charter commission, as provided by Act No. 279, Pub. Acts 1909, the writ will not be framed so as to compel the council to adopt the particular resolution proposed by the relator.—Attorney General v. Mayor & Common Council, City of Adrian, 164 Mich. 143.

¶ 989. On mandamus to compel the Board of State Canvassers to reconvene and recanvass a vote, where the only error was the want of proper authentication of their canvass, the record will be treated as sufficient without reconvening them for that purpose. —Rich v. Board of State Canvassers, 100 Mich. 458.

¶ 990. On mandamus to compel retaxation of costs, an item having been disallowed because the respondent deemed it to be altogether unwarranted by law, though it was open to objection as excessive as claimed, a direction was given to reduce the claim by the amount of excess and, as so reduced, to retax costs accordingly.—McGilvray v. Manistee Circuit Judge, 146 Mich. 480.

¶ 991. On mandamus to compel vacation of an order sending issues to a jury in a suit to annul marriage, the order having been made pursuant to How. St. § 6622, and bearing evidence that the judge ordered the issues to a jury because he thought their verdict would be binding, it is proper for the supreme court to consider and determine that such verdict is advisory only and to revise the order accordingly.—Maier v. Wayne Circuit Judge, 112 Mich. 491.

¶ 992. On mandamus to compel vacation of an injunction, which was granted to prevent payment of exempt money, and to compel vacation of an order for temporary maintenance, entered on a special appearance by the husband not a resident of the state for the purpose of moving to dissolve the injunction, the maintenance order was not interfered with; since if it was void it could not be enforced, and if not void it was a matter of discretion.—Hunt v. Branch Circuit Judge, 141 Mich. 423.

§ 173. ——Denial or allowance of writ on conditions or without prejudice.

Denial of order to show cause where petition is deficient, see ante § 139, ¶ 885.

Dismissal of petition for defects, see ante § 146.

Partial allowance of writ, see ante § 172.

Rendition of advisory judgment or opinion where mandamus proceeding is defective or improper, see post § 174.

¶ 993. Terms cannot be imposed on the relator when the writ is awarded, if he asks no more than his legal right.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

¶ 994. Mandamus to set aside an order of removal to a federal court was denied without looking into the merits where the record did not show that any application had been made to the respondent to vacate the order. —Le Roux v. Bay Circuit Judge, 45 Mich. 416.

¶ 995. Mandamus to pay a township order based upon a settlement which the answer claimed to be wrong was limited to the amount conceded by the answer to be due,

no issue of fact being made; but the allowance of the writ was without prejudice to any action by either party for the correction of the error.—Murphy v. Reeder Township, 57 Mich. 419.

¶ 996. Where county treasurer, after paying over to village under mistake of fact, liquor-tax moneys legally belonging to township, deducted amount thus paid from village's share of subsequent tax, mandamus to compel him to pay over was denied without prejudice to other remedies.—Village of Grosse Pointe v. Treasurer of Wayne County, 85 Mich. 44.

¶ 997. The supreme court on the hearing after answer to an order to show cause conditionally denied a peremptory writ to compel respondent common council to grant a liquor license, where it appeared that a former license had been revoked by it on the erroneous ground that by a certain conviction of crime a cause of revocation had accrued, and appeared further that grant of a license for the ensuing year was denied on the ground of said prior forfeiture; since it is supposable that on being informed of the law the council will consider the application for the license without regard to the illegal forfeiture.—Cox v. Jackson Common Council, 152 Mich. 630.

¶ 998. In mandamus to compel boards of supervisors of counties to rebuild a bridge over a river, where it appeared that there was a prospect of an early agreement between the boards to erect the bridge, the application for the writ was denied with leave to renew it if a bridge was not built within a reasonable time.—Oxby v. Boards of Supervisors of Kalkaska and Antrim Counties, 124 Mich. 463.

¶ 999. Decree was entered against relator, without proofs, upon consent of his counsel. Subsequently he filed a petition with the circuit judge for a rehearing, asking that the decree be set aside, and that he be permitted to defend upon the merits. The petition, which was defective in that it was not accompanied by the certificate of counsel, as required by 1897 Chancery Rule 25, to the effect that they believed the decree erroneous in the particulars mentioned in the petition, was denied. Relator, although the lapse of time had not been such as to prevent the filing of a new petition, made application for mandamus to compel the circuit judge to set aside the decree and permit him to enter his defense. Held, that the peremptory writ should be denied, but without prejudice to the right to present the question anew, upon proper showing, to the circuit judge.—Manley v. Kalamazoo Circuit Judge, 114 Mich. 525.

¶ 1000. On granting a mandamus to compel the circuit judge to vacate an order retaining an appeal for trial of a condemnation case, where the appeal was void because attempted to be taken under Comp. L. 1897, § 669, which covers no such case, leave was given to apply in the supreme court for a writ of certiorari in view of the fact that the time for taking a common law certiorari in the ordinary course had elapsed and in view of the circumstances of the case, the propriety of taking an appeal under that statute having had some seeming sanction in a previous decision of the supreme court and been settled negatively in the case at bar.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

§ 174. ——Rendition of opinion or suggestion on irregular or defective mandamus.

¶ 1001. Mandamus will not lie where a writ of error may be used but the court having issued the order in the cause under consideration and the parties having filed their briefs the question will be disposed of.—Detroit, G. R. & W. R. Co. v. Eaton Circuit Judge, 128 Mich. 495.

¶ 1002. While an appeal and not mandamus is the proper remedy where the circuit court in chancery has improvidently issued a restraining order which has in effect deprived a party of his possession, use, and control of his property without a hearing on the merits, yet, the court on mandamus expressed its views with "no doubt that the circuit judge will vacate the order upon a renewal of the application, and upon being advised of the view taken by this court."—State Road Bridge Co. v. Saginaw Circuit Judge, 143 Mich. 337.

¶ 1003. A state's attorney applied by mandamus to compel a judge to set aside an order for a change of venue, without first having entered a motion asking the judge to vacate the order. Held that, in view of the fact that the public interest required it, and that the mandamus proceeding had been fully briefed and argued, the court would consider the mandamus on its merits.—Bresnahan v. Cass Circuit Judge, 154 Mich. 491.

¶ 1004. The proper proceeding to review mandamus proceedings is certiorari; but, where the case brought improperly on mandamus was briefed by both parties, the case was treated by the supreme court as an application for certiorari and the questions presented disposed of.—Chicago, D. & C. G. T. Junct. R. Co. v. St. Clair Circuit Judge, 156 Mich. 567.

§ 175. Performance or offer as bar to peremptory writ.

Sufficiency of record showing as to readiness to perform, see ante § 162.

¶ 1005. Mandamus to compel a board of county supervisors to pass upon relator's claim was denied, where the answer, taken as true, set forth that upon receiving the order to show cause, respondent met and notified relator of the time and place for hearing his claim, that it met, rescinded its

former resolution submitting it to the electors, and disallowed the claim.—Gallagher v. Cheboygan Co. Sup'rs, 119 Mich. 271.

¶ 1006. Mandamus to the board of supervisors to reconvene and canvass vote for county seat's removal, will not issue where board alleges in response to a rule to show cause, that it has not refused to canvass votes, but that it will do so on an adjourned day.—Double v. McQueen, 96 Mich. 39, citing Belknap v. Board of Canvassers, decided December 3, 1892, without opinion.

§ 176. Suspension, stay or recall of writ.

Stay of proceedings pending mandamus, see Stay, II.

¶ 1007. A petition by a railroad company for the recalling or suspension of a peremptory writ of mandamus to enforce an order of the Michigan Railroad Commission pending the determination of a chancery case to review such order should be denied where the holding that the writ of mandamus to enforce the order should issue has been affirmed by the Supreme Court of the United States, and the new matter contained in the railway company's petition and not before the court when the mandamus was ordered was involved in the issue made in the pleadings in a pending chancery case, which had been appealed to the supreme court.—Michigan R. Commission v. Detroit & M. Ry. Co., 192 Mich. 426.

¶ 1008. On suspension of mandamus proceedings by a city to compel a street railway company to pave its tracks with brick, by agreement without prejudice to the rights of either party, the fact that the railway company proceeds to pave with macadam does not foreclose the right of the city to proceed with the case as if no agreement had been entered into.—City of Detroit v. Detroit United Ry., 172 Mich. 496.

§ 177. Review of mandamus judgments and proceedings.

See also ante ¶ 1004.

General mode of reviewing extraordinary legal proceedings, see Certiorari.

Questions of fact reviewable on certiorari to review mandamus, see Certiorari § 55.

Entering judgment on certiorari that ought to have been rendered on mandamus, see Certiorari § 62.

Review of ruling on demurrer to mandamus, see Certiorari ¶ 41a.

Common law judgments in extraordinary proceedings open to review by writ of error, see Appeal § 19.

MANDATE to MARKS; MARKING.

Cross-References.

Mandate—
- Order from supreme court sitting in review to lower court, see Appeal. XV.

Mandatory Injunction—
- See Injunctions § 3.

Mandatory Powers and Trusts—
- See Wills, VI; Trusts.

Mandatory Statutes—
- Rules for statutory construction, see Statutes, V.

Manholes—
- Actionable injuries from manholes in streets, see Highways, XII.

Manifest Injustice—
- Ground for reversal and duty to review record to discover, see Indictment, XIV, XV; Harmless Error.
- Ground for new trial by trial court, see New Trial, II.

Manslaughter—
- See Homicide.

Mantels—
- As fixtures, see Fixtures § 6.

Manufacture—
- Contracts for manufacture, see Contracts, VI, G; Sales.

Manufacturers' Liability—
- Liability of maker of defective dangerous thing placed on sale to person buying from dealer, see Negligence, II.
- Liability as employer, see Master and Servant, III; Workmen's Compensation Law.

Manufacturing Corporations—
- See generally Corporations.

Manure—
- As part of land on which produced, see Fixtures § 11.

Manuscripts—
- As property, see Literary Property.

Maple Syrup—
- Food regulations, see Food § 3.

Maps and Plats—
- As documentary evidence, see Evidence § 504; Indictment § 298.
- Use in examining witnesses, see Examination of Witnesses § 18.
- Delineation and location of boundaries, see Boundaries.
- Deeding according to plat, see Deeds § 58 et seq.
- Dedication by or according to map or plat, see Dedication; Highways, II, A.
- Easement according to map, see Easements.
- Filing maps and surveys as part of road, drain, condemnation, or assessment proceeding, see Highways, II, B; Drains, II; Eminent Domain, V, § 58; Local Improvements § 26.
- Files and records as public records, see Records.
- As fraudulent representations, see Fraud § 21.

Margin Contracts—
- As gambling contracts, see Gambling Contracts § 2.
- Rights of broker and principal, see Brokers § 12.

Marine Insurance—
- See Insurance.

Maritime Liens—
See Shipping, IV.
Relative jurisdictions of state and Federal courts, see Courts § 96.
Maritime Torts and Contracts—
See Admiralty § 2.
Relative jurisdiction of state and Federal courts, see Courts § 96.
Mark—
As signature, see Execution of Instruments § 2.
Marketable Title to Land—
See Vendors and Purchasers, III.
Market Reports—
As evidence of value or price, see Values.
As hearsay, see Evidence § 318.
As basis for opinion as to values or prices, see Evidence § 296.
Construction of contract for furnishing market information, see Contracts ¶ 787.
Markets—
Police power to regulate, see Constitutional Law § 107.
Municipal powers and rights, see Municipal Corporations, III, X.
Market Value—
As criterion by which to estimate damages, see Damages II, III, XI.
Evidence of value in general, see Values.
Marking Goods—
To identify and pass title, see Sales, IV, B.
Marks and Brands—
Log marks and brands, see Forestry § 3.
Trade-Marks and labels, see Trade-Marks.

MARRIAGE.

TREATS of the formation and fact of the marriage relationship and the proof of it as a fact and suits to establish judicially the nonexistence of a pretended marriage. It excludes the rights and status of the spouses (Husband and Wife) and suits to dissolve existing marriages for cause (Divorce), actionable breach of promise to marry (Breach of Promise), and civil and criminal liability for seduction under promise of marriage (Seduction). Crimes relating to marriage or offensive thereto are treated in Crimes, II; Indictment.

Analysis.

I. In general; requisites, licensing and celebration.

§ 1. Status and nature of marriage.
§ 2. License and ceremony.
§ 3. Nonceremonial or "common law" marriages.
§ 4. Foreign validity and effect.
§ 5. Bigamous marriages.
§ 6. Unlawful ceremony or pretense.

II. Capacity of parties, fraud and duress.

§ 7. Capacity and disability.
§ 8. Fraud; concealment of unchastity.
§ 9. Subsequent capacitation of parties illegally married.
§ 10. Actionable fraud or wrong.

III. Evidence and proofs and estoppel.

§ 11. Presumptions and burden of proof.
§ 12. Admissibility.
§ 13. Weight and sufficiency.
§ 14. ——Nonceremonial or common law marriage.
§ 15. ——Of fraud, duress or incapacity.
§ 16. Estoppel to question or assert.

IV. Annulment or establishment of marriage.

§ 17. In general; grounds and propriety of relief.
§ 18. Jurisdiction and suits for relief.
§ 19. Scope of bill and relief.

[Note. There are many statutes indirectly relating to marriage which are not herein referred to by direct citation. Only those in the general chapter on marriage (Comp. L. 1915, chap. 216) have been covered. For others see the indices to the published statutes.]

Marriage of the promisee as validating a parol agreement in consideration of marriage, see Frauds, Statute of, § 108.

Validity of parol agreements upon consideration of marriage, see Frauds, Statute of, I, C.

I. IN GENERAL; REQUISITES, LICENSING AND CELEBRATION.

§ 1. Status and nature of marriage.

Requisite capacity and assent of parties, see post II.

Bigamous ceremony, see post § 5.

Liability for breach of promise to marry, see Breach of Promise to Marry.

Mutual and relative rights and liabilities of husband and wife, see Husband and Wife.

Disabilities of coverture and contract rights and liabilities of married women, see Husband and Wife, IV.

Coverture as personal privilege with respect to claiming disabilities, see Husband and Wife § 74.

Indian marriages, see Indians § 1.

Public policy as to agreements affecting marital status, see Contracts § 64.

Marriage of persons domiciled in other state, applicability of statutes punishing abandonment, see Crimes § 88.

Effect of marriage to confer domicile, see Domicile § 5.

Effect of remarriage on dower right of widow, see Dower § 29.

Effect of remarriage on homestead rights, see Homesteads § 71.

Marriage of insured in benefit society as effecting change of beneficiary, see Fraternal Associations ¶ 112.

Unmarried status of woman as element in seduction, see Seduction.

Existence of marriage as jurisdictional fact in divorce, see Divorce § 2.

Relationship by marriage as affecting qualifications of judge or jury, see Judges § 11; Jury, III.

Legal nature of marriage, see Comp. L. 1915, § 11363.

¶ 1. While marriage is a contract it is also a relation governed by rules of public policy which apply to no mere private agreements.—Leavitt v. Leavitt, 13 Mich. 452.

§ 2. License and ceremony.

Validity as affected by falsity in application, for license, see also post ¶ 19.

Nonessential character of ceremony, see post § 3.

Unlawful ceremony, see post § 6.

Presumption as to legality of ceremony, see post § 11.

Presumption of consent from ceremony, see post ¶ 34.

Mode and sufficiency of proof of ceremony, see post §§ 12, 13.

Marriage licenses and returns thereto as public records, see Records.

Disposal of fees received for marriage licenses by clerk, see Counties ¶¶ 164, 165.

Statutory provisions as to form of ceremony, see Comp. L. 1915, § 11370.

Special provisions as to marriages of Quakers, see Comp. L. 1915, § 11374.

Provisions for secret licensing and marriage ceremony before probate judge to protect name of unmarried pregnant woman, see Comp. L. 1915, §§ 11387-11391.

Officers and ministers legally capable of solemnizing marriage, see Comp. L. 1915, § 11368.

Preliminary examination of parties on oath, see Comp. L. 1915, § 11369.

Provisions of statute respecting licenses, see Comp. L. 1915, §§ 11376-11386.

¶ 2. A marriage ceremony performed in one county by a justice of the peace of another, being followed by cohabitation, is sufficient to constitute the parties husband and wife.—People v. Girdler, 65 Mich. 68.

¶ 3. There is no valid marriage, though a ceremony is performed by a magistrate, where the woman, instead of assenting to the contract, positively dissents from it and never lives with the man.—Roszel v. Roszel, 73 Mich. 133.

¶ 4. Under Pub. Acts 1897, Act No. 180, § 1, conferring authority on judges of probate to perform the marriage ceremony in certain specified cases where the application for license is accompanied by the written request of the parent or guardian of the minor, where only one of the parties is under the marriageable age, the conditions fixed by the act must be complied with before the officer is authorized to act.—People v. Schoonmaker, 119 Mich. 242.

§ 3. Nonceremonial or "common law" marriages.

See also post ¶ 25.

Ceremony followed by cohabitation, see also ante ¶ 2.

Cohabitation as curing marriage between previously incapable parties, see post § 9.

Weight and sufficiency of evidence, see post § 14.

Right of one cohabiting with her supposed husband to fraternal insurance benefits, see Fraternal Associations § 46.

¶ 5. A marriage ceremony is not necessary to constitute a valid marriage in this state.—Lorimer v. Lorimer, 124 Mich. 631.

¶ 6. No formal ceremony is essential to the validity of a marriage.—Supreme Tent Knights of the Maccabees v. McAllister, 132 Mich. 69.

¶ 7. The test of a common law marriage is, did the parties presently agree to take each other for husband and wife and live together in that relation.—Judson v. Judson, 147 Mich. 518.

¶ 8. A marriage in fact may be shown by proof of an agreement between two persons of opposite sex to take each other presently as husband and wife, consummated by cohabitation.—People v. Mendenhall, 119 Mich. 404.

¶ 9. Marriage may be solemnized in Michigan otherwise than by a person actually authorized to do so, however the law may be elsewhere.—People v. Perriman, 72 Mich. 184.

¶ 10. On the question whether or not a common-law marriage existed, an instruction that in the absence of a valid marriage ceremony, a simple agreement to live together, even though the parties intended to carry out the agreement, was sufficient to constitute a valid marriage is erroneous as excluding the condition that the agreement be acted upon by living together and cohabiting as husband and wife.—Lorimer v. Lorimer, 124 Mich. 631.

¶ 11. A contract of marriage may be made and the relation of husband and wife established without proof of a formal ceremony conducted by a clergyman or magistrate, and without proof by actual witnesses to the making of the contract.—People v. Spencer, 199 Mich. 395.

¶ 12. As relating to a common-law marriage cohabitation means dwelling together, living in the usual manner of married people, a manifestation that the parties have consented between themselves to contract the marriage relation, a holding forth to the world by daily life, conduct, demeanor, habit, that the man and woman who live together have agreed to marriage, and to stand to each other in the mutual relation of husband and wife.—People v. Spencer, 199 Mich. 395.

¶ 13. Where parties agree presently to take each other for husband and wife, with or without a ceremony, whatever its form, and from that time live together, professedly in that relation, this constitutes a valid marriage under our law.—Hutchins v. Kimmell, 31 Mich. 126; Peet v. Peet, 52 Mich. 464; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826, reversing Fed. Cas. No. 9398.

¶ 14. The following was held not to be a marriage contract or a valid contract of any kind: "An article of agreement made and entered into by and between Mrs. Mary McCarthy of Chicago, Illinois, and Dennis Clancy, of Detroit, Michigan. We mutually and jointly, from now henceforth and forever, agree to live as man and wife, but each party retains the right to levy, sell and transfer their respective properties without question of the other party. Mrs. Mary McCarthy, Dennis Clancy. Witness: Hugh Murray, Emma Murray." And though followed by cohabitation, it was held there was no evidence of marriage.—Clancy v. Clancy, 66 Mich. 202.

¶ 15. A marriage contract, without ceremony, cannot be valid if a ceremonial marriage would be unlawful under the same circumstances, as where one of the parties has a husband or wife living.—People v. Seaman, 107 Mich. 348.

¶ 16. Where a man obtains a marriage certificate, shows it to a woman, says it is too late to get a minister and that they will come back the next day, to which she agrees, takes the woman to his father's home and introduces her as his wife, tells the woman that night that a ceremony is unnecessary, lives with her several years and they are regarded as husband and wife by those with whom they associate, and there is no legal impediment to a marriage, a valid marriage is created.—Severance v. Severance, 197 Mich. 327.

§ 4. Foreign validity and effect.

Presumption as to nonceremonial marriage in foreign state, see post ¶ 37.

¶ 17. Marriage, between parties capable of contracting it, is of common right and valid by the common law of Christendom. As a general rule, if valid where celebrated it is valid everywhere, and if void where celebrated it is void everywhere. Regulations restricting it or imposing conditions upon it are exceptional, depend upon statutes, and must be proved by one who claims a case falls within them.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 18. Marriage by a divorced person without the state where the divorce was granted, during the period within which the statute of such state forbids remarriage, is valid, where he has acquired a domicile in the state where the marriage was contracted.—People v. Steere, 184 Mich. 556.

¶ 19. A marriage in a certain county of the state of Michigan between persons nonresident in such county, held valid, notwithstanding one of the parties may have made a false affidavit as to her residence in such county in securing a license for the marriage for which she would be subject to penalty under Comp. L. 1897, § 8602 et seq., How. 2nd Ed., § 11437 et seq.—Switchmen's Union of North America v. Gillerman, 196 Mich. 141.

§ 5. Bigamous marriages.

See also post ¶ 25.

Marriage in anticipation of divorce, followed by cohabitation, see post § 9.

Crime of bigamy, see Crimes, II; Indictment.

¶ 20. Bigamy means more than the meretricious relation of one who has a husband or wife living; it imports a form or ceremony of marriage by a spouse who has a lawful husband or wife living.—In re Dettman's Estate, 195 Mich. 231.

¶ 21. Where a person who has contracted a bigamous marriage with a woman having no knowledge of his prior marriage holds such woman out to the public as his wife after the death of his wife by the first marriage she must be regarded as his legal wife at the time of his death, although he dies without knowledge of the death of the first wife.—In re Fitzgibbons' Estate, 162 Mich. 416. (Per Moore, J.; Bird, C. J., Blair and Stone, JJ., concurring; Brooke, Ostrander, Hooker and McAlvay, JJ., dissenting.)

¶ 22. Where a man, after a decree of divorce under which he was prohibited from remarrying, enters into a ceremonial marriage, and a deed is executed to him and his supposed wife by the later marriage, which does not describe them as husband and wife, but is to them both as grantees, and to their heirs and assigns, they take as tenants in common; and where, after the death of his supposed wife, the man marries again, and with his third wife conveys to a third person, taking back a reconveyance to himself and his third wife as tenants by the entirety, they take only one-half interest in the land as tenants in common with the heirs of the supposed second wife.—Wright v. Kaynor, 150 Mich. 7.

§ 6. Unlawful ceremony or pretense.

Crime of unlawfully solemnizing marriage, see Crimes § 107.

Crime of bigamy or polygamy, see Crimes § 48.

Ceremony by person incapable of marriage at the time as evidence bearing on nature of the cohabitation, see also post ¶ 62.

Penalty for solemnizing unlawfully, see Comp. L. 1915, §§ 11371, 11372.

Legality of marriage in ceremonial form before disqualified officer or minister, see Comp. L. 1915, § 11373.

¶ 23. Though a marriage where one of the parties is under the age of consent, as fixed by statute, is voidable only, yet such a marriage is not one authorized by law; and one who knowingly solemnizes such a marriage is guilty under Comp. L. 1871, § 4729, How. St. § 6219.—Bonker v. People, 37 Mich. 4.

¶ 23a. A marriage of a woman below the age of consent by a secret ceremony before the probate judge, which ceremony was inefficacious because there was no consent of a guardian as required by Pub. Acts 1897, No. 180, is void without further process under How. St. § 6224, where there was no cohabitation following the marriage or after attaining age of consent.—People v. Schoonmaker, 119 Mich. 242.

II. CAPACITY OF PARTIES, FRAUD AND DURESS.

Suits to annul illegal marriages or marriages of incapable persons, see post IV.

§ 7. Capacity and disability.

Validity as against capable party, other being incapable, see post ¶ 30.

Consent of parents or guardians, see also post ¶ 38.

Presumptions as to capacity of previously married persons, see post ¶¶ 39, 40.

Crime of incest, see Crimes § 94.

Prohibition of remarriage in decree of divorce, see Divorce § 110.

Validity of foreign divorce as element in capacity of party to marry or as making second marriage lawful or bigamous, see also Divorce § 191.

Impotency as ground for divorce, see Divorce § 8.

Age of consent to marry, see Comp. L. 1915, § 11362.

Prescribed relationships, see Comp. L. 1915, §§ 11364, 11365.

Incapacity by reason of disease, see Comp. L. 1915, § 11367.

Incapacity of insane or feeble-minded persons, see Comp. L. 1915, § 11367.

Validation of marriages between whites and negroes, see Comp. L. 1915, § 11367.

¶ 24. Comp. L. 1871, § 4719, How. St. § 6209, declaring males of eighteen and females of sixteen legally capable of "contracting marriage," refers to the actual forming of the marriage relation; and while it makes such marriages valid, it does not empower infants to make executory contracts of marriage that will sustain action for breach of promise.—Frost v. Vought, 37 Mich. 65.

¶ 25. A man and woman lived together as if they were husband and wife for twenty years and had thirteen children. Then they separated, and, during the man's life, the woman was formally married to another man, who lived with her nearly three years and then married another woman while the first was still living. Held, that the first couple were husband and wife, and the following marriage therefore void, so that the last marriage was valid and the woman entitled to claim a widow's share of her husband's estate upon his death.—Peet v. Peet, 52 Mich. 464.

§ 8. Fraud; concealment of unchastity.

Actionable fraud, see post § 10.

Evidence of pregnancy and birth of child as bearing on fraud, see post § 15.

Concealed pregnancy as ground for annulment, see post § 17.

General law of fraud, see Fraud.

¶ 26. Fraud to invalidate a marriage must be such as negatives consent, without reference to previous inducement, and must be nearly, if not quite, coincident in time with the marriage.—Leavitt v. Leavitt, 13 Mich. 452.

¶ 27. Chastity is not a requisite to the validity of a marriage, nor does mere incontinence avoid a subsequent marriage.—Leavitt v. Leavitt, 13 Mich. 452.

¶ 28. Whether pregnancy by another than the prospective husband and unknown to him would avoid marriage, quære.—Sissung v. Sissung, 65 Mich. 168, the court being equally divided.

¶ 29. Ante-nuptial unchastity of a woman is not sufficient ground for the annulment of a marriage, where the complainant had also been intimate with her previous thereto. (Affirmed by equally divided court.)—Sylvester v. Sylvester, 180 Mich. 512.

§ 9. Subsequent capacitation of parties illegally married.

Evidence of ceremony as bearing on nature of subsequent cohabitation, see post ¶ 62.

¶ 30. Where parties are married one of whom is under and the other over the age of consent, the latter, by the statutes of this state, is bound by the marriage, unless they separate by consent before the other reaches lawful age, and do not cohabit afterwards, or unless the other refuses to consent on arriving at that age.—People v. Slack, 15 Mich. 193.

¶ 31. The performance of a marriage which takes place four days before the filing of a decree of divorce, in favor of one of the parties to the marriage ceremony, is not invalid where the parties married continue to live and cohabit together as husband and wife from that time forward.—People v. Booth, 121 Mich. 131.

¶ 31a. The rule, that cohabitation as husband and wife meretricious in its beginning will not be held to be marriage after disability to contract marriage is removed without some further act or agreement of the parties equivalent in law to marriage, will not be applied in a case where the court is not convinced that the marriage of parties was unlawful in the beginning.—Bechtel v. Barton, 147 Mich. 318.

§ 10. Actionable fraud or wrong.

General law of actual fraud, see Fraud.

¶ 32. An action for fraud and deceit lies for fraudulently inducing a woman to enter into the marriage relation.—Sears v. Wegner, 150 Mich. 388.

¶ 33. Where, in an action for fraudulently inducing plaintiff to enter into the marriage relation, it appears that defendant told plaintiff that he was already married, but such marriage was void, and promised that shortly he would have such marriage set aside and have a formal public marriage with plaintiff solemnized, and by means of such promises induced plaintiff to enter into formal exchange of promises which he represented would constitute and stand as a marriage until the void marriage was set aside, and also induced plaintiff to live with him as his wife, plaintiff is entitled to recover if she proves that she entered into the relation in the belief that defendant's former marriage was void.—Sears v. Wegner, 150 Mich. 388.

III. EVIDENCE AND PROOFS AND ESTOPPEL.

§ 11. Presumptions and burden of proof.

Evidence of nonassent against presumption of validity, see post ¶ 50.

General law of presumptions and burden, see Evidence, II; Indictment, VIII, A.

Presumption as to foreign marriage laws, see Evidence § 59.

¶ 34. A formal ceremony of marriage, whether in due form or not, must be presumed to be by consent, and therefore, prima facie, a contract of marriage per verba de presenti.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 35. Evidence that persons appeared at a church, where the officiating minister publicly and in the presence of others performed a ceremony of marriage between them, and that they seemed to regard themselves as married, raises a presumption, in the absence of evidence to the contrary, that the ceremony was regular and legal, though there be no proof of the particulars of the ceremony or of the specific requisites of a lawful marriage ceremony under the forms and usages or customs of such church.—People v. Calder, 30 Mich. 85.

¶ 36. Reputation is important as evidence to establish the fact of a marriage, but it cannot disprove an actual marriage. And where there is doubt, the presumption should favor a lawful marriage rather than notorious immorality.—Peet v. Peet, 52 Mich. 464.

¶ 37. Proof that a man and woman went to Canada and there agreed in the presence of a person whom the woman took to be a minister, but who was not in fact such, to take each other as man and wife, and that they thereafter cohabited as such, would be sufficient in Michigan to establish a marriage valid at the common law, and, in the absence of evidence to the contrary must be presumed to constitute a valid marriage under the laws of Canada; and proof of additional positive requirements of the Canadian law would not by itself defeat such presumption, but noncompliance there-

with must be shown. Nor would such presumption be rebutted by the man's subsequent assertion that the marriage was a mere sham.—People v. Loomis, 106 Mich. 250.

¶ 38. Where a marriage ceremony is proved to have been performed in compliance with the provisions of Laws 1897, Act No. 180, authorizing secret marriages to protect reputation and requiring consent of parents or guardians, regularity and legality are presumed, and this presumption is not overcome by the fact that the girl's stepfather did not give his consent to the marriage, he not being her natural guardian.—People v. Schoonmaker, 117 Mich. 190.

¶ 39. In the absence of evidence to the contrary, it is presumed that parties during the continuance of a marriage, sustained the usual relations of husband and wife.—Killackey v. Killackey, 156 Mich. 127.

¶ 40. The fact that a party to a marriage has previously married someone else does not, in the absence of any evidence as to the continuance or termination of such prior marriage, impeach the presumption of legality attaching to the second marriage.—Killackey v. Killackey, 156 Mich. 127.

§ 12. Admissibility.

General law of evidence, see Evidence; Indictment, VIII, B.
Marriage certificate or record as documentary evidence, see Evidence § 510.
Certificates as documentary proofs, see also Indictment § 294.
Documentary proofs of foreign laws of marriage, see Evidence § 532.
Certificate of unavailing search for record as evidence on issue of marriage, see also Indictment ¶ 1337.
Admission of cohabitation as evidence of marriage, see also Indictment ¶ 882.
Evidence of ceremony in foreign country, see also Indictment ¶ 831.
Eyewitnesses or documents to prove marriage as best evidence, see also Indictment ¶ 887.
Hearsay evidence relative to marriage, see also Indictment ¶¶ 984, 985.
Letters addressed to "wife" as admission of marriage to addressee, see also Indictment ¶ 1199.
Evidence as to knowledge in unlawfully solemnizing marriage, see Indictment ¶ 870.
Admissibility of evidence of marriage to decedent in action for death, see Death by Wrongful Act § 21.
Provisions as to admissibility of original certificates and records of marriage as evidence, see Comp. L. 1915, § 11375.

¶ 41. The law is very liberal in the admission of evidence concerning marriage and it may be shown by testimony of the widow herself, especially when supported by a child and neighbors.—Shotwell v. Harrison, 22 Mich. 410.

¶ 42. In proceedings to recover dower, marriage is provable by conduct and reputation.—Proctor v. Bigelow, 88 Mich. 282.

¶ 43. In a prosecution for adultery, a marriage certificate is admissible, when accompanied by proof of the identity of the parties.—People v. Isham, 109 Mich. 72.

¶ 44. A foreign certificate of marriage is inadmissible to prove marriage.—People v. Imes, 110 Mich. 250.

¶ 45. A woman's deposition that she is the widow of a man who is deceased, and wherein she says he was her husband, is testimony that they were married.—Shotwell v. Harrison, 22 Mich. 410.

¶ 46. Certificates that are sufficient to prove the performance of a ceremony of marriage in a foreign country prima facie establish the marriage, and it is not error to admit such certificates in evidence without proof of the foreign law.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 47. A certificate of marriage performed in another state, merely signed by the minister, is not evidence in a criminal case where the defendant is entitled to confront the witnesses.—People v. Lambert, 5 Mich. 349.

¶ 48. In a prosecution for adultery with a married woman the recorded marriage certificate is admissible to aid in proving the marriage, though it may be insufficient without some identification of the parties. But where the husband's testimony and the certificate together identify them, and the defendant admits the fact, an objection to the admission of the certificate becomes unimportant.—People v. Broughton, 49 Mich. 339.

¶ 49. A certified copy of a decree of divorce from bed and board is evidence of marriage as between the parties and their privies.—Killackey v. Killackey, 156 Mich. 127.

§ 13. Weight and sufficiency.

Sufficiency of proof of common law or nonceremonial marriage, see post § 14.
Sufficiency of proofs of fraud or duress in the marriage, see post § 15.
Certificates as prima facie proof, see also ante ¶ 46.
Sufficiency of certificate as proof with other evidence, see also ante ¶ 48.
Weight of reputation against fact of marriage, see ante ¶ 36.
Degree of proof required in annulment suits, see post § 17, ¶ 77.
Prima facie establishment of marriage, see also Bastards ¶ 8.
Sufficiency of proof of nonexistence of marriage, see Indictment ¶ 1425.
Sufficiency of proof of marriage in prosecution for adultery, see Indictment ¶ 1488.

Sufficiency of proofs of marriage in prosecution for bigamy, see Indictment § 324b, ¶ 1443 et seq.
Insufficiency of confession to prove marriage in prosecution for bigamy, see Indictment § 314.
Sufficiency of evidence of marriage as factor in proof of heirship, see also Descent ¶ 9.

¶ 50. Positive evidence of nonassent to a marriage ceremony that had been irregularly performed weighs against the presumption of its validity.—Kopke v. People, 43 Mich. 41.

¶ 51. On a criminal trial a woman, upon her voir dire, testified that she was married to one P. in 1859; that the last time she saw him was in April, 1860; that she had not heard from him since; that in 1862 she read an account in a newspaper of the death of a man by the name of P., whom she supposed to be her husband; that when she married defendant she told him her husband was dead, and had been dead several years, and that she had lived with defendant as his wife about three years up to the time of his arrest. Held, that the evidence made a strong prima facie case of a marriage in good faith.—Dixon v. People, 18 Mich. 84.

¶ 52. In the absence of opposing testimony or of suspicious circumstances, marriage was regarded as proved by the depositions of his widow and neighbors, there being no question of identity or of his death.—Shotwell v. Harrison, 22 Mich. 410.

¶ 53. Marriage is provable by conduct and reputation in all civil cases involving property rights, but not in criminal cases or in actions for criminal conversation.—Proctor v. Bigelow, 38 Mich. 282; Perry v. Lovejoy, 49 Mich. 529.

¶ 54. In an action by a husband for enticing away his wife, evidence of cohabitation and repute and of defendant's admissions of the fact are enough to establish the marriage relation.—Perry v. Lovejoy, 49 Mich. 529.

¶ 55. In an action by a married woman for slander her marriage may be proved by repute. The highest evidence of marriage is not required where that fact is not a part of the main issue.—Leonard v. Pope, 27 Mich. 145.

¶ 56. In proving marriage reputation is important only as circumstantial evidence as to whether the parties themselves regarded each other as man and wife. An intimacy between a man and his housekeeper is not of itself evidence that they are married. And so long as their relations are such that the fact of marriage continues to be seriously questioned, it cannot be considered as established by reputation.—Cross v. Cross, 55 Mich. 280.

¶ 57. As it is possible for a valid marriage to be shown with no means of showing its time and place (and this is especially true of marriages in distant places), a witness who swears to seeing a man and woman joined together by a marriage ceremony, performed seriously by a person acting in a clerical or magisterial character, testifies to what is a valid marriage, unless clearly illegal by statute.—People v. Perriman, 72 Mich. 184.

¶ 58. The continued affirmance of the marriage relation between a man and woman living together during the life and after the death of one who was alleged to be the woman's legal husband, the later separation and settlement of property rights, divorce proceedings, and reference in the will of the husband to "my wife" are circumstances pointing strongly to a marriage between the parties; and they are not overcome by her testimony that her first husband was living when the cohabitation began.—Bechtel v. Barton, 147 Mich. 318.

§ 14. ——Nonceremonial or common law marriage.

See also ante ¶¶ 11, 14, 16.
Sufficiency of nonceremonial marriage, see ante § 3.

¶ 59. To establish a nonceremonial marriage, there must be proof, not only of the agreement, but of the setting up of the relation of husband and wife by cohabitation, and the parties must act in conformity with such agreement and live together and cohabit as husband and wife.—People v. Spencer, 199 Mich. 395.

¶ 60. Prima facie, a good marriage is shown by proof of a present agreement followed by cohabitation; it will not be presumed, in the absence of proof, that there are regulations anywhere restrictive of this common right.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 61. A marriage is presumed to exist where for seven years after the legal impediments of a former marriage, if any existed, had been removed the parties lived and cohabited together, introduced each other as husband and wife, the husband applied for insurance and named and designated his alleged wife as beneficiary, the wife supported the husband during several years' illness, and no question of the validity of the marriage was raised until after the husband's death.—Barker v. Valentine, 125 Mich. 336.

¶ 62. Pending a suit by a wife for divorce, she married again, and, after securing a decree, lived and cohabited with the second husband as his wife, under the belief that another marriage ceremony was not necessary, induced by his statement that he had been so advised by good counsel, and his

agreement, which was kept, to make his will in her favor, and deliver it to her for safekeeping. Held, that the formal marriage ceremony may be treated as evidence, with what subsequently occurred, of the nature of the relation which the parties assumed and occupied, and that the facts establish a valid marriage.—Williams v. Kilburn, 88 Mich. 279.

¶ 63. Where a man cohabited with a woman who was married to another, and who, after obtaining a divorce, asked him to marry her, which he refused to do, an actual marriage cannot be presumed from their continuing to live together.—Rose v. Rose, 67 Mich. 619.

¶ 64. Where the evidence showed that no marriage ceremony had ever been performed, and that the parties, though living as husband and wife and passing in society as such, had several times stated that they were not married,—the woman having on one occasion made affidavit to that effect,—a divorce was denied on the ground that there was no marriage.—Van Dusan v. Van Dusan, 97 Mich. 70.

¶ 65. On a petition by an administrator to obtain an order of the probate court, determining the heirs of decedent, evidence held insufficient to establish a common law marriage between decedent and one claiming his estate as his widow.—People v. Spencer, 199 Mich. 395.

¶ 66. On a bill to affirm a common law marriage under Comp. L. 1897, § 8619, testimony of the complainant to the effect that defendant requested her to come to his house and after his mother left they would get married and she did come and continued staying there with him, and on her frequent requests to have the ceremony performed he would put her off, that supposing she was going to be his wife she continued living with him for ten years, performing the duties of a wife although she knew it was a breach in etiquette, but she supposed he would keep his word, while it establishes a promise of marriage, a breach of that promise and seduction, does not establish a common law marriage.—Judson v. Judson, 147 Mich. 518.

¶ 67. Where after the performance of a marriage ceremony in 1885, the parties lived together for eight years before the woman learned that the man, who she knew had previously been married but who had told her that he was divorced, had in fact never been divorced until 1893, and where after obtaining such knowledge she insisted on a new marriage ceremony but was informed by the man that this would create scandal and was unnecessary and that they would treat the former marriage as binding, and where thereafter they continued to live together as husband and wife for three years; an agreement existed to take each other as man and wife, and constituted a valid marriage.—Flanagan v. Flanagan, 122 Mich. 386.

¶ 68. Evidence that a man and woman after living together illicitly for a time mutually agreed to live henceforward as husband and wife and so held themselves out to their neighbors is sufficient to submit to the jury the question as to the existence of a common law marriage, although the woman up to the time of the alleged marriage used her maiden name and not long before the death of the decedent took a deed in that name and signed a conveyance, and the decedent described himself as a bachelor in various conveyances.—Lorimer v. Lorimer, 124 Mich. 631.

¶ 69. The rule in Pennsylvania regarding marriages not performed strictly in accordance with the statute is the same as that laid down in this state, namely, that proof of such an informal marriage must be supplemented by proof of cohabitation.—People v. McQuaid, 85 Mich. 123.

§ 15. ——Of fraud, duress or incapacity.

¶ 70. Complainant, a blind and somewhat deaf old man, who had just received a liberal pension with a large amount of arrears, was induced, by putting him under the influence of liquors, to marry defendant, who was less than half his age, and who had a young child. Marriage annulled for fraud.—Gillett v. Gillett, 78 Mich. 184.

¶ 71. The wife's ante-nuptial pregnancy by a third person concealed from the husband and resulting in delivery of matured child six months after marriage warrants annulment of marriage on ground of fraud.—Harrison v. Harrison, 94 Mich. 559.

¶ 72. On appeal from a dismissal of cross complaints in a divorce case, in which the wife has alleged extreme cruelty on the husband's part in forcing her to sign a confession of unchastity and the husband has alleged specifically the matter confessed, the marriage may be annulled for fraud practiced on the husband, the wife's written confession of ante-nuptial unchastity, and of the husband's nonpaternity of a child born seven months after marriage, being considered as voluntary and truthful.—Nadra v. Nadra, 79 Mich. 591.

¶ 73. In a suit for divorce by the wife the defense that the marriage is invalid because the wife had a husband living at the time of the marriage is not sustained by evidence that the complainant's first husband after living with her for 15 months without unpleasantness left her to make a home for them in another State, that he was ill at the time, that on due inquiry he was never found but reported ill and about to return home, and never returned, that after four years the complainant and the defendant were married and had lived together

more than ten years, and that nothing had ever been heard of the previous husband.—Wagoner v. Wagoner, 128 Mich. 685.

§ 16. Estoppel to question or assert.

¶¶ 74, 75. Where one has been appointed administratrix as decedent's widow, the legality of her marriage cannot be questioned in an action by her as such administratrix.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 76. A woman who by mutual agreement with the man with whom she was living had parted from and released all claims upon him and left the state and married another man cannot maintain a claim for widow's allowances against the estate of her original companion, as against a woman who in good faith lawfully married him, without, at least, showing very clearly that she, the claimant, had been his lawful wife.—Young's Appeal, 52 Mich. 592.

IV. ANNULMENT OR ESTABLISHMENT OF MARRIAGE.

§ 17. In general; grounds and propriety of relief.

Ante-nuptial unchastity as grounds, see also ante § 8.
Total nullity without suit of invalid secret ceremony, see ante ¶ 28a.
Divorce as distinguished from annulment, see Divorce.
Dismissal of annulment suit brought in another county pending divorce suit, see Equity § 191, ¶ 773.
Provisions for judicial annulment or establishment of marriage, see Comp. L. 1915, §§ 11394, 11395.
Right and time for suit on ground of physical incapacity, see Comp. L. 1915, § 11427.
Cohabitation after attaining majority as bar to annulment, see Comp. L. 1915, § 11422.
Cohabitation after force or fraud as bar to annulment, see Comp. L. 1915, § 11425.
Attained age of consent at time of marriage as bar to annulment, see Comp. L. 1915, § 11422.

¶ 77. To warrant the annulling of a marriage for defendant's fraud in concealing her pregnancy, complainant must establish by satisfactory evidence that he was deceived; and he must, therefore, negative any legal inference that he knew, or had reasonable ground to believe, what her condition was.—Dawson v. Dawson, 18 Mich. 335.

¶ 78. Fraud, to warrant the annulment of a marriage, must usually be such as negatives any consent to be married, without reference to previous inducement, and it must be nearly, if not absolutely, coincident in time with the marriage. The wife's ante-nuptial incontinence (where there was no actual pregnancy by another at the time of the marriage), whether concealed by falsehood or simply not referred to at all, is not a ground for annulling the marriage.—Leavitt v. Leavitt, 13 Mich. 452.

¶ 79. A bill was brought by a husband, some-twenty years after marriage, to procure a decree of nullity on the ground of fraud in the marriage contract, and the bill alleged that the defendant was guilty of ante-nuptial unchastity; that her chastity was made the subject of frequent and diligent inquiry by him before marriage, and that the defendant made specific and open assertions to him on the subject, upon the falsehood of which, and his own inability to ascertain anything on the subject, he based his sole claim to relief. Several children had been born to the parties, and no complaint was made of defendant's conduct during the coverture. Bill dismissed.—Leavitt v. Leavitt, 13 Mich. 452.

¶ 80. By an equally divided court a decree was affirmed annulling for fraud a marriage procured by the woman's representing to the man (with whom she had had intercourse) that she was pregnant by him, she knowing that she was pregnant by another.—Sissung v. Sissung, 65 Mich. 168.

¶ 81. A bill to annul a marriage for gross duress was sustained where the marriage had never been recognized, and complainant was an unsophisticated youth of eighteen whom defendant had brought before a justice on a charge of bastardy, and who, though protesting his innocence, had been frightened by the justice into a marriage on the spot.—Smith v. Smith, 51 Mich. 607.

¶ 82. To warrant annulling a marriage for fraud there should be satisfactory evidence sustaining the charge, irrespective of the declarations, confessions or admissions of the parties.—Dawson v. Dawson, 18 Mich. 335.

§ 18. Jurisdiction and suits for relief.

Proof of marriage on suit to establish it, see also ante ¶ 66.
Matrimonial domicile and residence as jurisdictional fact in divorce, see Divorce § 2.
Amendment of divorce bill to pray annulment, see Divorce § 52.
Proper complainant on bill by lunatic, see Comp. L. 1915, §§ 11423, 11424.
Annulment bill by parent, guardian or next friend, see Comp. L. 1915, § 11422.

¶ 83. To give the courts of any state jurisdiction of the marriage relation, one of the parties must be domiciled within that state.—People v. Dawell, 25 Mich. 247.

¶ 84. Comp. L. 1871, § 5068 (How. St. § 6622), in requiring the issues raised upon a bill to annul a marriage to be tried by jury is not mandatory, but secures to either party the right to a jury unless it is waived. Failure after replication to move for a feigned issue is a waiver.—Schafberg v. Schafberg, 52 Mich. 429.

¶ 85. The verdict contemplated by How. St. § 6622 to be given by the jury that tries an issue upon the legality of a marriage, is merely advisory, and does not bind the court.—Maier v. Wayne Circuit Judge, 112 Mich. 491.

¶ 86. The guardian of an infant defendant in a bill to annul a marriage cannot bind her by his admission that she procured the marriage by fraud.—Cooper v. Mayhew, 40 Mich. 528.

§ 19. Scope of bill and relief.

Alimony in divorce cases, see Divorce.
Decree of custody and for maintenance of children on annulling marriage, see Comp. L. 1915, § 11426.
Effect of annulment decree on legitimacy of children, see Comp. L. 1915, §§ 11419, 11420.
Mode and term for hearing on bill confessed, see 1916 C. C. Rule 59, § 3.

¶ 87. In a suit in equity to annul a marriage, the circuit court has discretionary authority, under How. St. § 6622, providing that all issues upon the legality of marriages (except where physical capacity is involved) shall be tried by jury, to grant an application for the submission to a jury of the question whether complainant was mentally competent to enter into the marriage contract, even though the suit has been several times noticed for hearing by the party making the application, and none of the prior notices have mentioned a jury trial; but the statute is not mandatory and under such circumstances the circuit court may properly deny the application on the ground of waiver.—Maier v. Wayne Circuit Judge, 112 Mich. 491.

¶ 88. On a bill to annul a marriage under Comp. L. 1897, § 8618, the court has jurisdiction to make an order for expenses of defendant in defending the suit even though there is no express statutory authority therefor, inasmuch as the power to grant allowance is incident to divorce cases.—Webb v. Wayne Circuit Judge, 144 Mich. 674.

MARSHALLING ASSETS AND SECURITIES.

TREATS of the equitable principle of so ordering recourse of creditors to assets and securities that the assets shall be applied with due regard to the equities of all and the securities shall be classified in order that those doubly secured may not exhaust them at the expense of those who have but one fund to look to.

Analysis.

§ 1. In general; nature of the remedy and right.
§ 2. Occasions and grounds.
§ 3. Order in which to sell or subject assets.
§ 4. Remedy and procedure and evidence to marshal.

---

§ 1. In general; nature of the remedy and right.

Grounds and occasion for marshalling, see post § 2.
Order for sale of assets, see post § 3.

¶ 1. The rule of marshalling assets must be applied so as to protect and not destroy equities.—Southworth v. Parker, 41 Mich. 198.

¶ 2. The doctrine of marshalling assets must not be applied to the mortgagee's injury; its purpose is to protect as far as possible later interests.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

§ 2. Occasions and grounds.

Marshalling under assignments, see Assignments for Creditors § 25.
Marshalling claims for satisfaction out of chattel mortgaged property, see also Chattel Mortgages ¶ 349.
Marshalling assets in insolvent corporate estates, see Corporations § 226.
Marshalling assets in distribution, see Estates of Decedents ¶ 1199.

¶ 3. Where two persons have a lien on the same piece of property, which is not sufficient to satisfy both, and one of them has a lien for his debt on another piece of property, he must exhaust the latter before resorting to the common fund.—Trowbridge v. Harleston, W. 185; Cooper v. Bigly, 13 Mich. 463; Southworth v. Parker, 41 Mich. 198.

¶ 4. The rule that when one of two creditors of a common debtor has two funds out of which to pay he is first to resort to the

fund upon which the other creditor has no lien does not apply where one creditor has recourse to an indorser as well as to the common debtor.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 5. The creditor of a corporation for fuel furnished to the corporation on the oral promise of its president to pay for it, if the creditor would keep on supplying such fuel, is not required for the benefit of other creditors to look first to the president and to release a levy on corporate chattels for the debt; since that would relegate the creditor to the insecurity of relying on a promise not enforceable for want of a writing.—Ramsdell v. Citizens' Electric Light & Power Co., 103 Mich. 89.

¶ 6. Where lands conveyed by a husband to his wife are by her mortgaged to secure his debt, he at the same time turning over to the creditor notes as collateral security and giving a chattel mortgage, the other securities should be exhausted before resorting to the wife's land.—Grand Rapids Savings Bank v. Denison, 92 Mich. 418.

¶ 7. A doubly secured mortgagee, even if marshalling is otherwise proper, will not be required to resort to a foreign mortgage subsequently given and not shown to be available with equal security and without prejudice to his rights.—Farwell v. Bigelow, 112 Mich. 285.

¶ 8. The rule, that the holder of a lien upon two funds must, for the accommodation of a lien holder as to but one of these, enforce his lien against the other, is not universally applicable, and it can seldom be just where, instead of a common debtor, there are two or more whose interests in the funds are different.—Southworth v. Parker, 41 Mich. 198.

¶ 9. The doctrine will not enable a third mortgagee of part of premises covered by the first mortgage to compel the first mortgagee to sell first a parcel on which he also holds a second encumbrance, which is not included in the third.—Slater v. Breese, 36 Mich. 77.

§ 3. Order in which to sell or subject assets.

Order of sale of parcels on foreclosure by advertisement, see Foreclosure § 37.

Selling in inverse order of alienation to marshal assets in equity foreclosure, see Foreclosure § 116.

Persons entitled to require sale to be made in inverse order of alienation to marshal assets, see Foreclosure § 117.

Selling on foreclosure in inverse order of alienation to marshal assets, see Foreclosure §§ 116-117.

Persons entitled to require sale on foreclosure in inverse order of alienation, see Foreclosure § 117.

Equity jurisdiction to direct lands of estate to be sold in inverse ratio of alienation by devisees, see Estates of Decedents ¶ 817.

Order in which diverse debts should be satisfied out of common fund, see Payment, III.

Right of pledgee to sue on debt without resort to pledge, see Pledges, § 9.

Statutory order of contribution of lands liable to execution, see Jud. Act, chap. XXIII, § 132; Comp. L. 1915, § 12947.

¶ 10. As a general rule, where mortgaged lands are alienated or encumbered in parcels, the parcels are to be charged for the satisfaction of the mortgage in the inverse order of alienation or encumbrance.—Cooper v. Bigly, 13 Mich. 463; Ireland v. Woolman, 15 Mich. 253; McKinney v. Miller, 19 Mich. 142; Sibley v. Baker, 23 Mich. 312; Sager v. Tupper, 35 Mich. 134; McVeigh v. Sherwood, 47 Mich. 545.

¶ 11. The grantee of a parcel of mortgaged land is entitled to have the rest of the land sold to satisfy the mortgage before resort is had to his.—Mason v. Payne, W. 459; Gantz v. Toles, 40 Mich. 725.

¶ 12. Subsequent purchasers or encumbrancers take subject to any explicit provisions of a mortgage as to the order in which the property shall be sold, and that without reference to the considerations on which such preferences were agreed on.—Mickle v. Maxfield, 42 Mich. 304.

¶ 13. A junior mortgagee cannot claim that a homestead covered by the first mortgage but not by his own shall be first sold by the prior mortgagee.—Armitage v. Toll, 64 Mich. 412.

¶ 14. Where A. had a mortgage upon lots one, two and three, and B. had a subsequent mortgage upon lot three, and they, having no knowledge of conveyances which had been made of lots one and two subsequently to their mortgages, conjointly released a part of lot three, it was held that B.'s equitable right to have lots one and two first sold was not thereby affected.—Cooper v. Bigly, 13 Mich. 463.

¶ 15. On March 2, 1905, Warner mortgaged four tracts of land for $6,000. On January 25, 1906, he conveyed one of these tracts to Jewett, subject to the mortgage for $6,000, which the latter assumed. This deed recited that the mortgage was "to be paid on or before five years from date, March 2, 1905. * * * All interest to be paid to March 2, 1906." Later Jewett conveyed the land, subject to the mortgage, the amount of which was deducted from the purchase price, to Freeman, who relied solely on Warner's deed to Jewett, in corroboration of Jewett's statements as to the terms of the mortgage. The statements therein, which appear above, were

untrue, for in fact the mortgage was payable in yearly instalments, and the whole became due upon failure to pay the interest. Jewett's deed to Freeman recited that the interest was paid to March 2, 1906. The interest was not in fact paid, nor was the first instalment. Held, in a foreclosure suit by the mortgagee, who elected to declare the entire amount due, that Freeman had no right to rely upon the description of the mortgage in Warner's deed, and therefore was not entitled to have the other tracts first sold in payment of the mortgage debt.—Pease v. Warner, 153 Mich. 140. (Grant, C. J., and Montgomery, J., dissenting.)

¶ 16. C. gave F. a warranty deed of a farm subject to payment by F. of a certain mortgage. Another mortgage given to secure a debt of C.'s covered the farm and some of Mrs. C.'s property, and this mortgage was not excepted from the warranty. Upon the foreclosure of the last mentioned mortgage, Mrs. C.'s property was bid off first and bought in by F. Held, that as to her own lands she was entitled to the rights of a surety, and could insist that the farm be sold first; that her release of dower rights in the farm gave her the right to insist that F. protect her by paying off the mortgage first named; and that as between herself and him the foreclosure sale was wrongful, and F. acquired no rights by it except the right to the mortgage.—Carley v. Fox, 38 Mich. 387.

§ 4. Remedy and procedure and evidence to marshal.

General law of chancery practice, see Equity.
Method of claiming benefit of doctrine of marshalling assets in foreclosure, see Foreclosure ¶ 314.

¶ 17. In order to have a proper marshalling, the purchaser of land at a foreclosure sale may file a bill to compel the foreclosure of a prior mortgage upon that and other property, and to have the other property first sold; and if, pending the suit, the prior mortgagee purchases the interest of the complainant, he may file an original bill, in the nature of a supplemental bill, setting up the change of title, and is entitled to the same relief that could have been had under the original bill.—Cooper v. Bigly, 13 Mich. 463.

¶ 18. A third encumbrancer who concedes the existence of a second encumbrance is not of right entitled to introduce proofs to show that the amount of the second encumbrance is less than it is represented to be, where the question is merely as to the order of sale on foreclosure of the first mortgage, as between the parcels covered by the third and that covered by the second encumbrance.—Slater v. Breese, 36 Mich. 77.

MARSHALS to MASSES.

Cross-References.

Marshals—
United States Marshals, see United States.
Marsh Lands—
Swamp lands under the Swamp Land Act, see Public Lands.
Drainage and private rights, see Drains; Waters, II.
Masonic Fraternity—
See Associations.
Masses—
Bequests for masses, see Wills, VI.

MASTER AND SERVANT.

TREATS of the relation of master and servant, including therein employers and employees in the common significance of those terms, of the formation of the relation and the public regulations concerning it, the mutual rights and liabilities of the parties to the relation, and the rights and liabilities toward third persons dependent on the relation. It excludes the law of Agency, which see, and the Workmen's Compensation Law, which see, and the general law of Negligence, which see.

Analysis.

I. The relation; formation, duration and termination.

§ 1. In general; nature and existence of relation.
§ 2. Servantship or independent contract.
§ 3. Servantship or joint interest.
§ 4. Servantship for one or the other of several persons.
§ 5. Creation of relation and contracts of employment.
§ 6. Suspension, interruption or termination of relation.

II. Mutual contract rights aand liabilities; compensation.

§ 7. In general; terms and construction of employment contract.
§ 8. Respective duties, rights and liabilities as to services.
§ 9. Statutory regulations of hours of service.
§ 10. Wages, salaries and other remuneration.
§ 11. ——Sharing, commission and bonus agreements.
§ 12. ——Changes, increases, and reductions.
§ 13. ——Extra services, overtime and deductions.
§ 14. ——Perquisites and outside employment.
§ 15. ——Provisions for retention of compensation.
§ 16. Accounting and reimbursement.
§ 17. Discharge, dismissal or breach of contract.
§ 18. ——Life contracts and "satisfaction" contracts.
§ 19. Right of action and remedy for wrongful discharge.
§ 20. ——Presumptions and burden of proof.
§ 21. ——Admissibility of evidence.
§ 22. ——Weight and sufficiency of evidence.
§ 23. ——Questions of law and fact.
§ 24. ——Instructions.
§ 25. ——Verdict and amount of recovery.
§ 26. Actions for wages.
§ 27. ——Presumptions and burden of proof.
§ 28. ——Admissibility of evidence.
§ 29. ——Weight and sufficiency of evidence.
§ 30. ——Questions of law and fact.
§ 31. ——Instructions.
§ 32. Arbitrations and mediations of labor disputes.

III. Master's liability for injuries to servant.

A. Nature and Extent in General.

§ 33. In general; care and diligence required of master.
§ 34. Relation of the parties and scope of employment.
§ 35. Statutory provisions and regulations; employment of children.
§ 36. ——Railroad and mine employees.
§ 37. Interstate transportation and Federal Employers' Liability Act.
§ 38. ——Exclusiveness of remedy and election of remedies.
§ 39. ——Fatal injury and death cases.
§ 40. ——When employee deemed engaged in interstate commerce.
§ 41. Liability of corporate successor of master.
§ 42. Proximate and concurrent causes.
§ 43. ——Railroad and mine cases.
§ 44. Negligence of third persons.
§ 45. Contracts limiting or agreeing to release liability.

B. Tools, Machinery, Appliances and Places to Work.

§ 46. In general; duty to furnish safe appliances and places.
§ 47. Delegation of duty.
§ 48. Degree of care and sufficiency of machinery, appliance, or place.
§ 48a. Latest, best or safest tools and appliances.
§ 48b. Dangers or defects apparent or obvious to servant.

§ 48c. Defects or dangers caused by servant or other employees.
§ 48d. Appliances or tools procured or selected by servant or co-employees.
§ 49. Railroad tracks, bridges and equipment.
§ 49a. ——Tracks, sidings and switches.
§ 49b. ——Bridges and culverts.
§ 49c. ——Cars and locomotives.
§ 50. Mines and quarries.
§ 50a. ——Shafts, hoists and ladderways.
§ 50b. ——Drifts, raises, stopes, walls and timbering.
§ 51. Protecting or guarding dangerous machinery and places.
§ 51a. ——Machinery in shops and factories.
§ 51b. ——Saws and planers.
§ 51c. ——Stairways, elevators, hoisting shafts and trap doors.

C. Methods of Work, Rules, Orders, and Inspection.

§ 52. In general; precautions against injury.
§ 52a. Methods of operating or unloading trains.
§ 52b. Necessity, construction and operation of rules and regulations.
§ 53. Duty of master to inspect and repair.
§ 53a. ——Delegation of duty.
§ 53b. ——Simple tools and appliances.

D. Warnings and Instructions.

§ 54. In general; duty to warn or instruct.
§ 54a. Delegation of duty.
§ 54b. Master's knowledge or notice of danger.
§ 54c. Dangers or defects known or apparent to servant.
§ 54d. Immature and inexperienced employees.
§ 54e. Work outside scope of employment.
§ 54f. Sufficiency and construction of warnings and instructions.

E. Acts and Omissions of Fellow-Servants.

§ 55. In general; liability for acts of fellow-servant.
§ 55a. Concurrent negligence of master and fellow-servant.
§ 55b. Care in selection and retention of employees.
§ 55c. ——Master's notice or knowledge of servant's incompetency.
§ 55d. Who deemed fellow-servants or coemployees.
§ 55e. ——Infants or others employed in violation of statute.
§ 55f. Vice principals or representatives of master and other employees.
§ 55g. Foremen and other employees.
§ 55h. Employees in different departments.
§ 55i. Employees of separate masters in same work.
§ 55j. Railroad employees.
§ 55k. ——Vice principals or agents of company and other employees.
§ 55l. ——Inspector and other employees.
§ 55m. ——Foremen and other employees.
§ 55n. ——Conductors and other employees.
§ 55o. ——Brakemen or switchmen and other employees.
§ 55p. Mine employees.
§ 55q. ——Shift or timber boss and other employees.

F. Risks Assumed by Servant.

§ 56. In general; nature and basis of doctrine.
§ 56a. Risks incident to the employment.
§ 56b. Known, obvious or apparent dangers.
§ 56c. Latent or unknown defects and dangers.
§ 56d. Age, experience or intelligence of servant as factor.
§ 56e. Risks outside scope of employment.
§ 56f. Risk from master's negligence or nonperformance of duty.
§ 56g. ——Of duty imposed by statute.
§ 56h. Reliance on assurance of safety or promise to repair.
§ 56i. Risk of complying with orders, commands or threats.
§ 56j. Risks from violation of rules, orders and instructions.
§ 56k. Voluntary acts of servant and improper methods of work.
§ 56 l. Risk of fellow-servants' acts or negligence.
§ 56m. ——Of incompetent fellow-servants.
§ 56n. Miners' risks.
§ 56o. Employees in factories, shops and mills.
§ 56p. Linemen.
§ 56q. Workers about sewers, ditches and excavations.
§ 57. Railroad employees' risks.
§ 57a. ——Brakemen and switchmen.
§ 57b. ——Engineers and firemen.
§ 57c. ——Employees of street railways.
§ 58. Under Federal Employers' Liability Act.

G. Contributory Negligence.

§ 59. In general.
§ 59a. Statutory provisions.
§ 59b. Omission of statutory duty by master.
§ 59c. Reliance on due performance of duty by master.
§ 59d. Reliance on assurances of safety or promise to repair.
§ 59e. Avoidance of or precautions against known or apparent dangers.
§ 59f. ——Working on or about tracks or trains.
§ 59g. ——Mining.
§ 59h. Improper use of appliances and dangerous methods of work.
§ 59i. ——Boarding or working about trains or tracks.
§ 59j. Dangers not known or understood.
§ 59k. Using defective tools, machinery or appliances.
§ 59 l. Disregard of rules, warnings or instructions.
§ 59m. ——Operation of trains.
§ 59n. Compliance with orders or requests.
§ 59o. Comparative negligence of master and servant.

H. Actions for Injuries.

§ 60. Remedy and pleading.
§ 60a. ——Railroad accidents.
§ 60b. ——Mining accidents.
§ 61. Issues, proof and variance.
§ 61a. ——Actions by railroad employees.
§ 62. Burden of proof.
§ 62a. ——Negligence of master.
§ 62b. ——Contributory negligence under Federal Employers' Liability Act.

§ 63. Presumptions.
§ 63a. ——Of negligence.
§ 63b. ——Contributory negligence.
§ 64. Admissibility of evidence.
§ 64a. ——As to existence of relation and scope of employment.
§ 64b. ——As to safety of tools, appliances and places.
§ 64c. ——Prior or subsequent conditions or mishaps.
§ 64d. ——Master's knowledge of defects and inspection and repair.
§ 64e. ——As to methods of work, rules and orders.
§ 64f. ——As to warnings and instructions.
§ 64g. As to competency or negligence of fellow-servants.
§ 64h. ——As to contributory negligence.
§ 64i. ——Servant's experience and knowledge of dangers.
§ 65. Weight and sufficiency of evidence.
§ 65a. ——As to existence of relation and scope of employment.
§ 65b. ——As to cause of accident.
§ 65c. ——As to negligence of master or his representatives.
§ 65d. ——As to tools, appliances and places.
§ 65e. ——As to railroad tracks, cars and equipment.
§ 65f. ——As to inspection and knowledge or notice of defects.
§ 65g. ——As to methods of work.
§ 65h. ——As to rules, orders and commands and compliance therewith.
§ 65i. ——As to warnings and instructions.
§ 65j. As to competency and negligence of fellow-servants.
§ 65k. ——As to assumption of risk.
§ 65 l. ——As to care or contributory negligence of servant.
§ 66. Sufficiency of proofs under Federal Employers' Liability Act.
§ 67. Questions of law and fact.
§ 67a. Jury questions as to relationship and scope of employment.
§ 67b. Jury questions as to cause and manner of injury.
§ 67c. ——To railroad employees.
§ 67d. Jury questions as to negligence of master.
§ 67e. Jury questions as to violation of Child Labor Law.
§ 67f. Jury questions as to sufficiency of appliances, tools, and place to work.
§ 67g. ——Railroad tracks, cars and equipment.
§ 67h. ——Operation of mines.
§ 67i. ——Master's knowledge or notice of defects or dangers.
§ 67j. Jury questions as to methods, rules, and orders.
§ 67k. Jury questions as to tests and inspections.
§ 67 l. Jury questions as to warnings and instructions.
§ 67m. ——Immature or inexperienced employees.
§ 67n. Jury questions as to guards and signals.
§ 67o. Jury questions as to negligence of or care by fellow-servants.
§ 67p. ——Care in hiring or retaining servant.
§ 67q. Jury questions as to knowledge of and assumption of risk.
§ 67r. ——Employees in and about factories, shops and mills.
§ 67s. ——Railroad employees.
§ 67t. ——Employees in and about quarries and mines.
§ 68. Contributory negligence as jury question.
§ 68a. ——Inexperienced or youthful employees.
§ 68b. ——Obedience to or disregard of rules, orders or warnings.

§ 68c. ——Reliance on assurances of safety or promise to repair.
§ 68d. ——Contributory negligence of factory, shop, or mill employees.
§ 68e. ——Contributory negligence of employees in and about mines.
§ 68f. ——Contributory negligence of railroad employees in general.
§ 68g. ——Of brakemen and switchmen.
§ 68h. ——Of conductors, engineers and motormen.
§ 69. ——In actions under Federal Employers' Liability Act.
§ 70. Directing verdict.
§ 70a. ——For failure to show what caused accident.
§ 70b. ——On ground that the risk was assumed.
§ 70c. ——On ground of fellow servant's negligence.
§ 70d. ——On ground of contributory negligence.
§ 71. Instructions and requests.
§ 71a. ——On duty and care of master; tools, machinery and appliances.
§ 71b. ——As to safe place to work.
§ 71c. ——As to tests and inspections.
§ 71d. ——As to methods of work, rules, warnings and instructions.
§ 71e. ——Acts of fellow servants and duty to employ competent servants.
§ 71f. ——As to servant's knowledge of and assumption of risks.
§ 71g. ——On contributory negligence or care by servant.
§ 71h. ——As to burden and degree of proof.
§ 72. Instructions under Federal Employers' Liability Act.

IV. Liability for injury to third persons.

§ 73. In general.
§ 74. Relationship of wrongdoer as servant to defendant.
§ 75. Course or scope of employment of wrongdoing servant.
§ 76. ——Wanton, wilful and malicious acts.
§ 77. ——Acts of chauffeurs and drivers.
§ 78. Actions for injuries.
§ 79. ——Admissibility and sufficiency of evidence.
§ 80. ——Questions of law and fact.
§ 81. ——Instructions.

V. Interference with relation or service by third persons.

§ 82. In general.

[Note. The volume of matter in this topic pertaining to the common law and statutory tort liability of the master for personal injuries to the servant in course of his employment is very large. Much of this excepting that under the Federal Employers' Liability Act is to a greater or less degree superseded by the liability under the Workmen's Compensation Act. In the future, therefore, it is likely that the number of cases to be digested under division III of Master and Servant will be relatively small. Accordingly while the editor has not ventured to omit or discard any case as obsolete, it has seemed proper to devise an analytical index capable of simplification and contraction, which has been done by denoting with letters added to the figures such section lines as describe mere details and variations of the general rule or principle of law. It is not expected that these lettered sections will appear in the periodical digests supplementary of this.

Thus sections 55-55q, post, treat of the fellow servant doctrine in its varying aspects, but sections 55a to 55q inclusive are of a subordinate grade and not likely to be permanently needed.

For reasons just stated it has not seemed necessary or advisable to provide in division III such numerous and detailed cross-references as in the more thoroughly live and active topics. Enough have been made, however, to adequately connect all related and complementary portions of the digest.

Even those cases which might be regarded as obsolete precedents on the subject of employers' liability may yet be of value as precedents on the general law of actionable negligence. For that reason alone it would be unsafe to omit any.]

I. THE RELATION; FORMATION, DURATION AND TERMINATION.

Employer or employee of party as juryman, see Jury, § 24.

§ 1. In general; nature and existence of relation.

Creation of relation, see post § 5.
Mutual contract rights and liabilities, see post § 7 et seq.
Contract to furnish information as to specified lands as one of employment, see post ¶ 36.
Evidence as to existence of contract of employment, see post §§ 21, 28, 64a, 65a, 79.
Jury questions as to existence of relation, see post §§ 30, 67, 80.
Relation of wrongdoer as servant of defendant, see also post § 74.
Relation of injured party as servant of defendant, see post §§ 34, 64a, 65a, 67a.
Interference with relation by third persons, see post § 82.
Distinguished from independent contractor, see post § 2.
Agency and service as compatible relations, see Agency § 2, ¶ 9.
Master and apprentice, see Apprentices.

¶ 1. Although in all ordinary transactions the relation of contractor excludes that of master and servant, yet there is no such repugnance between them that they cannot coexist.—City of Detroit v. Corey, 9 Mich. 165.

¶ 2. The relation of master and servant may exist between a corporation and an individual.—McWilliams v. Detroit Central Mills Co., 31 Mich. 274.

§ 2. Servantship or independent contract.

Negligent employee as servant of defendant or of independent contractor, see post § 74.
Independent contractors distinguished from servants, see also Independent Contractors § 1.

¶ 3. One whom the employer does not control and has no right to control, as to the method, or means, by which he produces the result contracted for, is an independent contractor.—Gall v. Detroit Journal Co., 191 Mich. 405.

¶ 3a. One employed to furnish labor and materials for a job at a fixed price is an independent contractor and not a servant of the employer.—Bacon v. Candler, 181 Mich. 372.

¶ 4. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant.—Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385; Opitz v. Hoertz, 194 Mich. 626.

¶ 4a. Workmen employed by the day in construction of a building and under the superintendence of the owner's architect are servants of the owner and not independent contractors.—Hoar v. Merritt, 62 Mich. 386.

¶ 5. The posting of a notice in the mailing room of a newspaper company requiring delivery men not to exceed the speed limit fixed by law in making delivery of newspapers does not constitute the assumption of control over one who has a contract for delivery of newspapers in his own conveyance so as to create the relation of master and servant instead of that of independent contractor.—Gall v. Detroit Journal Co., 191 Mich. 405.

¶ 6. The relation of independent contractor exists where a person who is not a licensed drayman, enters into a written contract with a newspaper company whereby he agrees in consideration of a certain weekly salary, subject to deduction of fines for delay in delivery, to deliver and distribute to such persons and at such places and along such routes and on such regular schedules as may from time to time be designated by the company, such delivery to be according to means of conveyance selected and controlled by him and without supervision by the newspaper company, even though either party has the right to terminate the contract at pleasure.—Gall v. Detroit Journal Co., 191 Mich. 405.

¶ 7. A written proposition by a contractor to the owner of land for clearing a tract of property destroyed by fire and erection of new buildings, which is plain and unambiguous, but is the entire contract between the parties upon acceptance, must determine as to whether the relation between the parties is that of master and servant or whether the contractor is an independent contractor.—Opitz v. Hoertz, 194 Mich. 626.

¶ 8. Plaintiff and some other miners were engaged in mining shale in defendant's

mine. They were to be paid thirty cents a ton, the money to be divided between them. They furnished their own lights and explosives and were masters of their own time. Defendant furnished cars, track, and a place to work, and an agent of defendant handled and exploded the dynamite. Defendant could discharge them at any time. Held, plaintiff was a servant, not an independent contractor.—Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489.

¶ 8a. A construction company which agreed to construct a telephone plant and system for a telephone company and to assume all risks connected therewith, held to be a servant of the telephone company and not an independent contractor.—Larson v. Home Tel. Co., 164 Mich. 295.

¶ 9. The relation of owner and independent contractor exists under a contract for the clearing of the site of a building and the erection of a new building, according to the terms of which the contractor agrees to superintend the work of clearing the site and erecting the new building, to co-operate with the employer in purchasing material and in employing men and teams, to furnish necessary tools to properly carry on the work, to do the work in accordance with the wishes of the employer and to accept in compensation therefor, a stipulated per cent of the net cost of labor and materials.—Opitz v. Hoertz, 194 Mich. 626.

¶ 10. In an action by a railroad employee to recover for personal injuries sustained as the result of the starting of the machinery in a coal dock used for loading coal in engines while plaintiff was in the hopper for purpose of spreading out the coal, where it appeared that the foreman in charge, in addition to his duties as yard foreman had a contract with the company for loading coal and hired and paid plaintiff, evidence held insufficient to show that such foreman was an independent contractor.—Guy v. Cincinnati Northern R. Co., 198 Mich. 140.

¶ 11. One who furnishes an estimate of the cost of the construction of a reinforced concrete building and agrees to oversee the work for a certain percentage of the cost, subject to certain modifications, according to whether the cost exceeds or is less than the estimate to furnish equipment and machinery and to pay for the hauling of the same away when the work is completed, and is to have the lumber used in the work, is an independent contractor.—Bayne v. Everham, 197 Mich. 181.

§ 3. Servantship or joint interest.

Joint adventure defined and distinguished from employment for share of profits, see Joint Adventures § 1.

¶ 12. One who is to enter land, in the name of the others to an agreement by which they are to advance money for his expenses, and on repayment to deed to him a portion of the land, is a joint adventurer with them and not their servant.—McCreery v. Green, 38 Mich. 172.

§ 4. Servantship for one or the other of several persons.

Servant employed from other employer's force as independent contractors, see Independent Contractors § 3.

¶ 13. Where men are employed in the ordinary way as laborers in cutting trees for another person under an intermediate agent who is an overseer and not a contractor, they as well as such agent are the servants of such other person.—Smith v. Webster, 23 Mich. 298.

¶ 14. A contract for services wherein one party reserves the right to pay the other's laborers in order to secure himself against the risk of non-performance does not make the party reserving such a right the employer of the laborers or exonerate the other party from paying them himself. The payments are made by virtue of an agency, and on the employer's account.—Dyer v. Tyler, 49 Mich. 366.

¶ 15. The driver supplied by a bailee of a team is the servant of the bailee and not of the owner where such arrangement is made temporarily in place of the original agreement that the owner furnish the driver for the team.—Hofer v. Hodge, 52 Mich. 372.

¶ 16. Men employed in a logging camp by the owner's agent and upon the owner's credit are the servants of the owner.—Smaltz v. Boyce, 109 Mich. 382.

¶ 17. On the issue whether the chief engineer in making a contract for construction acted as agent for defendant, the fact that defendant railroad company was engaged in procuring aid and rights of way has no tendency to show that it was building its own road, or that any particular person employed in that work was doing so as a servant of defendant where no adequate authority is shown.—Bond v. Pontiac, O. & P. A. R. Co., 62 Mich. 643.

§ 5. Creation of relation and contracts of employment.

Rights and liabilities under the contract, see post § 7 et seq.

Life contracts, see post § 18.

"Satisfaction" contracts, see post § 18.

Presumption as to renewal of contract, see post § 27.

Relation of landlord and tenant changed by agreement to master and servant, see post ¶ 66.

Acceptance of offer of employment to form contract, see Contracts, III.

Employment contracts of corporation with officers and agents, see also Corporations §§ 151-154.
Authority of attorney or agent in settling damage claim to make contract for employment, see Agency § 37; Attorneys § 24.
Employment of architects, see Building Contracts, VII.
Police power to regulate employment agencies, see Constitutional Law § 109.
Necessity that contract of employment for more than a year be in writing, see Frauds, Statute of, I, A.
Provisions as to employment agencies sending applications for employment, see Comp. L. 1915, § 5420.
Contracts for services to be rendered away from home locality, see Comp. L. 1915, §§ 5850-5582.

¶ 18. A contract is not void for indefiniteness where the term of employment, the compensation, and the duties to be performed are specified.—Carney v. Ionia Transp. Co., 157 Mich. 54.

§ 6. Suspension, interruption or termination of relation.

Servant's right to occupy house after quitting service of master, see post ¶ 67.
Discharge, dismissal or breach of contract, see post § 17.
Actions for wrongful discharge, see post § 19.
Presumption as to continuation of the employment for another like period, see post § 20.

¶ 19. The service tie or contractual relation and obligation between master and servant is not broken by suspension of all activities directly beneficial to the employer, as by noon intermission for lunch.—Haller v. City of Lansing, 195 Mich. 753.

¶ 20. A employer's agreement, in consideration of his employee's compromising a claim for personal injuries, to retain the latter in his service for life, is not terminated by the employee's resigning to accept another position, which he held for a few months, and, becoming dissatisfied, returns to his original employment, where it was agreed by the employer's superintendent, with whom the employee was required to deal, before the resignation was accepted, that, if he did not like the new place, he could have his old one again upon the same conditions that existed before he left it.—Stearns v. Lake Shore & M. S. R. Co., 112 Mich. 651.

II. MUTUAL CONTRACT RIGHTS AND LIABILITIES; COMPENSATION.

Compensation and reimbursement between agent and principal, see Agency, IV, B.
Immateriality of evidence as to unsatisfactory general employment in action for extra services, see Contracts ¶ 1285.

§ 7. In general; terms and construction of employment contract.

Contracts of employment generally, see ante § 5.
Provisions of the contract as to wages or other compensation, see also post § 10 et seq.
Construction of commission or bonus agreements, see post § 11.
Parties bound by their construction of the contract, see also post ¶ 57.
Presumption as to continuation of employment, see post § 27.
Contracts limiting or releasing masters' liability for injury to servant, see post § 45.
Risks impliedly assumed, see post § 56 et seq.
Interpretation and construction of contracts generally, see Contracts, VI.
Construction of employment contract as joint or several, see also Contracts § 169.
Implication for continuance of employment until purpose involved therein is accomplished, see also Contracts § 163, ¶ 735.
One year as "permanent" employment of attorney, see also Contracts ¶ 810.
Construction of contract of employer to determine joint liability of another with him, see Contracts § 169.
Promise of employment to one already employed as past consideration, see Contracts § 122.
Mutuality of working and service agreements, see Contracts § 2.
Invalidity of agreement against taking employment with competitor, see Contracts § 84.
Customs in employment unknown to employer, see also Customs ¶ 14.
Validity of oral agreement to pay for services by conveyance of lands, see Frauds, Statute of, § 59.
Contracts for work and labor as sales of goods within statute of frauds, see Frauds, Statute of, § 36.
Construction of guaranty of the contract between master and servant, see Guaranty, II.
Validity of parol promise of employer to pay employee's board, see Frauds, Statute of, § 14.
Validity of parol promise to pay for services inuring to another, see Frauds, Statute of, § 22 and ¶ 111.

¶ 21. When an express contract covers the terms of an employment there is no room for implications which change, or defeat, those terms.—Hollister v. Kinyon's Estate, 195 Mich. 261.

¶ 22. The use, in negotiations for employment, of the word "salary," as implying a year's compensation, cannot be said in itself to fix the time of employment at a year rather than a term of years.—Palmer v. Marquette & P. Rolling Mill Co., 32 Mich. 274.

¶ 23. A contract of hire made June 2, 1890, and which recites that the employee is to re-

ceive a certain sum per week, and "for the year 1891 the above-mentioned salary and five per cent of the net profits of" the business, covers the whole of the year 1891.—Koehler v. Buhl, 94 Mich. 496.

¶ 24. Plaintiff wrote a third party offering to work for the latter as an engraver at $37.50 a week, with the understanding that at the end of six months he was to receive $40 per week. Said party replied, agreeing to pay $37.50 per week for six months and $40 a week thereafter if he found plaintiff was making good. Held, said contract of employment was for six months and not for a year.—Robinson v. Western U. Tel. Co., 169 Mich. 503.

¶ 25. A written contract of employment as a "general superintendent" is not so ambiguous as to the purposes of employment as to render the contract void, and if the term is deemed at all ambiguous when used in connection with the kind of business defendant was engaged in, it may be explained, but the parties must be deemed to have used it in the sense in which it would be understood by those engaged in that business.—Schaub v. Arc Welding Co., 123 Mich. 487.

¶ 26. A "spare brakeman" employed as needed, having been injured and having contracted with the railroad company for re-employment is entitled to employment only as needed.—Sax v. Detroit, G. H. & M. R. Co., 129 Mich. 502.

¶ 27. The term "re-employment" in a contract between a railroad company and an injured employee means employment in the same service as that in which he was formerly employed.—Sax v. Detroit, G. H. & M. R. Co., 129 Mich. 502.

¶ 28. Where an employee of a railroad, given a contract for life in consideration of settlement of a claim for injuries, desired to take up other employment and did so on the assurance of his superior, the division superintendent, that he could have his place back if the new one proved unsatisfactory, which occurred; the authority of the superintendent to make a new contract upon the same terms as the original is not involved, his engagement being equivalent to granting the employee an indefinite leave of absence, the latter reserving his rights under the original contract.—Stearns v. Lake Shore & M. S. R. Co., 112 Mich. 651.

§ 8. Respective duties, rights and liabilities as to services.

Right to wages or other compensation, see post § 10 et seq.
Compensation for overtime or extra services, see post § 13.
Right to discharge or dismiss servant, see post § 17.
Evidence as to failure to perform duties, see post § 21.
Liability of master for injuries to servant, see post III.
Liability of master for injuries to third persons, see post IV.
Duty of servant, who is also bailee, as to care and keeping of bailed goods, see also Bailments ¶ 21.
Injunction against disclosure of trade secrets or misuse of them by an employee, who learned them by reason of his employment without right to divulge them, see Injunctions, II, F.
Fidelity bonds against defalcations of servant, see Indemnity § 3.
Provisions as to embezzlement from employer, see Comp. L. 1915, § 15310.
Provisions against influencing employee in his political opinions, see Comp. L. 1915, § 3842.

¶ 29. It is the duty of a servant to be loyal and obedient to his master.—Kyselka v. Northern Assur. Co. of Michigan, 194 Mich. 430.

¶ 30. When one engages in another's employment he undertakes to obey all lawful orders, and subjects himself for failure to do so to liability to discharge and damages.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 31. One employed by the year on a salary is bound to devote his time diligently and faithfully to the business interests of his employers, and to do nothing which will hinder or compete with those interests; but this will not prevent his rendering civilities or services to others which do not conflict with his duties to his employers, or prejudice their interests.—Geiger v. Harris, 19 Mich. 209.

¶ 32. A traveling agent commits no violation of duty by taking, gratuitously, orders for goods upon a house in whose service he has formerly been engaged; he not having solicited them, and it not appearing that such orders were in any way prejudicial to the interests of his employers.—Geiger v. Harris, 19 Mich. 209.

¶ 33. Under an ordinary hiring by the day, the party cannot be required to prolong his service in order to complete any particular piece of work upon which he may happen to be employed.—Wyngert v. Norton, 4 Mich. 286.

¶ 34. The rule that all the time and labor of an employee belong to the employer during the hours of service applies where a railroad employee, who receives a stated salary as clerk, acts as customs broker and receives fees for such services, especially where he promises to remit such fees to the employer.—Duluth, S. S. & A. Ry. Co. v. Wilson, 200 Mich. 313.

¶ 35. In general, one who engages to render skilled services undertakes for reasona-

ble skill and for good faith, and is liable for negligence or dishonest service, but not for errors of judgment; the risk of those is on the employer.—Page v. Wells, 37 Mich. 415.

¶ 36. An arrangement by which one is to receive compensation for minutes to be obtained by him of valuable lands of a certain quality is an employment, and not a sale of information, and implies no warranty of the absolute truth of the descriptions, and the employee is not liable for mistakes. Though if, in furnishing descriptions of land, he misleads or injures his employer by a positive affirmation of their quality, when he knows nothing about it, he would be liable for bad faith or negligence.—Page v. Wells, 37 Mich. 415.

¶ 37. An agreement to respect the secrets of manufacturing processes will be implied from the nature of the employment and the confidence bestowed on the employee though there is nothing expressed thereabout.—O. & W. Thum Co. v. Tloczynski, 114 Mich. 149.

¶ 38. A master mechanic who agrees to devote his entire time and energy towards the welfare of the company employing him, and also agrees that any invention he should make as a result of his employment, in the nature of machinery to be used by such company, shall belong to the company, is prohibited under his agreement from working upon the same character of inventions at his home, without the company's knowledge, for the purpose of using them to his own advantage after his connection with the company had ceased.—Detroit Lubricator Co. v. Lavigne, 151 Mich. 650.

¶ 39. In hiring plaintiff to install and repair an engine, the defendant has a right to require that plaintiff shall possess and use reasonable skill in doing the work before being liable to pay him his wages.—Smith v. Hertz & Hosbach Co., 160 Mich. 431.

¶ 40. Under a contract of employment to learn a trade, the terms therein govern, and the parties have no right to demand rights and privileges outside of such contract.—Lepan v. MacKinnon Boiler & Machine Co., 178 Mich. 18.

§ 9. Statutory regulations of hours of service.

Regulation of hours of labor as class legislation, see Constitutional Law § 218.

¶ 41. It is very doubtful whether the statute making ten hours a legal day's work in factories, workshops, etc., covers services as a night watchman in the horse barns of a car company.—Bartlett v. Grand Rapids Street R. Co., 82 Mich. 658.

¶ 42. Laws of 1885, Act No. 137 (How. St. § 1997a6), making ten hours a legal day's work, does not apply to a contract with an expert in taking, finishing and retouching photographs, or to service or employment under a hiring by the week, month or year.—Schurr v. Savigny, 85 Mich. 144.

§ 10. Wages, salaries and other remuneration.

Right to wages as dependent on skill and ability to perform duties, see also ante § 8.

Estoppel to claim wages, see also post ¶¶ 61, 63.

Store manager's right to commissions as postmaster, see post ¶ 68.

Overdrafts by servant as ground for discharge, see post ¶ 79.

Changes in wages, see post § 12.

Action for wages, see post § 26 et seq.

Burden of proof as to right to wages, see post § 27.

Evidence as to wages or other compensation, see post §§ 21, 28.

Evidence of waiver of agreed salary, see post ¶ 118.

Assignability of wages to accrue, see Assignments § 4.

Validity of payment without notice of assignment, see Assignments § 3.

Assignment of wages to be earned in the future under an existing employment, see Assignments, I.

Direct promises of third persons to pay servants, see also Contracts § 13.

Usage as to compensation to control terms of contract, see Customs § 12.

Specific enforcement of agreements for shares or stocks as compensation, see Specific Performance.

Exemption of wages, see Exemptions § 26.

Labor liens, see Liens § 5; Mechanics' Liens.

Provisions as to semi-monthly payment of wages, see Comp. L. 1915, §§ 5583-5586.

¶ 43. An agreement to pay a servant what the employer thinks he is worth binds the latter to pay what the services are reasonably worth, and does not leave him to fix his wages at such sum as he sees fit after the services are performed, although such an agreement would be valid if understood.—Millar v. Cuddy, 43 Mich. 273.

¶ 44. Where one employed for an indefinite time continues work after the managing agent through whom he was employed has assumed control of the business as principal, he can recover against the former employer for his wages subsequently accruing if he had no notice of the change of employers.—Tousignant v. Shafer Iron Co., 96 Mich. 87.

¶ 45. A contract of employment dated January 1, 1893, by which the employee was "to receive $1,200 per year until further notice, or during the year 1893," the salary not to be reduced in any event, is not a contract from year to year, and the employee, on being discharged, after having worked a year and eight months, cannot recover compensation for the balance of the year.—Fuller v. Peninsular White Lead & Color Works, 111 Mich. 221.

¶ 46. Where the plaintiff had agreed to work for a year on a basis of a percentage of the gross receipts, but left the employment after two and a half months, he could recover, if at all, only the average rate for the entire twelve months, and he could not select the period when the receipts were the greatest and make this the basis of computing his percentage.—Kendall v. Chapel, 147 Mich. 709.

¶ 47. Where plaintiff, in an action on a contract for wages earned, did not perform any service, held that he earned no salary. —Wray v. Tilden Saw Co., 198 Mich. 461.

§ 11. ——Sharing, commission, and bonus agreements.

Servant and joint adventurer distinguished, see ante § 3.

¶ 48. In fixing the profits of a business for the purpose of complying with a contract giving the manager a share of the profits at the end of each year, the employer is not entitled to deduct interest on his investment in the absence of any provision in the contract for such deduction.—Morrow v. Murphy, 120 Mich. 204.

¶ 49. In fixing the estimate of the profits of a business for the purpose of compliance with a contract giving the manager a share of the profits for the year, actions in tort, pending against the employer, the damages being unliquidated, cannot be considered, there being no amount which can be deducted in fixing the profits.—Morrow v. Murphy, 120 Mich. 204.

¶ 50. Plaintiff made an agreement of employment with defendants by which he was to buy and sell horses and receive 33⅓% of the net profits. Defendants were to furnish the capital and pay his expenses. Plaintiff was not to be a partner and was not to be liable for any portion of the losses. Settlements and balances were to be paid to plaintiff quarterly. Held, plaintiff was not entitled to his 33⅓% at the end of the quarter for the conclusion of sales where promissory notes were given in payment, but was only entitled to recover as the notes were paid and capital, expenses and losses deducted.—Crawford v. Calkins, 170 Mich. 587.

¶ 51. A contract between a firm and a traveling salesman provided that the salesman should enter upon his duties for the term of one year from the date of the contract, for the sale of $40,000 worth of goods; that he should receive $800 and his traveling expenses; that all mail orders received from his territory should be credited to his sales account; that he should receive, in addition to said salary, 1 per cent on all goods in excess of $40,000 sold by him, and shipped and paid for; that if, at the end of the year, his sales should fall short of $40,000, 2 per cent on the deficiency should be deducted from his salary. Held, that the contract does not provide for monthly payments; that, in view of the fact that money was asked and furnished at intervals, the most reasonable construction is that the salesman was to be paid from time to time on the basis of goods sold and shipped, but not beyond the rate of $800 per annum and traveling expenses.—Reynolds v. Reeder, 104 Mich. 265.

¶ 52. Under a contract of employment of a salesman providing for commissions of 7 per cent on all sales and a drawing account of $100 per month, traveling expenses, and drawings to be deducted before payment of commission, the words "drawing account" are held to imply a guaranty of commission with no obligation to repay the amount so drawn. —Christopher v. Hechheimer, 127 Mich. 451.

¶ 53. The term "drawing account" as used in a contract of employment of a traveling salesman is not understood by persons not familiar with the trade and it is proper to introduce testimony as to its meaning.— Christopher v. Hechheimer, 127 Mich. 451.

¶ 54. Under an apprenticeship contract where a per diem bonus is provided for payable at the end of the term and the apprentice is discharged, no recovery can be had for such bonus, since such provision cannot be considered as a part of the agreed wages, but only as a reward in the event the apprentice stays for the full term.—Lepan v. MacKinnon Boiler & Machine Co., 178 Mich. 18.

§ 12. ——Changes, increases, and reductions.

Evidence as to change of salary, see post ¶ 110.

¶ 55. Where, by reason of the change of work of a mechanic to that requiring increased skill, he is promised an indefinite increase of wages, he is entitled to have the new rate fixed, and if he receives an increased sum for months, without fraud or deception on his part, defendant cannot, on the ground of an alleged mistake in such payment, prevent a recovery by the mechanic at the increased rate.—Kennedy v. Murphy Iron Works, 91 Mich. 500.

¶ 56. Where a master notifies his servant that he will hereafter pay him less, and the servant continues work without notifying his master that he will claim more, it constitutes a new arrangement.—Spicer v. Earl, 41 Mich. 191.

¶ 57. Under a contract of employment to saw logs or to do whatever else he was directed to do, pursuant to which the employee acted as engineer when it was ascertained that there was no engineer at hand, the parties were bound by their own construction of the contract to the effect that services as engineer were not included, and that there-

fore a higher rate of wages should be paid than provided.—Wilson v. Godkin, 136 Mich. 106.

§ 13. ——Extra services, overtime and deductions.

Deductions under profit sharing agreements, see also ante § 11.

¶ 58. The existence of an express contract for hire for one year, at a stated weekly compensation, excludes any implied agreement or understanding about wages, and the contract price cannot be increased without a further agreement to that effect between the parties. So held when the employee under such a contract, after the expiration of the year, sought to recover for extra work, and double compensation for two weeks allowed to him for a vacation, but of which he did not avail himself.—Schurr v. Savigny, 85 Mich. 144.

¶ 59. One who has contracted with knowledge of, and with reference to, the invariable custom and rule of his employer that its employees shall work for the sum agreed upon as one day's pay, as many hours as its convenience or business demands, and who knew that the authority of his employer's officers to employ men was limited to so much per day, regardless of the number of hours worked, cannot recover for work beyond ten hours per day under Laws of 1885, Act No. 137, making ten hours a legal day's work in factories, etc.—Bartlett v. Grand Rapids Street R. Co., 82 Mich. 658.

¶ 60. All claims for extra time and not merely that within the final pay-roll period are covered by a receipt read to and assented to by an employee, when quitting its service, which receipt acknowledged payment of the amount specified "in full of all demands for work done during the regular and irregular working hours in the service of said company [defendant] up to and including the date of this pay-roll."—Bartlett v. Grand Rapids Street R. Co., 82 Mich. 658.

¶ 61. An employee who works for a company for about four years, being paid weekly for his services, and who gives receipts in full for the wages paid him, is estopped to claim that he was entitled to compensation for overtime, especially where he makes no claim for such additional compensation until nearly four months after he has left the employ, at which time he rendered a statement of overtime of employees under him but said nothing of his own claim.—Davis v. Detroit Boat Works, 121 Mich. 261.

¶ 62. A foreman in a freight yard of a railroad company cannot receive pay for overtime for work performed on Sundays where it appears that the work was not one of necessity but could as well have been performed on Monday by the employment of more help by the employee.—Bidwell v. Grand Trunk W. R. Co., 148 Mich. 524.

¶ 63. One who keeps a boarding-house for 57 months, presenting an account each month and receiving her pay therefor, is estopped to maintain a claim, after leaving the work, for services for attending a telephone which was kept at the boarding house for the use of the defendant company, the plaintiff, and the boarders, and for which she made no claim while in the defendant's employ.—Lachine v. Manistique R. Co., 126 Mich. 519.

¶ 64. Deductions for an employee's use of time that does not belong to his employer cannot be made from his compensation.—Geiger v. Harris, 19 Mich. 209; People ex rel. Benoit v. Miller, 24 Mich. 458.

¶ 65. A servant may recover under the common counts in assumpsit for the value of services performed under a contract with defendant, subject to a deduction where he leaves the service before the stipulated time.—Williams v. Crane, 153 Mich. 89.

¶ 66. A servant agreed to manage defendant's farm as tenant. Later they agreed to change the relation to that of master and servant, and that the relation should relate back to the beginning of the tenancy. Before the altered relations, the servant had received money for work done for others after the tenancy began, but defendant did not lose anything through his absence while doing this work. Held, in an action by the servant to recover the value of his services, that defendant was not entitled to be credited for such money, but that he could not be charged with plaintiff's time while earning it.—Williams v. Crane, 153 Mich. 89.

§ 14. ——Perquisites and outside employment.

¶ 67. When an employee voluntarily quits the services of his employer, his right to occupy, by virtue of his employment and contract of hiring, a dwelling house of his employer immediately ceases.—Lane v. Au Sable Elec. Co., 181 Mich. 26.

¶ 68. A person employed to manage the general store of a quarry company is entitled to his commissions as postmaster, although the quarry company may have been influential in securing his appointment, furnished a place in which to keep the office, and provided light, heat and occasionally help.—Bailey v. Sibley Quarry Co., 166 Mich. 321.

§ 15. ——Provisions for retention of compensation.

¶ 69. A provision for the retention of six days' pay until the completion of the contract of employment in question, was valid and was not for a penalty on the theory that the retention was intended to cover different breaches varying in importance, thus raising the presumption that it was not intended as furnishing compensation.—Wilson v. Godkin, 136 Mich. 106.

§ 16. Accounting and reimbursement.

Actions for wages, see post § 26.
General law of equity, see Equity.
General law as to accounting, see Accounting Suits.
Sufficiency of jurisdictional allegations in bill for accounting in equity, see also Equity § 83.

¶ 70. A traveling salesman whose contract of employment secures him his traveling expenses is entitled to reimbursement for the expenses of necessary trips to headquarters and of hotel bills while there.—Lamb v. Henderson, 63 Mich. 302.

¶ 71. Where a bill for an accounting alleges an agreement between a mother and her son whereby the son and his wife were to labor on the farm and to receive a certain wage, that the son appropriated the profits of the farm, and that a fiduciary relation existed between the parties, it is sufficient to warrant the interference of equity.—Graham v. Graham, 171 Mich. 307.

¶ 72. Grounds for equitable relief are disclosed by a bill of complaint alleging in substance a contract between the complainant and the defendant whereby the former was to receive a percentage of the profits of a business for a term of three years, the fraudulent concealment of profits by the defendant, and the practice of fraud to reduce them to the complainant's detriment, and praying for an accounting and discovery.—Reid v. Heater, 184 Mich. 184.

§ 17. Discharge, dismissal or breach of contract.

Rights and duties of master and servant, see ante § 8.
Actions for wrongful discharge, see post § 19.
Conditions precedent to action for discharge, see post ¶¶ 88, 89.
Burden of proof as to discharge, see post § 20.
Presumptions as to continuation of employment, see post §§ 20, 27.
Evidence to show grounds for discharge, see post §§ 21, 22.
Fitness of place to work as affecting right of apprentice to quit, see Apprentices ¶ 3.
Measure of damages for breach of contract for services, see Damages § 80.
Duty to seek other work to reduce damages, see Damages §§ 21, 80.

¶ 73. Employers cannot assume to final judges in their own behalf of the propriety of dismissing their employees during their term of employment, unless they also take the responsibility which attaches to dismissals without actual cause.—Jones v. Graham & Morton Transp. Co., 51 Mich. 539.

¶ 74. An employer has no arbitrary power to dismiss his employee for a disobedience to orders that involve no serious consequences and is not "wilful" in the sense of being perverse, insubordinate or unreasonable. Nor can disobedience be made a pretext for dismissal apart from the injury it causes. Whether even a menial or domestic servant can be dismissed for mere harmless disobedience, quære.—Shaver v. Ingham, 58 Mich. 649.

¶ 75. In contracts of employment dismissal is warranted by any act of the servant which is prejudicial, or likely to be prejudicial, to the interests of the employer.—Robinson v. Western U. Tel. Co., 169 Mich. 503.

¶ 76. A master or employer is justified in discharging his servant or employee for any breach of the express or implied conditions of the contract of employment.—Robinson v. Western U. Tel. Co., 169 Mich. 503.

¶ 77. The refusal of a street railway superintendent to obey the instructions of the president of the company, to whom the management of its affairs has been intrusted, constitutes a breach of his agreement to perform such duties as might be required of him by the company, and justifies his discharge.—Degen v. Manistee, F. C. & E. L. R. Co., 113 Mich. 66.

¶ 78. The fact that an engineer, after he had been discharged by the captain of a yacht and paid off, made an assault upon the captain which, had it occurred before his discharge, would have justified his dismissal, cannot be considered in an action by the engineer against the owner for breach of his contract of employment.—Gerardo v. Brush, 120 Mich. 405.

¶ 79. Where a bookkeeper, who is employed at a yearly salary, makes unauthorized overdrafts from his employer's money, of which he has the handling, the employer is authorized to discharge him before the end of the year, and demand repayment.—Smith v. Baker, 101 Mich. 155.

¶ 80. The words "I am very sorry to have to ask you to resign your position," in a letter from an employer to his employee, are properly construed as a peremptory discharge.—Jones v. Graham & Morton Transp. Co., 51 Mich. 539.

¶ 81. A letter to plaintiff from defendant, informing him of pending negotiations which, if they went through, would enable the latter to retire certain loans, and relieve plaintiff of liability on endorsements, in which event plaintiff's services would be no longer needed, and would mean the termination of his "service contract" and asking "an expression concerning same" from him, plaintiff replying that he would resign when the loans were fully paid and he was relieved of liability on his indorsements, and repaid the amount of his investment made as consideration of the

contract, does not indicate a discharge of plaintiff.—Hinchman v. Matheson Motor Car Co., 151 Mich. 214.

¶ 82. An employee who is hired by two corporations under a single contract is discharged from both corporations by letters written on the letterhead of one corporation, one signed by the secretary and one signed by the president of both corporations, and both making it clear that he is discharged from "the company" without indicating which company, where the letters were in reply to a written claim for back salary made and addressed to both companies and both letters computed the entire salary due from both companies.—Schaub v. Welded-Barrel Co., 125 Mich. 591.

¶ 83. A levy of execution upon stock and and business of an employer, and a sale by the sheriff do not justify an employee in treating the contract as abrogated, or assuming that the employer cannot carry out its contract.—Nash v. H. R. Gladding Co., 118 Mich. 529.

§ 18. ——Life contracts and "satisfaction" contracts.

Settlement of claim as consideration for life or term employment, see Contracts § 115.
Mutuality of agreement for life employment in consideration of settlement of claims, see Contracts § 2, ¶ 9.
Measure of damages for breach of contract of employment for life, see Damages § 81.

¶ 84. An agreement to employ the plaintiff "so long as his services and conduct are satisfactory" is terminable by the employer whenever in his opinion the services are not to his entire satisfaction and the reasons for or the justice of the defendant's dissatisfaction cannot be inquired into.—Sax v. Detroit, G. H. & M. R. Co., 125 Mich. 252.

¶ 85. Under an agreement to employ the plaintiff "so long as his services and conduct are satisfactory" where it affirmatively appears that the plaintiff was not laid off because of dissatisfaction, a failure to re-employ him is a breach of the contract.—Sax v. Detroit, G. H. & M. R. Co., 125 Mich. 252.

¶ 86. Where a person contracts to enter into service "subject to the general control and satisfaction" of his employer, the latter is the sole judge, and courts will not inquire into the reasonableness or justice of his discharging such servant on the ground of dissatisfaction.—Schmand v. Jandorf, 175 Mich. 88.

¶ 87. Under a contract with defendant railroad company entitling an injured employee to employment at a fixed monthly salary during his life, or during his ability and disposition to perform the duties pertaining to said employment, he is subject to discharge and forfeits his rights if he becomes incompetent, unfaithful, or disobedient.—Brighton v. Lake Shore & M. S. R. Co., 103 Mich. 420.

§ 19. Right of action and remedy for wrongful discharge.

Grounds for discharge or dismissal, see ante § 17.
Amount of damages for discharge or breach of contract, see post § 25.
Actions for wages, see post § 26.
Pleading condition on which employment was to continue, see also Contracts ¶ 1179.
Amendments of pleadings, see Pleading, VI.

¶ 88. A vessel captain who has been peremptorily discharged by the owner of the vessel for unfitness is not bound to offer to resume command before leaving and beginning suit against the owner on the contract of employment between them. He owes defendant no further duty than to use reasonable diligence to obtain other employment.—Jones v. Graham & Morton Transp. Co., 51 Mich. 539.

¶ 89. An engineer of a yacht, claiming to have been hired for the season, who is dismissed at the end of a month by the captain on the theory that he was employed from month to month, is not precluded from insisting upon damages for breach of the contract by the fact that he did not hunt up the owner and inform him of his dismissal.—Gerardo v. Brush, 120 Mich. 405.

¶ 90. In an action for breach of contract to employ where the plaintiff was discharged by the employer, under the right to terminate the contract at any time, the plaintiff may treat the contract as performed by him if in fact he has actually performed up to the time of discharge.—Pungs v. American Brake-Beam Co., 128 Mich. 318.

¶ 91. Assumpsit on a contract of employment, where the declaration sets forth the contract in full,—that plaintiff entered upon his duties, that he was paid to a certain time, that he was at all times prepared and ready to continue to discharge the duties of his employment,—and refusal of defendant to pay, is the proper form of action to recover, where plaintiff has been discharged before the expiration of the contract.—Hinchman v. Matheson Motor Car Co., 151 Mich. 214.

¶ 92. Where a servant is dismissed before the period of service contracted for, a suit in which the bill of particulars alleges that damage is claimed for what plaintiff would have earned if allowed to complete the contract, is a suit for damages and not for wages, and defendant is not misled.—Webb v. Depew, 152 Mich. 698.

¶ 93. In an action for the value of services rendered under a special contract the

defendant may show the unsatisfactory nature of the services without a plea of recoupment.—Pungs v. American Brake-Beam Co., 128 Mich. 318.

¶ 94. In an action on a special contract of employment by an employee discharged for non-performance the defendant may show the unsatisfactory nature of the services rendered by way of defense without a plea of recoupment notwithstanding the defendant reserved the right to terminate the employment at any time.—Pungs v. American Brake-Beam Co., 128 Mich. 318.

§ 20. ——Presumptions and burden of proof.

Presumptions and burden of proof in actions for wages, see post § 27.
Presumptions and burden of proof in actions by servant for injury, see post §§ 62, 63.
General law as to presumptions and burden of proof, see Evidence, II.
Burden of proof that servant might have had other employment in reduction of damages, see Damages § 291.

¶ 95. Where, under a contract for a year's service, the employee has gone on from year to year, and at the end of a year is allowed to go on without objection, a presumption arises which in an action for wrongful discharge will warrant a jury in finding that the parties to the contract have assented to its continuing in force for another year.—Sines v. Wayne County Poor Superintendents, 58 Mich. 503, 55 Mich. 383.

¶ 96. Where under a contract for a year's services the employee at the end of the year is allowed to continue at work without objection, a presumption arises warranting the jury in finding that the parties to the contract had assented to its being continued in force for another year.—Reynick v. Allington & Curtis Mfg. Co., 179 Mich. 630.

¶ 97. A plaintiff who was personally employed by defendant is bound, in an action for wages claimed to be due for the period after an alleged wrongful dismissal, to show actual authority from defendant to the person assuming to discharge him, or actual knowledge and approval of his discharge; and he was bound to see that defendant had knowledge that he refused to acquiesce in his discharge, and that he proposed to hold himself ready at all times to resume his labor.—Collins v. Hazelton, 65 Mich. 220.

¶ 98. In an action for a wrongful discharge from employment, the burden of showing good and sufficient cause for such discharge rests upon defendant, after plaintiff has proved the contract, and its performance by him up to the time of his dismissal; Milligan v. Sligh Furniture Co., 111 Mich. 629.

¶ 99. In assumpsit on a contract of employment, the burden of proof rests on defendant to show sufficient cause for plaintiff's discharge from its employment.—Hinchman v. Matheson Motor Car Co., 151 Mich. 214.

§ 21. ——Admissibility of evidence.

Matters justifying discharge or dismissal, see ante § 17.
Issues and variance, see ante § 19.
Admissibility of evidence in actions for wages, see post § 28.
Evidence in actions for injury to servant, see post § 64.
Evidence in actions by third persons against master, see post § 79.
General law of evidence, see Evidence.
Admissibility of evidence as to parties to contract, see Contracts §§ 310, 311.

¶ 100. In an action to recover a balance of salary after wrongful discharge, evidence of an initial hiring for one year and a new arrangement from year to year is competent to show the existence of a year's contract at the time of discharge.—Wright v. Elk Rapids Iron Co., 129 Mich. 543.

¶ 101. Proof of the actual fitness of an employee who has been discharged is proper in an action by him on the contract of employment.—Jones v. Graham & Morton Transp. Co., 51 Mich. 539.

¶ 102. Where a salesman receives a fixed sum for traveling expenses, and a salary dependent upon the amount of his sales, it is admissible, when he sues upon his contract of employment, to show his lack of diligence in reduction or bar of damages.—Alberts v. Stearns, 50 Mich. 349.

¶ 103. In an action for wrongful discharge from service defendant may show the amount of goods sold by plaintiff, and that they were sold contrary to instructions, that he sold scarcely any goods, that he might have sold large quantities, and that his work was not done according to agreement and was by reason thereof worthless.—Child v. Detroit Mfg. Co., 72 Mich. 623.

¶ 104. In suit for damages for wrongful discharge from service under a contract whereby plaintiff was to give his exclusive time and services to defendant in consideration of a certain salary, defendant may show on cross-examination of plaintiff that when plaintiff was employed he made false representations to defendant, that he refused to obey instructions, that he did not perform defendant's work as he promised, that he did not work enough to earn his salary, and that he received pay from other parties while in defendant's employ.—Child v. Detroit Mfg. Co., 72 Mich. 623.

¶ 105. Plaintiff, claiming to have been wrongfully dismissed from service before an alleged yearly term was up, sued for wages due for the period after the dismissal. It

appearing that pay had always been balanced monthly, it was error to exclude a question to plaintiff whether he had ever asked for any pay for such period after dismissal.—Collins v. Hazelton, 65 Mich. 220.

¶ 106. In an action by one who, having been employed as a fur-cutter, was discharged for incompetency, evidence that defendants employed the same fur-cutters while plaintiff was with them as before, and that the work was good before they hired plaintiff, does not tend to show his incompetency, and is inadmissible.—Koehler v. Buhl, 94 Mich. 496.

¶ 107. While the discharge of a traveling salesman may be justified by his failure to obey instructions with reference to places to be visited and the manner of making sales, a disregard of instructions in these particulars cannot be inferred from the fact that the sales did not fulfil the expectations of his employer, and evidence to that effect should be excluded in an action by him for a wrongful discharge.—Milligan v. Sligh Furniture Co., 111 Mich. 629.

¶ 108. Under a contract of apprenticeship where wrongful discharge is claimed, the superintendent's evidence that according to his observations the apprentice was not working faithfully is admissible on the question of proper cause for the discharge.—Lepan v. MacKinnon Boiler & Machine Co., 178 Mich. 18.

¶ 109. In an action for wrongful discharge of an apprentice, the foreman's evidence as to a general custom of putting apprentices at other work than the trade they were learning, and the benefit to be derived therefrom, held improperly excluded.—Lepan v. MacKinnon Boiler & Machine Co., 178 Mich. 18.

§ 22. ——Weight and sufficiency of evidence.

As to what amounts to a discharge, see also ante § 17.

¶ 110. That an employer agreed to increase an employee's salary from a future date to a fixed sum per year does not establish a contract of hiring for a year from such date.—Donnelly v. Michigan Malleable Iron Co., 181 Mich. 333.

¶ 111. A leave of absence and not a discharge is shown by evidence that a lumber measurer, asking permission to go away for a few days and offering to provide a substitute, was told that in view of a customer's dissatisfaction with measurements he might go, that he was paid up to that time and did go and never returned, it being disputed whether he went away conditionally on being back by a certain time or on condition that he would be called by telegraph when needed.—Pinet v. Montague, 103 Mich. 516.

¶ 112. In an action by an emancipated minor against a husband and wife for damages for breach of a contract to furnish plaintiff shelter, food, clothing and education in consideration of the performance of personal services, evidence held sufficient to sustain a finding that plaintiff was not in default for not returning after being notified not to return by the wife.—Fox v. Schumann, 191 Mich. 331.

¶ 113. In an action by an insurance agent against the insurance company to recover renewal commissions as provided by his contract, and to which he would have been entitled if he had resigned and had not been discharged, letters in evidence written by the plaintiff to the officers and agents of defendant, criticizing the policy and methods of business of the company, construed as not having been written in a spirit of insubordination but rather with a desire to ascertain the truth and condition of the company and protect if possible the plaintiff's legitimate interests, so as to not constitute just ground for dismissal.—Kyselka v. Northern Assur. Co. of Michigan, 194 Mich. 430.

§ 23. ——Questions of law and fact.

In actions for wages, see post § 30.
In actions for injury to servant, see post § 67 et seq.
In actions by third persons against master, see post § 80.
General law as to questions of law and fact, see Trial, VI.

¶ 114. It is for the jury to say whether the employee's conduct was so unreasonable or insubordinate as to justify the master in dismissing him.—Shaver v. Ingham, 58 Mich. 649.

¶ 115. The question as to whether an employee (a general superintendent) was guilty of such insubordination as to justify his discharge where he used disrespectful language to the president, but where the latter used provocative language, considering that such employee occupied a position of great responsibility, is for the jury in an action for the breach of a contract of employment.—Schaub v. Arc Welding Co., 123 Mich. 487.

¶ 116. In an action on a contract of hire the question was whether the period of employment was by the year or by the month. The contract itself stated that the one party agreed to pay the other a specified sum "per year, payable in monthly payments." Payments were in fact made monthly, but in the course of the third year of employment the employee was discharged. Toward the close of the second year he had asked his employer if he was satisfied and the latter had said that he was. Held, that these facts were for the jury, who were to determine what the understanding of the parties was as to the period of hire.—Tallon v. Grand Portage Copper Min. Co., 55 Mich. 147.

¶ 117. Where, by a resolution of the board of trustees of a school district, the lowest bidder for the janitorship of its school building is employed for such time as he shall faithfully perform the duties of the position to the satisfaction of the board, and no longer, and, after a year's trial, he is re-employed from year to year at an annual salary, it cannot be assumed, as matter of law, that the parties understood that the board, with each re-employment, reserved the right to terminate the contract of hiring at will.—Laughlin v. Jackson City School Dist. No. 17, 98 Mich. 523.

¶ 118. Acceptance for fifteen years of a reduced salary by one to whom another has agreed to furnish employment for life at a fixed monthly salary is evidence of a waiver of his right to the agreed salary for such period, and, if unexplained, amounts in law to such waiver.—Brighton v. Lake Shore & M. S. R. Co., 103 Mich. 420.

¶ 119. The action of traveling salesman in leaving his designated route on Saturday night, to spend Sunday with his family, does not, as a matter of law, constitute a breach of the employment contract justifying his discharge; especially if it does not appear but that he returned to his route in time to comply with his contract.—Milligan v. Sligh Furniture Co., 111 Mich. 629.

¶ 120. The mere planning by an employee during his contract of employment to engage, after the expiration thereof, in a competing business, does not justify his discharge as a matter of law.—Meyers v. Roger J. Sullivan Co., 166 Mich. 193.

¶ 121. Where, in a suit to recover the balance of salary alleged to be due under a contract of hiring by the year, there is a sharp conflict of testimony upon the question whether plaintiff consented to the termination of the contract, said question is properly left to the jury.—Bailey v. Sibley Quarry Co., 169 Mich. 227.

¶ 122. In an action to recover for the balance due on a contract of employment the question as to whether the plaintiff was rightfully discharged for insubordination was for the jury. Lengthy instructions given on this point were held proper.—Ernst v. Grand Rapids Engraving Co., 173 Mich. 254.

¶ 123. Plaintiff contended that after having been hired by defendant corporation by the month he informed the board of directors that he must be assured employment for a year, to which they assented, but no formal record was made and he thereafter continued to work for nearly a year and a half, while defendant's officers denied an employment from year to year contending that plaintiff was to be employed as long as his services were satisfactory. It was held that the evidence presented a question for the jury.—Reynick v. Allington & Curtis Mfg. Co., 179 Mich. 630.

¶ 124. Plaintiff contracted to work as manager and buyer for defendant for a period of two years. During about the first six months of his employment he planned to organize and engage in a competing business, such business not to begin until the expiration of his contract with defendant. Defendant knew of his plans and expressed approval of the services being rendered by him. In a suit for breach of the contract for discharging plaintiff, held the trial court erred in directing a verdict for defendant on the ground that his conduct amounted, as a matter of law, to a breach of his contract.—Meyers v. Roger J. Sullivan Co., 166 Mich. 193.

§ 24. ——Instructions.

In actions for wages of servant, see post § 31.

In actions for injury to servant, see post § 71 et seq.

In actions by third persons against master, see post § 81.

General law of instructions, see Instructions.

¶ 125. In an action on a contract of hire a request to charge that if plaintiff had secured other employment, at lower wages, and had abandoned it, he could only recover the difference between the amount sued for and the amount he would have earned under the later employment, is sufficiently covered by the instruction that he is bound to obtain other employment if he can, and that what he would earn at it must be deducted from the amount of his recovery, even if he had relinquished such other employment.—Champlain v. Detroit Stamping Co., 68 Mich. 238.

¶ 126. A charge "whether he hired him for another year or not, I will not say; but it is for you to say exactly the language that the plaintiff used as to the time," and "if you believe from all the evidence * * * that it was on June 1 that the parties had this conversation, then the plaintiff is to recover," construed as a whole, submitted fairly to the jury the question of plaintiff's alleged hiring, and the date thereof; where it was claimed by plaintiff, in an action for breach of contract of hiring, that after receiving notice that his services would not be needed at the close of his fiscal year, he was engaged by defendant for another year, but where defendant claimed the second contract of hiring was until the end of the calendar year, only.—Thompson v. Detroit & L. S. Copper Co., 80 Mich. 422.

¶ 127. In an action by an employee hired for a term under an agreement to do satisfactory work and afterwards discharged for incompetency, an instruction that if the employers became aware of his incompetency it was their duty to make it known to him within a reasonable time is erroneous; such

a rule would require an employer to take advantage of the first infraction of the contract, and, if he did not do so, would make an incompetent workman secure in his employment.—Koehler v. Buhl, 94 Mich. 496.

¶ 128. In an action to recover salary for five months under a contract for a year where the plaintiff was discharged for violation of the contract with one month and four days owing, it is error in the absence of a claim for recoupment for damages occasioned by the breach of the contract, to instruct the jury that the plaintiff is not entitled to recover for his services up to the time of the discharge, and to direct a verdict for defendant, as the retention in service was some evidence of the plaintiff's right to salary.—Pungs v. American Brake-Beam Co., 124 Mich. 344.

¶ 129. In an action to recover a balance of salary after wrongful discharge, an instruction that if the plaintiff applied for a letter of recommendation leading the defendant to believe he was accepting his discharge, he could not recover, is properly modified by adding that if the plaintiff gave notice that he claimed under a contract by the year and intended to enforce it he was entitled to recover.—Wright v. Elk Rapids Iron Co., 129 Mich. 543.

¶ 130. In an action for breach of a contract of employment by a dismissal an instruction interpreting testimony to the effect that the contract was terminable on thirty days' notice is prejudicial error where the instruction was not supported by the evidence.—McDonald v. Ideal Mfg. Co., 143 Mich. 17.

§ 25. ——Verdict and amount of recovery.

Measure of damages for breach of contract for services, see Damages § 80.

Forfeiture of accrued wages as liquidated damages for breach, see Damages § 185.

Adequacy and excessiveness of award for breach of contract of employment for life, see Damages § 222.

¶ 131. In a suit for damages for breach of a contract of service for a given period, the plaintiff is not limited to an assessment of damages up to date of trial, but is entitled to damages for the whole period.—Webb v. Depew, 152 Mich. 698.

¶ 132. One who is under a contract of employment for a year and whose engagement is practically terminated by his employer within that period is entitled to such damages as will make him good for the loss of his situation, if he has fully performed his obligation and stands ready to continue to do so.—Alberts v. Stearns, 50 Mich. 349.

¶ 133. A party who is prevented from performing a contract involving his personal services by the wrongful act of the other party can recover what his time was worth while attempting to perform it, and his reasonable expenses.—Cadman v. Markle, 76 Mich. 448.

¶ 134. Where plaintiff, employed under a two year contract as manager and buyer, was wrongfully discharged by the defendant, he is entitled to recover up to the date of his discharge for his share of the net profits of the business, such percentage being granted to him as a part of his compensation under the terms of the contract.—Meyers v. Roger J. Sullivan Co., 166 Mich. 193.

§ 26. Actions for wages.

Amendment of pleadings, see Pleading, VI.

Right to and amount of wages or compensation, see ante § 10.

Actions for wrongful discharge, see ante § 19.

Suit to recover what plaintiff would have earned after discharge as one for damages rather than for wages, see ante ¶ 92.

Accounting and reimbursement, see ante § 16.

Necessity of notice or special plea to set up defense of fraud, see Fraud § 98; and see also Pleading, IX.

Necessity of demand for property to be rendered in compensation, see also Contracts ¶ 960.

Actions by corporate officers for salary, see also Corporations § 180.

Adjustment of dispute over wages due by accord and satisfaction, see Accord and Satisfaction.

Common assumpsit for services, see also Assumpsit, II.

Recovery for services rendered under contract within statute of frauds, see Frauds, Statute of, § 126.

Limitations of actions for work and labor or on express contracts for service, see Limitations §§ 57, 58.

Limitations of actions for services extended over long period, see Limitations § 58.

¶ 135. Where an express oral contract of employment for three years is declared upon and relied on, no recovery can be had on the theory that the contract was a hiring for a year, and that when the parties entered upon a new year by the payment and acceptance of the salary, a new contract was made for another year.—Smith v. Chase & Baker Piano Mfg. Co., 175 Mich. 371.

¶ 135a. An action will lie on the common counts for wages fairly earned by past services already rendered under an express agreement of which the defendant has prevented the full performance.—Mitchell v. Scott, 41 Mich. 108.

¶ 136. A fatal variance is not made out by a declaration alleging a contract of employment for $120 per month, a bill of particulars for 8 months at $90 per month, and evi-

dence tending to show a hiring at "the going wage" which was at $100 to $120 per month. —De Land v. Hall, 134 Mich. 381.

¶ 137. Where plaintiff sues a corporate employer for services rendered at a monthly salary claimed by him under an alleged agreement for the same amount as he was to receive from defendant's predecessor for whom he had worked before employment by defendant, the amount under such prior employment being, however, disputed, he cannot show such prior employment and its terms, as a collateral issue would thus be raised. —Ganther v. James Jenks & Co., 76 Mich. 510.

§ 27. ——Presumptions and burden of proof.

In actions for wrongful discharge, see ante § 20.
Presumption as to re-employment, see also post ¶ 157.
In actions for injury to servant, see post §§ 62, 68.
General law as to burden of proof and presumptions, see Evidence, II.

¶ 138. Where one who has been employed at a specified salary per month is engaged for another year without anything being said as to wages, they will be presumed to continue at the old rate.—Thompson v. Detroit & L. S. Copper Co., 80 Mich. 422.

¶ 139. Where a contract of employment runs from February 9, 1909, to December 31, 1909, no presumption of renewal for another year on the same terms arises by reason of continuance in the same service after the expiration of said contract.—White v. United States Gypsum Co., 168 Mich. 238.

¶ 140. Retention in service is proof of the servant's right to wages until something is shown to the contrary, and the burden is not on him to prove that he has done everything incumbent on him, but is on the master to prove otherwise.—Bolt v. Frederick, 56 Mich. 20.

¶ 141. Where an employee, after his term of hiring expires, renders service of a different character for his former employer, it raises no presumption that his former contract is renewed.—White v. United States Gypsum Co., 168 Mich. 238.

¶ 142. In an action by a servant to recover the value of services performed for, and accepted by, defendant, the burden of proving his fidelity is not upon the servant, but the defendant must prove the contrary. —Williams v. Crane, 153 Mich. 89.

¶ 143. In an action to recover commissions claimed to have been earned under a contract of employment, the burden of proving items pleaded as a set-off is upon defendant.—Muir v. Kalamazoo Corset Co., 155 Mich. 441.

§ 28. ——Admissibility of evidence.

In actions for wrongful discharge, see ante § 21.
General law of evidence, see Evidence.
Admissibility of evidence as to parties to contract, see Contracts §§ 310, 311.
Res inter alios evidence as to expenses, comparison with others, see Evidence § 97.
Qualifications of experts as to value of services, see Evidence § 288.
Res gestæ of the contract, see also Evidence §§ 457, 458.
Evidence in assumpsit for reasonable worth, see also Assumpsit § 62.

¶ 144. In an action by a father to recover on the common counts for his minor son's services in peddling beer, it appeared that the son undertook to answer for any beer he should carry out and for which he should fail to bring back tickets or cash. Held, that defendant could show that defendant was dishonest and embezzled more than the amount of his unpaid wages. This would tend to show the reasonable value of the service and that it was not of value but positively injurious.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 145. The actual value of services may be shown in an action on a contract of employment where there is a direct conflict of evidence as to the agreed rate of payment. —Richardson v. McGoldrick, 43 Mich. 476.

¶ 146. Where a company contracts to pay an employee "the same wages as shall be paid to other men in the employ of the company filling similar positions," and the laborer sues for compensation, and there is no showing that the company had other employees in similar positions, the plaintiff is entitled to prove what his services were worth.—Kent Furniture Mfg. Co. v. Ransom, 46 Mich. 416.

¶ 147. In an action of assumpsit upon the common counts, where plaintiff testified that he performed work and labor for defendant, it was held proper to ask him how much his services were worth.—McDonald v. McDonald, 67 Mich. 122.

¶ 148. Where the issue is whether plaintiff was hired at the same compensation as he received from a former employer, the individual predecessor of defendant, questions calling for evidence regarding the business of the former employer, and the skill and service of the plaintiff while in his employ, and what would be a low average rate of wages for the class of work then done, are properly excluded, the proper inquiry being as to the services performed for defendant, and their value.—Ganther v. James Jenks & Co., 76 Mich. 510.

¶ 149. Where, in an action for wages, the general issue without notice of set-off is

pleaded, and there is no evidence that plaintiff's board was to be deducted from his wages, he cannot be asked on cross-examination questions intended to draw out that his board was paid by the defendant.—O'Hara v. Mernan, 79 Mich. 222.

¶ 150. Where plaintiff sues for services as a salesman in a carriage repository, and defendants deny all liability and any contract of employment whatever, it is proper to refuse to allow them to testify what wages they are paying to men in their livery barn. —Williams v. Williams, 82 Mich. 449.

¶ 151. Where one who has been succeeded as an employer by his former manager is sued by an employee for wages accruing after the change of employers, plaintiff alleging want of notice of the change, it is admissible to show the method of paying the men prior to the date of the change as well as after.—Tousignant v. Shafer Iron Co., 96 Mich. 87.

¶ 152. Where an express contract to pay for working overtime as engineer is alleged by plaintiff but denied by defendant, evidence by defendant to show what the custom is in other similar establishments is inadmissible.—Benedict v. Michigan Beef & Provision Co., 115 Mich. 527.

¶ 153. Testimony of an employee as to his willingness to carry out a contract of employment is properly excluded in an action for a balance due on the contract where it is shown that he quit and not shown that such willingness was expressed to the employer.—Nash v. H. R. Gladding Co., 118 Mich. 529.

¶ 154. Where the bookkeeper of a corporation performed certain services for the president of the corporation, evidence as to the manner in which the services for the corporation were performed is inadmissible in an action by the bookkeeper against the president for the personal services, there being no question made by either party that the contract with the corporation had been performed, and that plaintiff had received his pay therefor.—Fox v. Bialy, 151 Mich. 106.

¶ 155. Where, in an action by a servant to recover the value of services performed for defendant in conducting the latter's farm for the season, defendant testified that plaintiff's compensation was to depend upon the good results obtained, evidence of the gross income of the farm for that season was admissible.—Williams v. Crane, 153 Mich. 89.

¶ 156. Where, in an action for services, plaintiff admitted that he was discharging duties toward two other employers, for which he had brought suit, defendant is entitled to show, on cross-examination, the amount of the claim, and the character of the services for which he had sued.—Ruttle v. What Cheer Coal Min. Co., 153 Mich. 300.

§ 29. ——Weight and sufficiency of evidence.

Sufficiency of evidence showing promise to increase wages to support claim therefor, see Estates of Decedents ¶ 628.

¶ 157. Where the work under two successive employers was not continuous, there being a re-employment at the same work, after the change, of one who had ceased to work before the change took place, and where there is no evidence as to the nature of the re-employment except the new employer's testimony that after assuming control and relinquishing his agency he made no contracts in the old employer's name, the latter cannot be held liable in the absence of evidence to rebut the presumption that the re-employment was by his successor.—Tousignant v. Shafer Iron Co., 96 Mich. 87.

¶ 158. In an action to recover for services rendered a coal corporation, the only evidence as to the value of plaintiff's services was his own testimony that they were worth $5,000. Held, that such evidence was competent to support a recovery of $2,000, the services being of such character that it was practically impossible to value the separate items thereof as they were performed.—Ruttle v. What Cheer Coal Min. Co., 153 Mich. 300.

¶ 159. On September 1, 1908, plaintiff made a contract to work as salesman for defendant on commissions, for a period of three years. On February 9, 1909, said contract was canceled by mutual agreement and plaintiff signed another contract running from that date to December 31, 1909, on a salary basis. After December 31, 1909, plaintiff's contract was not definitely renewed, although he rendered some services for defendant at the request of an employee of defendant who was not authorized to hire salesmen. Held, the former three-year commission contract could have no effect as tending to show an implied renewal of the salary contract ending December 31, 1909.—White v. United States Gypsum Co., 168 Mich. 238.

¶ 160. In a suit to recover the balance of salary alleged to be due under a contract of hiring by the year, plaintiff testified that defendant offered him $1,000 a year in addition to house rent, heat and light for a year. He denied on cross-examination that he was to be paid at "the rate" of $1,000 a year, and stated that the number of years was not specified in the conversation with the defendant. Held, there was sufficient evidence to support a finding of the jury that the contract of hiring was by the year.—Bailey v. Sibley Quarry Co., 169 Mich. 227.

¶ 161. In an action against an estate to recover on an implied contract for services

rendered deceased evidence held sufficient to show that an express contract was made whereby claimant was to render such services in consideration of the furnishing to him of board and room.—Hollister v. Kinyon's Estate, 195 Mich. 261.

¶ 162. Evidence held insufficient to sustain a verdict in favor of plaintiff officer for services under the contract with defendant corporation.—Clark v. Onoway-Alpena Telephone Co., 196 Mich. 168.

¶ 163. In an action on a contract for wages earned, where the defendant did not so arrange or force matters that plaintiff was admitted to earn his salary, held that the result was the same as if defendant had denied plaintiff opportunity to perform the contract, and, even if the contract was for a fixed period, plaintiff could not recover wages as such by a showing that he stood ready to perform.—Wray v. Tilden Saw Co., 198 Mich. 461.

§ 30. ——Questions of law and fact.

In actions for injury to servant, see post § 67.

General law as to jury questions, see Trial, VI.

Direction of verdict on conflicting evidence, see also Directing Verdict ¶ 56.

¶ 164. Where there is some evidence tending to establish the claim of the plaintiff that defendant employed him, its weight and sufficiency are for the jury, and a verdict for plaintiff should not be directed.—Parrish v. Bradley, 73 Mich. 610.

¶ 165. Where the facts are undisputed, the question whether a contract for employment is made out or not is for the court.—Covel v. Turner, 74 Mich. 408.

¶ 166. In an action for compensation for work and labor, which action involves by neither pleadings nor evidence the theory of the plaintiff's having been deceived into contracting with one having apparent authority to act for the defendant, an actual authority must be proved in order to justify submission to the jury of the question whether the plaintiff was employed by the defendant to perform the labor sued for.—Swanstrom v. Muskegon Imp. Co., 91 Mich. 367.

¶ 167. Actual knowledge by the employee, however, acquired of the change of employers, releases the former employer; and where there is some evidence of such knowledge the question of notice or knowledge is for the jury in an action for wages against such employer.—Jones v. Shafer Iron Co., 96 Mich. 98.

¶ 168. Unless it can be said that the evidence offered by plaintiff wholly fails to show a right to recover, such right is, at least, a question of fact for the jury, upon the testimony.—Chamberlain v. Detroit Stove Works, 103 Mich. 124.

¶ 169. Whether or not the statement of an employer that the salary of an employee, who had previously been hired by the month, would have to be reduced to a stated sum "for the year," and the latter's assent to the reduction, created a new contract of employment for a year, is a proper question for the jury.—Graves v. Lyon Bros. & Co., 110 Mich. 670.

¶ 170. In an action for work and labor the fact of employment by the defendant is properly left to the jury on testimony that the plaintiff was employed by the president of the defendant's predecessor, that he worked for it, that he helped to secure its right of way, the deeds to which ran in the name of the defendant and its predecessor, and evidence of a pass issued by the defendant to the plaintiff as its "employee."—Martin v. Milwaukee, Benton Harbor & Columbus R. Co., 138 Mich. 155.

¶ 171. Where in an action for overtime the employee had each month signed a payroll reciting it was in full payment for the work performed by him, but it appeared that he had at different times called to the attention of defendant's agent who had employed him to the fact that he was not receiving pay for overtime but had been assured by the agent that he would be paid for such work, the question of waiver or estoppel by signing the payroll without protest was one for the jury.—Bidwell v. Grand Trunk W. R. Co., 148 Mich. 524.

¶ 172. In an action by an employee of a railroad to recover for overtime under a contract for a named sum as monthly salary, it being agreed he should have pay for overtime, where he signed a payroll containing the clause that the stipulated salary was "in full of all demands for work during the regular and irregular working hours, up to and including the date of this payroll," but it appeared from the evidence that he spoke to the agent who had employed him at various times about his overtime, and he was assured it would be paid him, it was for the jury to say whether he in fact understood he was receiving his full pay each month.—Bidwell v. Grand Trunk W. R. Co., 148 Mich. 524.

¶ 173. Plaintiff worked in the flouring mill of defendant, under an express contract for so much per week, for several years. He married defendant's daughter in February, 1901, and his wife and he boarded with defendant. In November, 1902, defendant opened an electric light plant and plaintiff did extra work there nights and continued to work there after his employment at the flouring mill ceased. Held, there was evidence to go to the jury of an implied con-

tract to pay plaintiff extra for the work in the electric light plant.—Middlebrook v. Slocum, 152 Mich. 286.

¶ 174. A servant engaged by defendant to manage his farm applied a portion of the proceeds upon his own claim for wages, presumably according to the intention of both parties, and failed to credit certain items to defendant until his attention was called to them. Held, this did not justify the court in saying, as a matter of law, that the servant was lacking in fidelity.—Williams v. Crane, 153 Mich. 89.

¶ 175. Plaintiff was employed by defendant as a salesman on a salary under a contract running from February 8, 1909, to December 31, 1909. On December 2, 1909, plaintiff wrote to defendant asking if his contract would be renewed, which letter was referred to one Fulton, defendant's sales manager. Plaintiff was advised that his letter had been referred to said Fulton. On December 12 and 27, 1909, plaintiff wrote letters to defendant requesting a reply to his letter of December 2. On December 30, 1909, one Booth, who had no authority to employ salesmen, requested plaintiff to examine and correct certain advertising matter. This and other services were performed by plaintiff in January, 1910. Defendant did not inform plaintiff until January 24, 1910, that his contract would not be renewed. Held, the dealings between the parties did not as a matter of law result in a renewal of the plaintiff's contract.—White v. United States Gypsum Co., 168 Mich. 238.

¶ 176. Plaintiff's testator was employed as a bookkeeper for defendant's father. Defendant and his father were interested in a corporation and plaintiff's testator kept the books of the corporation which was financially embarrassed. In a suit by plaintiff to recover of defendant for services in so keeping the books of said corporation, there was no direct evidence of a hiring of plaintiff's testator by the defendant. The testator sent defendant his bill for his services, which defendant returned with the remark that the testator had omitted to charge for drawing his breath and other active services, and that he should correct the bill and return it. Held, it was a question for the jury whether plaintiff's testator was or was not to do all the bookkeeping work in the office of defendant's father, including the work in question, without extra compensation.—McCain v. Smith, 172 Mich. 1.

¶ 177. Where the plaintiff's testimony showed that he supposed that he was hired for a definite period, and the negotiations showed that the plaintiff was seeking a permanent situation, that both parties understood that it might continue for a year, and that the compensation was fixed at a definite sum per annum, it was not error for the court to refuse to charge that there was no evidence of a hiring for a definite period, and that the verdict must be for the defendant.—Franklin Mining Co. v. Harris, 24 Mich. 115.

¶ 178. Upon the undisputed facts it was held that there was no agreement, express or implied, on defendant's part to pay plaintiff for help rendered around defendant's barn, and that a verdict was rightly directed for defendant.—Covel v. Turner, 74 Mich. 408.

¶ 179. A defense in an action against a corporation for services rendered, that plaintiff was under contract to render services for another corporation during the period in question, is not sufficient to demand a directed verdict for defendant where the other corporation involved does not raise the question, and plaintiff testifies that he had performed all of the services required by his first employer, and that its general manager authorized his employment by defendant.—Ruttle v. What Cheer Coal Min. Co., 153 Mich. 300.

¶ 180. Where in a suit to recover for services in installing an engine, the evidence of plaintiff and the admissions of defendant clearly indicated that services were rendered, and remain unpaid for, the dispute being as to the rate of wages, it is proper to refuse to direct a verdict for defendant.—Smith v. Hertz & Hosbach Co., 160 Mich. 431.

§ 31. ——Instructions.

In actions for wrongful discharge, see ante § 24.

In actions for injury to servant, see post § 71.

In actions by third persons against master, see post § 81.

General law of instructions, see Instructions.

¶ 181. In an action upon a contract of employment as a salesman at an annual salary of $800 upon an estimate of $15,000 worth of goods sold, it is error in charging the jury to assume without evidence that it was expected that the annual sales would reach $15,000, the parties themselves having practically construed the contract by making and receiving payments in the ratio of these sums on the amount of actual sales.—Alberts v. Stearns, 50 Mich. 349.

¶ 182. In an action on a contract of hire a request to charge that if plaintiff had secured other employment at lower wages, and had abandoned it, he could only recover the difference between the amount sued for and the amount he would have earned under the later employment, is sufficiently covered by the instruction that he is bound to obtain other employment if he can, and that what he would earn at it must be deducted

from the amount of his recovery, even if he had relinquished such other employment.—Champlain v. Detroit Stamping Co., 68 Mich. 238.

¶ 183. In an action by an employee in a grist-mill, suing for his compensation, where the evidence tends to show that the plaintiff received and used the tolls, but that the mill did little work, and that defendant knew when he employed plaintiff that the mill's earnings would be insufficient to pay for plaintiff's services, it is proper to refuse an instruction that plaintiff having received the entire proceeds of his labor, and defendant having received no benefit therefrom, the former cannot recover.—Bonner v. Runals, 76 Mich. 136.

¶ 184. Plaintiff sued defendant to recover for labor of himself and wife. He testified to an arrangement under which he took charge of defendant's farm, living in his house with him, and working on the farm, while his wife did the work in the house. He was to receive the same wages as the other men, and his wife was to be paid for the housekeeping. Defendant denied any such arrangement, and testified that plaintiff came to him and said that he was about to be married, and that he told plaintiff that if he was "going to marry any kind of a smartish girl" he could "fetch" her to defendant's house and that she could work for both of them and plaintiff could work on his own farm, and that he said he ought to know how smart she was, for they were raised together, and that no more was said. Held, that it was error to instruct the jury that if they found defendant's version of the talk to be correct they should say what that talk meant; since under defendant's version he was entitled to a verdict.—Alderton v. Wright, 81 Mich. 294.

¶ 185. Where a person contracts to do work to the satisfaction of his employer, the latter is the judge, and the question of the reasonableness of his judgment is not for the jury; and instructions which, in effect, give the jury to understand that if the employee is a competent workman he can recover his wages whether he does good work or not is erroneous.—Koehler v. Buhl, 94 Mich. 496.

¶ 186. Where the charge left it to the jury to say whether there was a contract for services payable by a commission if plaintiff should serve a year, or whether there was no agreement as to the term and an agreement to pay by commission, and further they were told that in the first case the plaintiff failing to stay the year could recover only what the services were reasonably worth; a concluding sentence, that in one case it would be according to the agreed compensation "and in the other case the question of commissions does not cut any figure," it is only what the services are reasonably worth, does not tell them that the contract price cannot be considered.—Kendall v. Chappel, 147 Mich. 709.

¶ 187. Where a plaintiff worked under an express contract in defendant's flouring mill, and later worked in addition at night in the latter's newly erected lighting plant, it was proper to instruct the jury that plaintiff was entitled for his work in the lighting plant to reasonable compensation, if he expected to be paid, and, under the circumstances, defendant should have, as a reasonable man, expected pay would be required.—Middlebrook v. Slocum, 152 Mich. 286.

¶ 188. Plaintiff in installing an engine for defendant was told to employ an assistant, and defendant agreed to allow him the usual wages of the assistant. Plaintiff testified that those wages were sixty cents an hour and sued on that basis; the assistant testified they were forty cents. Held, that in view of this, it was error for the court to instruct the jury that if they believed plaintiff's side, he had made out his case.—Smith v. Hertz & Hosbach Co., 160 Mich. 431.

¶ 189. Defendant employed plaintiff to install and repair an engine. After efforts by the plaintiff, the engine did not run properly and defendant employed another man to fix it. The evidence was conflicting as to what was the matter with the engine. In a suit for services rendered, held, it was error for the court to charge that the trouble with the engine was not connected in any way with the plaintiff's work.—Smith v. Hertz & Hosbach Co., 160 Mich. 431.

¶ 190. In a suit by a plaintiff employee on a contract of hiring, where there is testimony that plaintiff was entitled to receive cash in lieu of certain stock to be issued to him as a part of his salary, it is proper to refuse a requested instruction of defendant that there was no evidence of a conditional sale of the stock to plaintiff.—Richards v. Church Balance-Gear Co., 166 Mich. 464.

§ 32. Arbitrations and mediations of labor disputes.

General law as to arbitration, see Arbitration.

Provisions as to arbitration of disputes through board of mediation and conciliation, see Comp. L. 1915, §§ 5564-5577.

¶ 191. Comp. L. 1897, § 563, which provides that the state court of mediation and arbitration shall, within ten days after a matter has been fully heard render a decision thereon in writing, is directory merely and a decision rendered after the expiration of the ten days is valid.—Pingree v. State Court of Mediation and Arbitration, 130 Mich. 229.

¶ 192. A submission to arbitration which stated that the parties were unable to agree upon prices for certain work and requested an arbitration, the work specified being certain steps in the manufacture of shoes, is sufficiently broad to authorize the state court of mediation and arbitration to fix the price by the piece instead of by the day or week as had been the custom, especially where testimony was received on the hearing, without objection, in relation to the scale of wages by the piece as well as by the day.—Pingree v. State Court of Mediation and Arbitration, 130 Mich. 229.

¶ 193. The court of mediation and arbitration may fix the time from which the prices it determines shall be paid earlier than the date of submission where the articles of submission are silent as to the time from which the decision shall fix the prices, and the testimony received at the hearing indicates an understanding that the prices to be fixed shall date back to a time prior to the submission when certain machines used in the work in controversy, were installed.—Pingree v. State Court of Mediation and Arbitration, 130 Mich. 229.

¶ 194. A decision by the court of mediation and arbitration fixing prices to be paid for certain work need not fix a limit to the time when such prices shall be in effect where the articles of submission themselves fix the time, since the time so fixed necessarily controls.—Pingree v. State Court of Mediation and Arbitration, 130 Mich. 229.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

A. NATURE AND EXTENT IN GENERAL.

[Note. The treatment given to this division and the schematic arrangement thereof are explained in a note, ante, which precedes the analytical index. See that explanation.]

§ 33. In general; care and diligence required of master.

Liability under Federal Employers' Liability Act, see post §§ 37, 58.
Contracts limiting or releasing liability, see post § 45.
Duty to provide safe tools, appliances and places, see post § 46.
Duty to take precautions against injury, see also post § 52.
Duty to warn and instruct servant, see post § 54.
Methods of work, rules and orders, see post § 52.
Duty of master to inspect, see post § 53.
Liability for acts of fellow servants, see post § 55.
Doctrine of assumption of risk, see post § 56.
Actions for injury to servant, see post § 60 et seq.
Burden of proof as to negligence of master, see post § 62.
Jury questions as to negligence of master, see post § 67d.
General law of negligence, see Negligence.
Authority to employ medical services and nursing for injured employees, see Agency § 34.
Actionable death of servant, see Death by Wrongful Act.
Contracts to indemnify widow in case of death of servant, see also Death by Wrongful Act § 2.
Liability to workman injured on county structure while at work by reason of defect therein, see also Counties § 36.

¶ 195. When a master has done all that can be reasonably required of him, to prevent risks to his servants, he has done all that he owes them.—Smith v. Potter, 46 Mich. 258.

¶ 196. A master's liability for injuries to his servant from defective arrangements is not that of an insurer or guarantor if the defect was apparent to ordinary observation. It is a question of reasonble care and diligence in providing against it.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 197. A master is bound only to use ordinary care in protecting his servants from dangers that are not within their knowledge or observation.—Richards v. Rough, 53 Mich. 212.

¶ 198. An employer cannot be held liable as for negligence in omitting to guard against accidents that are not likely to happen.—Sjogren v. Hall, 53 Mich. 274.

¶ 199. An employer is not required to use every possible safeguard against accident to his employees from the machinery on his premises. Reasonable care is the requirement.—Lindstrand v. Delta Lumber Co., 65 Mich. 254.

¶ 200. The reduction of danger to a minimum requires the exercise of the highest degree of care attainable, and the law imposes no such duty upon the employer, but only the exercise of that reasonable care which the ordinarily prudent and careful man exercises in like or similar work.—Jungnitsch v. Michigan Malleable Iron Co., 105 Mich. 270.

¶ 201. An employer does not become an insurer by requesting his employee to incur danger in his service, unless he conceals from the employee his knowledge of, or at least fails to make known to him, a latent danger.—Welch v. Brainard, 108 Mich. 38.

¶ 202. The care which a master should employ to prevent accident is measured by the known danger.—Charron v. Union Carbide Co., 151 Mich. 687.

¶ 203. An employer who has furnished safe tools and competent workmen to select and use them has performed his full duty to his employees in the matter.—Flaws v. West Bay City Shipbuilding Co., 132 Mich. 169.

§ 34. Relation of the parties and scope of employment.

Formation and existence of relation, see ante I.
Liability of corporate successor of master, see post § 41.
Negligence of third persons, see post § 44.
Scope of employment as bearing on duty to warn and instruct, see post § 54e.
Evidence as to the relation and scope of employment, see post §§ 64a, 65a.
Jury questions as to relationship and scope of employment, see post § 67a.
In actions for injury to third persons, see post § 74.
Control of premises as test for liability of master to servant injured during work in another's building, see also Buildings ¶ 19.
Workman traveling on free ticket as passenger, see Carriers § 112.
Liability of owners of premises to railroad employees injured while switching on premises, see Independent Contractors ¶ 18.
Disability of injured servant to sue contractor who furnished machine not according to contract with master, see Contracts ¶ 1129.
Liability of successor to employing corporation, see Corporations § 213.

¶ 204. A manufacturer of nitro-glycerine contracted with a railroad company for the transportation of a quantity, and the latter requested another railroad company to move the car loaded therewith some distance over its track. The company so requested sent a switchman to perform the service, and he was killed by the explosion of a can while it was being loaded. The loading was done by employees of the manufacturer, and the switchman had no control or authority over them. He, however, knew the dangerous character of the work. Held, that there was no ground of action against the company which employed the switchman for the fatal injury to him.—Foley v. Chicago & N. W. Ry. Co., 48 Mich. 622.

¶ 205. The manufacturer of an elevator which had been in use two or three days sent an employee, at the purchaser's request, to see what was the matter with it. After taking the car to an upper floor the latter said to one of the purchasers, "Let us load it up," and the purchaser accordingly directed a servant to assist in the loading. The elevator fell while being loaded, and the servant was hurt. Held, that he had a right of action against the manufacturer, who was in possession by his employee.—Necker v. Harvey, 49 Mich. 517.

¶ 205a. Where persons under contract to dig a shaft in defendant's mine have entire charge and supervision of the work, the defendant is not liable for any injury to one of his employees caused by a defect in the contractor's apparatus of which defect contractors had notice and which it was their duty to repair.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 206. In an action for personal injuries based upon the relation of master and servant, there can be no recovery where the evidence shows that plaintiff was not employed by defendant, but by a contractor, to whom defendant furnished the building and appliances about which plaintiff was employed, and who paid, and had exclusive control of, the workmen.—Reier v. Detroit Steel & Spring Works, 109 Mich. 244.

¶ 207. Where a defendant railroad company sued for damages for personal injuries had acquired the property of another company by which the plaintiff had been injured, but there was no evidence that the plaintiff knew of the transfer, and where the defendant company was in fact operating the properties at the time of the accident, it occupied the position of an undisclosed principal and is liable as master for any negligence, the matter not being so much a question of contract as of duty owed to the employees.—McClure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 207a. A manufacturer, through whose yards railroad switch tracks were built, was not responsible for injuries to its servant who was struck by a switch train while working in such yards for his master, on the ground that it was the agent of such railroad company; since it had no supervision or control of the railroad company or its men, such company being an independent contractor.—Breeze v. MacKinnon Mfg. Co., 140 Mich. 372.

¶ 208. A workman who stays upon his employer's premises during the noon recess to eat his dinner is not a trespasser; he has implied permission to stay there, and if called on to resume work before the recess has expired it is his duty to do so. And whatever he does under such circumstances is within the scope of his employment, and to that extent not voluntary.—Broderick v. Detroit Union R. Station & Depot Co., 56 Mich. 261.

¶ 209. Opening a ventilator during a noon recess is not so foreign to a workman's employment that he would be justified in refusing to do it, when directed to do so by competent authority, since such opening of the ventilator, adding to the comfort of the employees while rendering service is beneficial to the employer.—Broderick v. Detroit Union R. Station & Depot Co., 56 Mich. 261.

¶ 210. A workman in a grain elevator stayed on the premises during the time allowed him for his dinner. Within that time he was ordered to aid in opening a ventilator, and, by reason of a defect, sustained injury without fault on his part. Held, that he was during such time in the employ and under the direction of his employer, and that his employer was liable.—Broderick v. Detroit Union R. Station & Depot Co., 56 Mich. 261.

¶ 211. Where a servant, whose duty it is at any time during working hours when upon the master's premises to perform the duties incident to his employment, starts to leave the premises on his private business, and is injured by the alleged negligence of the master, while upon the premises, and during working hours, he is at the time in the employment of the master, and if injured by a fellow-servant's negligence there can be no recovery.—Adams v. Iron Cliffs Co., 78 Mich. 271.

¶ 212. Where a miner directed by defendant to clean out the sump on Sunday is injured by defendant's negligence while so engaged, the mine is to that extent so in operation as to render the defendant liable, although the mine is otherwise closed down on that day.—Capeling v. Saginaw Coal Co., 156 Mich. 437.

¶ 213. A quarry laborer injured by a stone from a blast while eating his dinner on a highway during his noon hour is not a fellow-servant with the other workmen at the time of the accident.—Moronen v. McDonnell, 177 Mich. 691.

¶ 214. Where a quarry laborer is injured by a stone from a blast while eating his dinner on a highway, at a place selected by himself, during his noon hour, the relation of master and servant does not exist in the sense requisite to make applicable the fellow-servant rule, or the duties to furnish a safe place to work or to instruct.—Moronen v. McDonnell, 177 Mich. 691.

¶ 215. It is not without the scope of the employment of one employed in a car factory to do general work,—such as carrying timbers, painting, lifting, etc.,—to assist in hoisting a car upon its trucks by means of a block and tackle apparatus, especially where he has been accustomed to render such service whenever called upon to do so.—Findlay v. Russel Wheel & Foundry Co., 108 Mich. 286.

¶ 216. In an action for injuries by an employee who was employed in the woodworking department where cars were brought for repair, and the employees thereof sometimes assisted in jacking up wrecked cars when called upon, the plaintiff, who had been ordered to go into the yard and assist in the repair of a loaded freight car, and who in obeying an order was killed while in the act of getting under the car by its falling on him, cannot be said to be working outside the general scope of his employment.—McClure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 217. Where plaintiff was in the employ of a company contracting to do certain work for the defendant, and was injured by falling into an unguarded hatchway, he cannot recover without showing that in the performance of the contract it was necessary for him to go in the vicinity of the hatchway.—Hutchinson v. Cleveland-Cliffs Iron Co., 152 Mich. 367.

¶ 218. Where a plaintiff is injured by going outside his usual line of work, and using a certain dangerous machine of defendant, his employer, it is error to instruct that plaintiff cannot recover unless the defendant specifically ordered him to use the machine, if, from the nature of plaintiff's employment, it might be fairly understood that he was to use the machine.—Marklewitz v. Olds Motor Works, 152 Mich. 113.

¶ 219. Where plaintiff had been employed for a considerable time in handling the logs on defendant's skidways after they had been unloaded from the cars, an order to drive the team moving the car to the different skidways, while doing which he was injured by the fall of a log, is not beyond the scope of his employment.—Hilgbrandt v. Oval Wood Dish Co., 180 Mich. 43.

¶ 219a. A village which had no control of sewer work let out under contract, except to employ an inspector whose sole duty it was to see that the tile was laid in a proper manner after the trench was dug, was not liable to an employee of the contractor who sustained injury while digging.—Lenderink v. Village of Rockford, 181 Mich. 372.

§ 35. Statutory provisions and regulations; employment of children.

Federal Employers' Liability Act, see post § 37.

Provisions as to protecting and guarding dangerous machinery and places, see post § 51.

Warning and instructing immature servants, see post § 54d.

Care in selection and retention of servants, see post § 55b.

Infants employed in violation of statute as fellow-servants, see post § 55e.

Assumption of risk by immature employees, see post § 56d.

Statutory provisions as to contributory negligence, see post § 59a.

Omission of statutory duty as bearing on contributory negligence, see post § 59b.

Contributory negligence of minor employees, see post § 59j.

Jury questions as to violation of Child Labor Law, see post § 67e.
Workmen's Compensation Act, see Workmen's Compensation Act.
Police power to regulate for welfare and safety of workmen, see Constitutional Law § 104.
Consent to illegal employment of minor as defense in action by parents for his wrongful death, see Death by Wrongful Act § 7.

¶ 220. Under Pub. Acts 1901, No. 113, § 3, the employment of a boy under 16 at an employment whereby his life or limb is endangered constitutes actionable negligence.—Sterling v. Union Carbide Co., 142 Mich. 284.

¶ 221. To construe Pub. Acts 1901, No. 113, § 3, providing that no child under 16 shall be employed at employment whereby his life or limb is endangered, as designed to protect children from such dangers as could not be obviated by persons of mature judgment would render it nugatory.—Sterling v. Union Carbide Co., 142 Mich. 284.

¶ 222. Pub. Acts 1901, Act No. 113, prohibiting the employment of children under the age of fourteen years in any manufacturing establishment, and providing that no child under the age of sixteen years shall have employment whereby life or limb is in danger, although it does not provide a remedy for one injured by or on account of its violation, raises a duty for the benefit of persons of the classes liable to be injured, and may be enforced by such persons.—Syneszewski v. Schmidt, 153 Mich. 438.

¶ 223. In construing the statute (Act No. 113, Pub. Acts 1901), with reference to the employment of children in dangerous occupations, regard must be given to the inexperience and heedlessness of children.—Braasch v. Michigan Stove Co., 153 Mich. 652.

¶ 224. In determining whether an occupation is dangerous, with regard to a statute prohibiting the employment of children in dangerous occupations, the question is not one of the obviousness of the danger, but whether the occupation is one attended with dangers which a child would not be competent, in view of childish habits and instincts, to understand or avoid.—Braasch v. Michigan Stove Co., 153 Mich. 652.

¶ 225. Where a child under sixteen was employed in violation of Pub. Acts 1901, Act No. 113, §§ 2 and 5, he is not estopped from recovering for injuries sustained by reason of the fact that he was employed upon representations made in his hearing that papers were unnecessary in his case.—Braasch v. Michigan Stove Co., 153 Mich. 652.

¶ 226. Where a child not sixteen years of age is employed (in violation of statute requiring that as a condition to such employment there must be provided and placed on file a sworn statement, made by the parent or guardian, stating the age, date, and place of birth of such child, and that the child can read and write), without any precaution except to inquire the age of the child, and to judge from his appearance that he was telling the truth, the employer acts at his own risk, and cannot assert the statements of the child or his parents in defense to an action for injury to the child.—Syneszewski v. Schmidt, 153 Mich. 438.

¶ 227. Employment, in which a boy under the age of eighteen years was compelled to stand in a space slightly over three feet in width between moving belts, within an arm's length of revolving knives, to take boards thirty inches long, nine inches wide, and one and three-eighths inches thick, the ends of which were within six inches of the revolving knives, and carry them some distance and pile them, is hazardous within the meaning of Public Acts of 1911, No. 230.—Radic v. Thomas Jackson & Co., Ltd., 178 Mich. 618.

¶ 228. One who employs a minor and places him at work about a dangerous machine in violation of section 11, Act No. 285, Pub. Acts 1909 (How. St., 2nd Ed., § 4019), is not relieved from liability for a resulting injury by reason of the employee's misstatement of his age where the employer did not rely on such misstatement but used his own judgment in employing the plaintiff, without making any investigation as to his age.—Powell v. E. F. Stafford Mfg. Co., 183 Mich. 1.

¶ 229. A common laborer employed to clean out the still used in the manufacture of soda ash and to assist in closing the still door is not engaged at an employment endangering his life and limb within the meaning of the Child Labor Law, Act No. 113, Pub. Acts of 1901.—Antosik v. Michigan Alkali Co., 166 Mich. 415.

¶ 230. Act No. 285, Public Acts of 1909, which provides that no female under the age of twenty-one years or male under eighteen years shall be employed "in any other employment which may be considered dangerous to their lives," etc., does not so make the state factory inspector the final judge as to whether machinery is dangerous as to preclude the possibility of recovery for an injury suffered by an employee from falling into the cogs of a machine after said inspector had inspected said machine and made no order regarding the same.—Tabinski v. A. Harvey's Sons Mfg. Co., 168 Mich. 392.

¶ 231. To employ a girl sixteen years old to operate a laundry mangle equipped with adequate safety devises is not, under Act No. 285, Pub. Acts 1909, §§ 4009-4063, How. St., 2nd Ed., negligence as a matter of law.

—Great Lakes Laundry Co. v. Aetna Life Ins. Co., 184 Mich. 294.

¶ 232. A judgment in favor of a girl twelve years old for the loss of her right hand while employed in operating a laundry mangle in violation of Act No. 285, Pub. Acts 1909, as amended by Act No. 220, Pub. Acts 1911, §§ 4009-4063, How. St., 2nd Ed., affirmed.—Schuetz v. Van Orman, 184 Mich. 478.

§ 36. ——Railroad and mine employees.

Proximate cause of injury, see post § 43.
Federal Employers' Liability Act, see post § 37.
Safety of railroad tracks, bridges and equipment, see post § 49.
Safety of mines and mining equipment, see post § 50.
Railroad employees as fellow-servants, see post § 55j.
Mine employees as fellow-servants, see post § 55p.
Risks assumed by railroad and mining employees, see post §§ 56n, 57, 58.
Contributory negligence of railroad employees and miners, see post § 59 et seq.
Pleading in actions by railroad and mine employees, see post §§ 60a, 60b.

¶ 233. The common-law liability of railway companies is not added to by Comp. L. 1897, §§ 6284, 6295, providing that no person shall be employed as a servant in any operating department of a railroad who uses intoxicating drinks as a beverage and any company knowingly employing such person shall be liable to a penalty of five hundred dollars, and providing that any person intoxicated while in charge of a locomotive running on a railroad or acting as the conductor of any train shall be liable for all damages incurred in consequence and deemed guilty of a misdemeanor, but that this does not release the railway company from liability.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

¶ 234. Act 104, P. A. 1909, How. 2nd Ed., § 4110, relating to recovery by employees of common carrier railroads for negligence of the company, its officers, agents, or employees, is constitutional.—Quick v. Detroit & M. R. Co., 175 Mich. 676; Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 235. Under Act 104, P. A. 1909, How. 2nd. Ed., § 4110, relating to the liability of common carrier railroads to employees for injuries, the liability intended to be created in case death results is for damages which may result to the class of persons mentioned by the act, in whose interest the action is begun.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 236. The purpose of Act 104, P. A. 1909, How. 2nd Ed., § 4110, relating to recovery by an employee of a common carrier railroad for injuries and providing that nothing shall be held to "limit the duty" of the carrier, under existing laws, is to change the common law rules as to the liability of such railroads, and not to change the measure of damages fixed by the existing law or to create any new causes of action.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 237. Act No. 104, P. A. 1909, providing that "every common carrier railroad" is liable for injuries to its employees through the negligence of the company or of its officers, agents or employees, and that contributory negligence does not bar recovery if of a lesser degree than that of the company, and that contracts, etc., of employment do not release the company, applies to street railways.—Arends v. Grand Rapids Ry. Co., 172 Mich. 448.

¶ 238. By Act No. 104, § 3, P. A. 1909, providing that the words "railroad company" as used in the act embrace any company, etc., operating or in possession of a common carrier railroad it is clearly indicated that the term "railroad company" does not apply to companies incorporated under the railroad act only but to every common carrier railroad.—Arends v. Grand Rapids Ry. Co., 172 Mich. 448.

¶ 239. Pub. Acts 1905, No. 100, § 3, providing that only competent and trustworthy engineers shall be permitted to operate the cages and hoisting devices in coal mines, imposes a positive and continuing duty upon the mine owner or operator to employ engineers such as the statute specifies, and makes him the insurer of the competency and trustworthiness of any engineer permitted to operate cages and hoisting devices in his mine. (Per McAlvay, J.; Blair, C. J., Moore and Brooke, JJ., concurring.) The owner or operator is not an insurer, but the statute prescribes a class from whom those permitted to operate cages shall be selected, and fixes a status of capability and efficiency for such officer. (Per Ostrander, J.; Grant and Montgomery, JJ., concurring; Hooker, J., dissenting.)—Layzell v. J. H. Somers Coal Co., 156 Mich. 268.

¶ 240. Under Pub. Acts 1905, No. 100, providing for the protection of coal miners, a mine operator is bound, as between himself and his servants, to employ only competent and trustworthy engineers to operate cages and hoisting devices, as required by § 3 of such act, although the mine inspector has taken no steps to penalize him for his neglect.—Layzell v. J. H. Somers Coal Co., 156 Mich. 268.

¶ 241. Section 3, Act No. 100, Pub. Acts 1905, provides "that only a competent and trustworthy engineer shall be permitted to operate cages and hoisting devices in any coal mine of this state." Plaintiff's dece-

dent was killed while ascending in a cage operated by a fireman. Held, defendant was guilty of neglect of the duty imposed by the statute from the fact he employed a fireman instead of an engineer, and to recover, plaintiff need not prove that defendant had notice of the fireman's incompetency.—Kleinfelt v. J. H. Somers Coal Co., 156 Mich. 473.

§ 37. Interstate transportation and Federal Employers' Liability Act.

Assumption of risk under Federal Employers' Liability Act, see post § 58.
Burden of proof as to contributory negligence, see post § 62b.
Sufficiency of proofs, see post § 66.
Jury questions in actions under Federal Employers' Liability Act, see post § 69.
Instructions in actions under Federal Employers' Liability Act, see post § 72.
Interstate regulations of employers' liability, see Commerce § 13.
Railroad employers' liability act as denial of equal protection of law, see Constitutional Law § 225.
Adequacy and excessiveness of damages under Federal Employers' Liability Act, see Damages § 243.

¶ 242. Liability of a carrier to its employees for injuries either under the state or federal law must be based on some negligent act of the employer.—Hollingshead v. Detroit, G. H. & M. Ry. Co., 181 Mich. 547.

¶ 243. A railway company is not liable under the Federal Employers' Liability Act for injuries received by an employee unless negligence on the part of the employer is shown.—Miller v. Michigan Cent. R. Co., 185 Mich. 432.

¶ 244. In an action under the Federal Employers' Liability Act, 35 U. S. Stat. 65, plaintiff cannot recover unless he shows that he was injured through the actionable negligence of his employer.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

¶ 245. The Federal Employers' Liability Act does not make a railway company an insurer of the lives of its employees.—Miller v. Michigan Cent. R. Co., 185 Mich. 432.

¶ 246. The Federal Employers' Liability Act, § 6, 35 U. S. Stat. 65, providing that no action can be maintained under the act unless commenced within two years from the day the cause of action accrued, creates a new liability, takes away the defenses formerly available, and the right of action therein created is conditioned upon its enforcement within the prescribed period, such statute not being a statute of limitations, but a statute of creation.—Bement v. Grand Rapids & I. Ry. Co., 194 Mich. 64.

¶ 247. The construction given to the Federal Employers' Liability Act by the Supreme Court of the United States is controlling in an action in the state courts based upon such act.—Jorgensen v. Grand Rapids & I. Ry. Co., 189 Mich. 537.

¶ 248. In cases brought under the Federal Employers' Liability Act, 35 U. S. Stat. 65, and amendments thereto, that statute and decisions of the federal courts upon it are controlling.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

¶ 249. The Federal Employers' Liability Act, § 6, 35 U. S. Stat. 65, providing that no action can be maintained under the act unless commenced within two years from the day the cause of action accrued, being a federal statute, must be governed in its construction by decisions of the federal courts.—Bement v. Grand Rapids & I. Ry. Co., 194 Mich. 64.

The Federal Employers' Liability Act as construed and applied by the Supreme Court of the United States down to April 5, 1915, see note, 8 N. C. C. A. 1-24.
The Federal Employers' Liability Act as construed and applied by the decisions of the Supreme Court of the United States handed down between April 5, 1915, and May 1, 1916, see note, 11 N. C. C. A. 992-1011.
Limitation upon field covered by Federal Employers' Liability Act as exemplified by controlling decisions of United States Supreme Court during 1916 and 1917, see note, 13 N. C. C. A. 1127-1135.
Federal questions reviewable in actions under Federal Employers' Liability Act, see note, 9 N. C. C. A. 452-457.
Conflict between Federal Employers' Liability Act and state compensation acts, see note, 14 N. C. C. A. 680-696.
Application for, or relief under, workmen's compensation acts as barring action under Federal Employers' Liability Act, see note, 13 N. C. C. A. 1100-1112.
Application of state compensation acts to employers engaged in interstate commerce, see note, 14 N. C. C. A. 725.
Nature and extent of liability under Federal Safety Appliance Act, see note, 14 N. C. C. A. 865-879.
Liability of railroad company under the Federal Safety Appliance Act for defects in cars of another company, see note, 8 N. C. C. A. 265-281.
When an action is maintainable under the Federal Employers' Liability Act, see note, 3 N. C. C. A. 788-799.
Parent's right of action for injury to minor child under Federal Employers' Liability Act, see note, 14 N. C. C. A. 1072-1073.
Liability under Federal Employers' Liability Act for injury to or death of employee struck by train or car while crossing railroad yard on way to or from work, see note, 11 N. C. C. A. 101-125.

Application of res ipsa loquitur rule in actions under Federal Employers' Liability Act, see note, 15 N. C. C. A. 591-617.
Application, in actions under Federal Employers' Liability Act, of state statutes making railroad companies prima facie liable for personal injuries caused in the running of locomotives or cars, see note, 15 N. C. C. A. 49-69.
Releases under Federal Employers' Liability Act, see note, 11 N. C. C. A. 1087-1101.

§ 38. ——Exclusiveness of remedy and election of redemies.

¶ 250. In view of the paramount jurisdiction of congress over interstate commerce, and thus over remedies against employers therein for injuries sustained by employees while in such commerce, the Federal Employers' Liability Act provides the exclusive remedy for at least negligent injuries to employees of interstate railroad carriers while actually engaged in interstate commerce.—Waters v. Guile, 234 Fed. 532.

¶ 251. The fact that a railroad employee, who was injured while engaged in interstate commerce, in a signed account of the accident given the railroad receivers' representative six days later, expressed the opinion that no one was to blame for the accident, and the negligence alleged in his letter refusing the receivers' offered adjustment was not asserted on appeal, would not estop him from the assertion of negligence, even though the Workmen's Compensation Act would apply if his injuries were not due to negligence, since the remedy under the Federal Employers' Liability Act is exclusive if the injuries are due to negligence.—Waters v. Guile, 234 Fed. 532.

¶ 252. The fact that employers provide medical and hospital services and medicines for an injured employee, who was injured while engaged in interstate commerce, during the first three weeks after the injury, which they are required to do by the Workmen's Compensation Act, Part II, § 4, does not estop the employee, who had abandoned a claim for compensation made under the Workmen's Compensation Act, from proceeding under the Federal Employers' Liability Act, which was the proper remedy, especially where, while such payments were made because of plaintiff's claim, defendants were not prejudiced by such payments, and an allowance for such payments would have been made in the verdict if they had not been made.—Waters v. Guile, 234 Fed. 532.

§ 39. ——Fatal injury and death cases.

¶ 253. The Federal Employers' Liability Act, 35 Stat. L. 65, as amended by 36 Stat. L. 291, provides for two distinct actions, one for the benefit of the employee where death is not instantaneous, and the other for the benefit of certain relatives whereby they are to receive compensation for their financial loss and damage resulting from the employee's death.—Jorgensen v. Grand Rapids & I. Ry. Co., 189 Mich. 537.

¶ 254. Where an injury results immediately in the employee's death the only action maintainable is the action to compensate relatives for their financial loss because of his death.—Jorgensen v. Grand Rapids & I. Ry. Co., 189 Mich. 537.

Damages for wrongful death under Federal Employers' Liability Act, see note 7 N. C. C. A. 622-636.
Right of action and measure of recovery for death under Federal Employers' Liability Act, see note 6 N. C. C. A. 437-454.
Survival of employees' right of action under the Federal Employers' Liability Act, see note 3 N. C. C. A. 769-770.
Distribution of recovery under the Federal Employers' Liability Act, see note 16 N. C. C. A. 724-728.
Distribution and apportionment of fruits of compromise or recovery for death or liability under Federal Employers' Liability Act where not made by jury, see note 15 N. C. C. A. 618-630.

§ 40. ——When employee deemed engaged in interstate commerce.

¶ 255. In an action against a railroad company for personal injuries sustained in a collision between two trains, where it appeared that each train contained cars billed to points outside the state, the plaintiff was held entitled to recover only under the Federal Employers' Liability Act.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 256. The right of a railway employee to recover for injuries sustained while making repairs on a car owned by an interstate carrier, which was being returned after bringing a consignment of freight into this state, must be based on the Federal Employers' Liability Act (April 22, 1908, 35 U. S. Stat. 65, ch. 149), notwithstanding the defendant's line of railroad lies wholly within the state.—Gaines v. Detroit, G. H. & M. Ry. Co., 181 Mich. 376.

¶ 257. An engineer on a train running between two points within a state on an interstate railroad and carrying gravel for the purpose of improving the roadbed is engaged in an act of interstate commerce so as to be within the protection of the Federal Employers' Liability Act.—Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605. (Brooke, C. J., and Ostrander, J., dissenting.)

¶ 258. A telephone lineman employed by an interstate carrier held engaged in interstate commerce while installing new telephone wires to be used in interstate commerce so as to entitle him to sue under the

Federal Employers' Liability Act.—Collins v. Michigan Cent. R. Co., 198 Mich. 303.

¶ 259. One who is engaged in coaling and placing water in tanks of engines used in interstate commerce, among other duties, is engaged in interstate commerce.—Guy v. Cincinnati Northern R. Co., 198 Mich. 140.

¶ 260. In an action to recover damages for injuries sustained while plaintiff was employed by defendant as one of defendant's bonding crew engaged in cleaning and wiring the ends of the rails of defendant's railroad tracks, where defendant owned and operated its railway wholly within the state and ran no cars without or 'from without the state, but accepted freight to and from a point in another state on through bills of lading and collected charges for the full distance, held that plaintiff was at the time of his injuries engaged in interstate commerce, under the Federal Employers' Liability Act.—Cholerton v. Detroit, J. & C. Railway, 199 Mich. 647.

¶ 261. A brakeman on a train loaded with interstate freight is engaged in interstate commerce within the Federal Employers' Liability Act, notwithstanding the train in question runs only between points in the same state.—Waters v. Guile, 234 Fed. 532.

¶ 262. A railroad bridge carpenter riding on a work train carrying the equipment for repair of a bridge used by the company in interstate commerce is employed in interstate commerce, within the Federal Employers' Liability Act.—Grand Trunk R. Co. of Canada v. Knapp, 233 Fed. 950.

What employees are within the Federal Employers' Liability Act, see notes 3 N. C. C. A. 779-787; 6 N. C. C. A. 183-208; 10 N. C. C. A. 153-184; 14 N. C. C. A. 957-1011.

What railroads are within Federal Employers' Liability Act, and character of particular railroad activities as interstate or intrastate, see note 11 N. C. C. A. 857-867.

Railroad employees hauling empty cars as within Federal Employers' Liability Act, see note 9 N. C. C. A. 109-118.

Liability under Federal Employers' Liability Act for negligent operation of train or car causing injury to employee working in railroad yard, see note 11 N. C. C. A. 165-173.

Application of Federal Employers' Liability Act to switching operations, see note 9 N. C. C. A. 1-23.

Application of Federal Employers' Liability Act to employees engaged in construction work, see note 8 N. C. C. A. 981-985.

Liability under Federal Employers' Liability Act for negligent operation of trains causing injury to section, track, or other workmen on railroad tracks, see note 11 N. C. C. A. 342-358.

Liability under Federal Employers' Liability Act for injuries to employees other than track laborers struck by trains while on or crossing tracks, see note 11 N. C. C. A. 273-283.

Liability under Federal Employers' Liability Act for injury to or death of employee struck by train or car while crossing railroad yard or track on way to or from work, see note 11 N. C. C. A. 101-125.

Employee within Federal Hours of Service Act, see note 15 N. C. C. A. 325-343.

§ 41. Liability of corporate successor of master.

¶ 263. Where an employee is injured through the negligence of a railroad company, a corporation into which the former is subsequently merged is liable to the same extent as its predecessor was.—Batterson v. Chicago & G. T. Ry. Co., 53 Mich. 125.

¶ 264. A directed verdict is proper, in an action of tort for injuries against a telephone company, where the evidence shows a sale of the property of a construction company which employed the plaintiff to the telephone company, but there is no evidence of a consolidation of the two companies; or that the telephone company assumed the obligations of the construction company, and in such a case the burden of proof is upon the plaintiff to show the assumption of obligations by the defendant.—Chase v. Michigan Tel. Co., 121 Mich. 631.

§ 42. Proximate and concurrent causes.

Doctrine of res ipsa loquitur, see also post § 63a.

Evidence as to the cause of injury, see post §§ 64, 65b.

Jury questions as to cause and manner of injury, see post § 67b.

Directing verdict where cause of action not shown, see post § 70a.

General law as to proximate cause, see Negligence, III.

¶ 265. Accumulation of sawdust on top of a boiler was not the proximate cause of plaintiff's fall where it appeared that he tried to climb to the top in the dark by a ladder shorter than he supposed it to be and fell in consequence, he being in a hurry to clear off the sawdust which had ignited.—Lamotte v. Boyce, 105 Mich. 545.

¶ 266. The fact that the injured boy was employed without the written permission of his parents or guardian, contrary to the provisions of How. St. § 1997c3, was not the proximate cause of the injuries received in a scuffle with another boy over possession of some bolt-nuts near a machine with uncovered gears of which the boy had full knowledge.—Borck v. Michigan Bolt & Nut Works, 111 Mich. 129.

¶ 267. The causal connection between the employment of a boy under 16 at an employ-

ment dangerous to his life or limb and an injury sustained by him is clearly the proximate cause of such injury.—Sterling v. Union Carbide Co., 142 Mich. 284.

¶ 268. A minor having an employment permit under Pub. Acts 1909, No. 285, § 10, How. 2nd Ed. § 4018, brought suit under Pub. Acts 1911, No. 220, How. 2nd Ed. § 4017, as to employing a minor under eighteen years of age at hazardous work. In improperly pushing a board through a guarded ripsaw with the hood or guard up, his hand was injured. Held, the proximate cause of the injury was plaintiff's careless operation.—Pequignot v. Germain, 176 Mich. 659.

¶ 269. Where an employee was injured through falling into an unguarded trapdoor in a platform over which he was carrying a box of shavings, it is not a sufficient defense to show that a fellow-servant who carried the forward end of the box saw the open trapdoor and should have given warning, since it cannot be said that the failure of the employer to guard the opening or to give warning thereof did not contribute to the injury.—Hayes v. Frederick Stearns & Co., 130 Mich. 287.

¶ 270. It cannot be said that the absence of a guard customarily kept over a belt was not the proximate cause and that the slipping of the servant on a greasy floor was the proximate cause, where in attempting to turn an air cock with a wrench he slipped and fell upon the moving belt while it was unguarded.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 271. Where a servant was injured while placing his hand between the plates of a steel press, in order to put in position a sheet of steel caught under a loose gauge attached to the lower plate, by the tripping of the press by the operator, the proximate cause of the injury was not the loose gauge, but the negligence of the operator, a fellow-servant, in tripping the press at that time.—Richards v. Michigan Pressed Steel Co., 155 Mich. 668.

¶ 272. Improper temper in a piece of steel may be regarded as a proximate cause of an injury to a servant resulting from a piece of the steel chipping off and striking him.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 273. The removal of a railing surrounding an engine pit held not the proximate cause of injury to an employee falling into the pit when the bicycle which he was riding through the power room struck a loose air hose lying on the floor.—Schwager v. Saginaw Plate Glass Co., 179 Mich. 360.

¶ 274. Where an employee was injured by being caught in exposed gearing upon the breaking of a ladder upon which he was working, it was held that the failure to safeguard the gearing as required by Public Acts 1909, No. 285, and not the breaking of the ladder was the proximate cause.—Smith v. Mt. Clements Sugar Co., 179 Mich. 97.

¶ 275. The failure of factory owners to perform their statutory duty to properly guard exposed set screws in two chucks used in holding a log or bolt in place for shaving in a rotary veneer peeler, and not the failure of the workman to select a chuck which had no projecting set screws, is the proximate cause of an accident to a workman injured as a result of his clothing becoming caught on such set screws while the machine was in motion, where he used chucks of the proper size for the work and which were furnished for the purpose.—Edward v. Grand Haven Basket Factory, 187 Mich. 505.

§ 43. ——Railroad and mine cases.

Declaration in actions by railroad and mine employees, see post §§ 60a, 60b.

Jury questions as to cause of injury to railroad employees, see post § 67b.

Jury questions as to contributory negligence of railroad and mine employees, see post §§ 68e, 68f.

¶ 276. The crushing of a switchman between cars loaded with logs projecting so far that only a five-inch space remained when they came together cannot be ascribed for cause to the neglect of the fireman in transmitting backing signals to the engineer, since no care in making train movements would have made it possible to have avoided the injury.—Catlin v. Michigan Cent. R. Co., 66 Mich. 358.

¶ 277. The absence of lights upon a reopened switch, which has been left unlocked by a trespasser or fellow employee of plaintiff, is as much the proximate cause of injury to an engineer of a derailed train as the turning of the switch rails.—Town v. Michigan Cent. R. Co., 84 Mich. 214.

¶ 278. A brakeman who had assisted in loading logs on a logging train was injured by the train's being wrecked because of a log falling from one of the cars. The accident happened either from the loosening of a stake carelessly put in or from the jolting of the train, which was running over a rough road at a rate of speed higher than the rules allowed. Held, that in either case the negligence of plaintiff or of his fellow-servants was the proximate cause of the accident, and that there could be no recovery.—Conger v. Flint & P. M. R. Co., 86 Mich. 76.

¶ 279. The fact that a box drain, which had been constructed to carry off the water, had frozen up, thus permitting the water to accumulate and freeze over the rails, cannot be said to have been the proximate cause of the accident, as distinguished from a de-

fective construction of the track, since the adequacy of the drain in view of probable conditions was one of the questions entering into the determination as to whether a reasonably safe place had been provided.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 280. In an action for injury to a section hand caused by a step projecting from a caboose striking a new tie placed too near the track and throwing it against plaintiff, it cannot be argued that the injury to plaintiff was evidence that the railroad should have apprehended the danger from the projecting step, since the injury did not result from the step but from the tie being placed too near the track.—Turner v. Detroit S. R. Co., 137 Mich. 142.

¶ 281. Where a railroad employee was injured while riding on the pilot of the locomotive and the accident was caused by a defect in the pilot, bringing it too low, he is not barred from recovery by the fact that a defective turntable of which he had knowledge contributed to the injury when the pilot struck it.—Barschow v. Lake Shore & M. S R. Co., 147 Mich. 226.

¶ 282. Defendant railroad failed to provide an automatic coupler, as required by Act No. 234, Pub. Acts 1907, for a car the center of whose coupling was 27¾ inches above the top rail. The plaintiff in attempting to couple this car with another whose coupling was only 25 inches above the top rail, was injured. Held, it could not be said as a matter of law that the violation of the statute was not the proximate cause of the injury.—Betterly v. Boyne City, G. & A. R. Co., 158 Mich. 385.

¶ 283. The contract between defendant railroad and its switchmen provided that the car men should do the work of cutting off passenger coaches. Plaintiff's decedent at the direction of the yard conductor attempted to cut off a coach and was killed. Held, the defendant's failure to have the hose cut by car men was the proximate cause of the decedent's injury.—Baker v. Michigan Cent. R. Co., 169 Mich. 609. (Stone, Brooke, Ostrander and Steere, JJ., dissenting.)

¶ 284. Where plaintiff employed as a brakeman on defendant's train is injured by a collision, the defendant is not liable where a mist or fog is the proximate cause of the injury.—Murphy v. Great Lakes Dredge & Dock Co., 175 Mich. 216.

¶ 285. In an action for personal injuries sustained by a conductor in a switch yard in being caught between a moving car and a pile of weights near the track after his lantern had been extinguished by the wind, it was held that the proximate cause of the injury was not the extinguishment of the alleged defective lantern but that it was caused by plaintiff's own act in walking towards the approaching car.—Charters v. Industrial Works, 179 Mich. 1.

¶ 286. In an action by a suburban railway employee who was injured by the car on which he was being transported running into an open unguarded switch which had been opened by the act of a third person, it could not be said that the failure to provide lights or locks was not the proximate cause of the injury.—Noe v. Rapid Ry. Co., 133 Mich. 152.

¶ 287. In an action for injuries sustained by a motorman in a collision of his car with another car which was backing up as the result of the derailment of a car ahead, a worn rail claimed to have been the cause of such derailment, was not the proximate cause of the injury.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 288. The master maintaining a platform in a mine shaft was bound so to construct the platform that it should be capable of withstanding the strain to which the ordinary operations of the mine would subject it; and if the platform became loosened under the strain of such ordinary operations, by reason of defects in the original construction, the company would not be entitled to have the operations themselves treated as an intervening cause of injuries to a workman under whom it gave way.—Smizel v. Odanah Iron Co., 116 Mich. 149.

¶ 289. The failure to inform an employee of a danger not to be apprehended cannot be said to be the cause of an injury.—Sommers v. Standard Min. Co., 146 Mich. 111.

¶ 290. Defendant mine owner in constructing a ladder into an exploration shaft left out a round in the same. While plaintiff employee was descending into said shaft in a bucket lowered by a cable, the pump boy in going down said ladder fell through the space left by said missing round, struck said bucket, and knocked plaintiff off. Plaintiff fell to the bottom of the shaft and was injured. Held, the negligence of the defendant in the construction of said ladder was the proximate cause of the accident.—Menere v. Copper Range Consol. Co., 169 Mich. 367.

¶ 291. Where a miner was injured by coming in contact with an exposed electric wire on the side of a narrow passage in a mine, to which he stepped in his excitement on meeting a moving car, the proximate cause of his injury was not his fright or excitement, but rather the negligence of his employer in not covering the exposed wire.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

¶ 292. Where a trammer was injured by the negligence of a fellow-servant while assisting in replacing a defective tram car on a track, the latter's negligence was the proximate cause of the injury, and not the defect in the car which permitted it to jump the

rails, which the employer had promised to repair.—Sabela v. Newport Min. Co., 184 Mich. 676.

§ 44. ——Negligence of third persons.

¶ 293. A contractor for the woodwork on a building is not liable for the act of the servant of the masonry contractor in allowing a brick to fall injuring the servant of the woodwork contractor, though the latter sent such servant to work in the place where he was hurt, if there was at the time nothing to indicate that anything would be thrown down.—Penner v. Vinton Co., 141 Mich. 77.

¶ 294. Where a person whose negligence has caused an injury, has contracted only for results, and is independent and free from direction or restraint in the performance of his obligation, the rule of independent contractor applies and the superior is not liable.—Wright v. Bid Rapids Door & Blind Mfg. Co., 124 Mich. 91.

§ 45. Contracts limiting or agreeing to release liability.

¶ 295. An employer can relieve himself by contract from liability for negligence only by an express stipulation.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

¶ 296. A waiver by contract of liability for negligence must be plainly expressed.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

¶ 297. Whether an employment is within the terms of a contract relieving an employer from liability for negligence is a question of law.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

¶ 298. A contract releasing an employer from liability for negligence covers only such claims as were within the contemplation of the parties at the time the contract was entered into.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

¶ 299. A stipulation in an application for employment as driver of an express wagon within a designated city, exempting an express company from liability for injuries received by the applicant while in its employ, does not extend to and include his subsequent employment as a railway express messenger.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

¶ 300. The words "I understand that I may be required to render services for the company on or about the railroad, stage and steamboat lines used by the company for forwarding property," in a printed form of application for employment exempting an express company from liability for injuries sustained by an applicant while in its employ, have reference only to the particular employment sought, and when applied to a person employed as driver of an express wagon within a designated city, do not extend to and include his subsequent employment as a railway express messenger.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

B. TOOLS, MACHINERY, APPLIANCES AND PLACES TO WORK.

§ 46. In general; duty to furnish safe appliances and places.

Railroad tracks, bridges and equipment, see post § 49.
Mines and quarries, see post § 50.
Protecting or guarding dangerous machinery and places, see post § 51.
Master's nonperformance of duty as bearing on assumption of risk, see post § 56f et seq.
Omission of duty of master as bearing on contributory negligence, see post § 59b et seq.
Burden of proof as to negligence of master, see post § 62.
Evidence as to safety and sufficiency of tools, appliances and places, see post §§ 64b, 65d.
Jury questions as to sufficiency of appliances, tools and places, see post § 67f.
Instructions as to tools, appliances and places to work, see post § 71.

¶ 301. An employer must furnish a suitable place in which his servant, with due care, may do his work without exposure to dangers that are not usual to his occupation as ordinarily performed.—Swoboda v. Ward, 40 Mich. 420; Smith v. Peninsular Car Co., 60 Mich. 501.

¶ 302. An employer is negligent if he fails to furnish a safe place for his employees to work in, and safe appliances or tools with which to do the work.—Palmer v. Michigan Cent. R. Co., 87 Mich. 281; Tangney v. Wilson & Co., 87 Mich. 453; Sweet v. Michigan Cent. R. Co., 87 Mich. 559; Schlacker v. Ashland Iron Mining Co., 89 Mich. 253.

¶ 303. As between the employer and his employees it is the duty of the former to furnish suitable machinery and to see not only that it is suitable, but that it is kept in repair for the employee's safety; and he is bound to use reasonable care to prevent accidents.—Johnson v. Spear, 76 Mich. 139.

¶ 304. The employer must furnish a suitable place where the servant, with due care, may perform his work without being exposed to any but the ordinary dangers of his occupation.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 305. It is the duty of an employer to provide his employees with a safe place in which to work.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 306. The obligation on the part of the master to provide a safe place is not im-

posed where dangers arise by reason of changing conditions in the progress of the work.—Dunn v. Great Lakes Dredge & Dock Co., 161 Mich. 551.

¶ 307. It is the master's duty to furnish adequate steam capacity to make the operation of machinery reasonably safe.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 308. An explosion of calcium carbide caused by water coming in contact with it from a steam pipe which was being repaired, is one which should have been anticipated, and precautions taken to prevent, where the carbide was in an elevator pit and defendant had knowledge of such fact, and that the floor was so constructed that water falling on it would reach the pit, that sparks were produced in the elevator, and that the combination of water, carbide, air and a spark will produce an explosion.—Charron v. Union Carbide Co., 151 Mich. 687.

¶ 309. The fact that an electric light and telephone company is about to change the entire construction of its poles and lines does not make its duty less imperative to protect its linemen from dangers arising from original faulty construction of said lines and from faulty repairing of same prior to the date of the accident in question.—Huber v. Twin City General Electric Co., 168 Mich. 531.

¶ 310. It is the duty of an automobile company to furnish its foreman, who is required to test cars upon a track built by the company, with a reasonably safe place or instrumentality on which to perform his services.—Blick v. Olds Motor Works, 175 Mich. 640.

¶ 311. Where as the result of installing new machinery in a factory, chipping of pieces of iron therefrom with a cold chisel had continued for two weeks without any precaution being taken to prevent the injury to other employees from flying chips, and a servant not employed in such work while passing was struck in the eye by a flying chip, the doctrine of safe place applies.—Webb v. Buick Motor Co., 182 Mich. 551.

¶ 312. The doctrine of safe place extends to a trench in which an employee who had no part in making the place where he was working, was engaged in enlarging the trench about the ends of water pipes so as to permit the calking of the joints.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 313. It is the duty of the proprietor of a hairdressing and manicuring establishment operated on the first floor and basement of a building to furnish one employed as a scrubwoman with a reasonably safe place to work and to keep a flight of stairs customarily used by employees in going to and from the basement adequately lighted and in good condition for the easy and safe passage of employees.—Wulff v. Bossler, 199 Mich. 70.

¶ 314. The employer must use due care in furnishing suitable instrumentalities for the performance of the work required; and for an omission, whether from his own want of care or for that of a fellow-servant of the person injured, he is liable.—Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140.

§ 47. Delegation of duty.

Delegation of duty to inspect and repair, see post § 53a.

Delegation of duty to warn and instruct, see post § 54a.

¶ 315. A master cannot shift his duty to furnish his servants a safe place to work upon by appointing a foreman with full authority to choose the material and direct the construction of the scaffold on which such servants must work.—Brown v. Gilchrist, 80 Mich. 56.

¶ 316. The duty of a master to use reasonable care in providing safe tools and appliances for the use of workmen in its employ cannot be delegated to another so as to relieve the master from personal liability.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 317. An employer's duty to provide a safe place for his servants to work in is a nondelegable one.—Balhoff v. Michigan Cent. R. Co., 107 Mich. 591; Ranta v. Newport Min. Co., 180 Mich. 459; McBrown v. B. Siegel & Co., 175 Mich. 186; Maki v. Isle Royale Copper Co., 180 Mich. 624; Scoop v. W. H. White Co., 182 Mich. 539.

¶ 318. The primary duty of a railroad company to provide cars reasonably safe and in reasonably good condition for the purposes for which they are to be used, is one which cannot be delegated.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 319. Since an employer's duty to provide a safe place is nondelegable, the character and competency of the person employed to perform the duty is immaterial, except in so far as it may throw light on the question whether the master's duty was performed.—Scoop v. W. H. White Co., 182 Mich. 539.

¶ 320. An employer cannot relieve himself from liability for an injury to an employee by delegating to a subordinate his duty of providing his employees with a safe place in which to work.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 321. It is the duty of a master to furnish his servant with a reasonably safe place to work and with reasonably safe appliances, and he cannot delegate this duty so as to relieve himself of responsibility.—Gillette v.

Grand Trunk Western Ry. Co., 192 Mich. 113.

¶ 322. Where a steam-fitter engaged in making repairs in a steam pipe, allowed water to escape therefrom and come in contact with calcium carbide, whereby an explosion was caused and plaintiff's intestate was killed, there being nothing in the position of the steam-fitter and plumber which would cause him to know the conditions under which an explosion might occur, held, that the duty to cause the water to be removed from the steam pipe before instructing the plumber to do the work which necessitated the breaking of the pipe, devolved absolutely upon the master, and was nondelegable.—Charron v. Union Carbide Co., 151 Mich. 687.

¶ 323. A master is responsible for the negligence of its blacksmiths to whom it has committed the duty of furnishing safe tools to its employees.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 324. As regards the duty of the master to furnish a safe place to work it does not matter whether the order or direction resulting in plaintiff's injury is given by the superintendent or a foreman, for the duty to furnish a safe place in which to work is one which cannot be delegated by the master.—Orso v. Great Lakes Engineering Works, 164 Mich. 568.

¶ 325. The duty to repair and keep the place and appliances used in and about a business reasonably safe rests upon the employer and is nondelegable.—Courtois v. King Paper Co., 172 Mich. 305.

¶ 326. Where a miner working in the bottom of a shaft was injured by the fall of timber from a staging higher in the shaft, where timbermen were engaged in timbering the walls of the shaft, it was held that the duty of carefully constructing the staging and working thereon was not a nondelegable duty.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 327. An employer's duty to protect his employees from exposed electric wires cannot be delegated so as to relieve the former from liability for injuries sustained by an employee by coming into contact with such wires.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

§ 48. Degree of care and sufficiency of machinery, appliance, or place.

Evidence as to, see post §§ 64b, 65d.
Questions of law and fact, see post § 67f.

¶ 328. Masters do not impliedly warrant the machinery and appliances used by their servants to be safe beyond any contingencies or even to be as safe as those of other employers.—Richards v. Rough, 53 Mich. 212.

¶ 329. As between the employer and his employees, it is the duty of the master to furnish suitable machinery, and see that it is kept in repair, and he is bound to exercise reasonable care to prevent accidents; which care necessarily has relation to the parties, the business in which they are engaged, the wear and tear upon the machinery, and the varying exigencies which require vigilance and attention conforming in amount and degree to the circumstances of each particular case.—Johnson v. Spear, 76 Mich. 139; Johnson v. Spear, 82 Mich. 453.

¶ 330. A master is bound to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 331. A master owes the duty to a servant of using ordinary care and diligence in providing safe material and such appliances as are reasonably calculated to insure his safety.—Wachsmuth v. Shaw Elec. Crane Co., 118 Mich. 275.

¶ 332. A defendant's duty to supply safe appliances for the use of an employee is to be measured by the probability and not by the possibility that a certain device might result in injury.—Johnson v. Jackson, 168 Mich. 149.

¶ 333. In selecting and inspecting torpedoes for the signaling of trains, a railroad is bound to exercise only reasonable care, and is not required to absolutely insure their efficiency.—Siegel v. Detroit, G. H. & M. Ry. Co., 160 Mich. 270.

§ 48a. Latest, best or safest tools and appliances.

¶ 334. An employer is not under obligation to his servants to make use of the safest or most recent mechanical appliances for the purpose of insuring the safety of his employees.—Fort Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133; McGinnis v. Canada Southern Bridge Co., 49 Mich. 466.

¶ 335. Business establishments are not bound at their peril to use only the best machinery and implements and the safest methods.—Michigan Cent. R. Co. v. Smithson, 45 Mich. 212.

¶ 336. The use of appliances which are in universal and common use for the purpose cannot be said to be negligence.—Werbowlsky v. Fort Wayne & E. R. Co., 86 Mich. 236.

¶ 337. An employer is not in duty bound to furnish his employees the safest known appliances and instruments, but he discharges his duty towards them in that respect if he furnishes appliances which are in common and general use throughout the country in the same or similar lines of work.—Shadford v. Ann Arbor St. R. Co., 111 Mich. 390.

¶ 338. A master is not required to make his premises perfectly safe and furnish the best material, his duty being discharged if he makes the premises reasonably safe.—Lockwood v. Tennant, 137 Mich. 305.

¶ 339. Where a master furnishes tools which are efficient to the extent of their capacity, and are not calculated to deceive those who use them, it is not necessary that they shall have been of the latest pattern or those best adapted to the use.—Wheaton v. Wagner Lake Ice & Coal Co., 151 Mich. 100.

§ 48b. Dangers or defects apparent or obvious to servant.

¶ 340. A master is not negligent in failing to furnish his servant a place to work safe as against apparent and obvious danger.—Stone v. Bennett, 194 Mich. 441.

¶ 341. The fact that an employee had frequently ridden on his bicycle through the power room of a factory on his way to and from work, without having been forbidden to do so, does not render the master liable for failure to supply him with a safe place to ride.—Schwager v. Saginaw Plate Glass Co., 179 Mich. 360.

¶ 342. Where plaintiff's intestate was killed in a building known as the "erecting house" where there were sixteen tracks, while he was employed by the defendant painting cars and was passing between cars while going for more paint, it cannot be said that the defendant failed to perform a duty owing to decedent to provide a safe place to work and to travel on its premises in the performance of his work, when the danger of passing between cars that were liable to be moved at any moment was obvious to decedent. There was no duty to guard and protect the opening or passage left between the cars when employees were required to cross.—Jurkiewicz v. American Car & Foundry Co., 147 Mich. 622.

§ 48c. Defects or dangers caused by servant or other employees.

¶ 343. The duty of a master to provide a safe place to work does not extend so far as to require that he shall see at his peril that the machinery and appliances employed are properly used. Reasonable regulations must be made for their use; but when this is done, and the fault of one servant makes a place unsafe, which, but for such fault, would be safe, the rule of nonliability for the fault of a fellow-servant applies.—Jurkiewicz v. American Car & Foundry Co., 147 Mich. 622.

¶ 344. While a master must at his peril provide his servant with a reasonably safe place in which to work, exception is made to this rule where the unsafe place is made by the servant himself, or is created as an incident of the work being performed by the servant and his colaborer.—Scendar v. Winona Copper Co., 169 Mich. 665.

¶ 345. Where a certain scaffold had been constructed of one inch boards because planks were not available, and planks for the purpose had subsequently been furnished, the master is not liable though the workmen had failed to substitute the plank for the boards.—Lockwood v. Tennant, 137 Mich. 305.

¶ 346. A master is not guilty of negligence in furnishing one inch boards for the erection of scaffolds instead of two inch planks though the latter would be better for the purpose, where a sufficient quantity of boards is furnished so that the scaffold may be made safe by doubling.—Lockwood v. Tennant, 137 Mich. 305.

¶ 347. The safe place doctrine has no application where the master sends the servant to a place in a building to work which is safe but for the unforeseen negligence of servants of another contractor working on the same building and for whose acts defendant is not responsible.—Penner v. Vinton Co., 141 Mich. 77.

¶ 348. To hold linemen responsible for negligence in setting defective poles in the construction of a trolley line it must appear that selecting the poles was the duty of such linemen at the time of such construction and that the poles set were not first examined by special inspectors employed by the company directing such linemen.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

¶ 349. Plaintiff's intestate had no right of action against a city for the death of such intestate caused by the caving in of a sewer on which he was working for such city, upon the ground that due diligence was not used by the city in putting in the sheeting; where such intestate had agreed to put in the sheeting and such sheeting was put in according to the directions and under the supervision of such intestate.—Salzwedel v. City of Adrian, 145 Mich. 280.

¶ 350. It is the duty of the master to provide a safe place for his servants to work, and he cannot delegate this duty to another in such a way as to relieve himself from liability; but when the master has discharged this duty by making the place safe and it is subsequently rendered unsafe by the negligent act of a servant in carrying on the work in the place, the master is relieved of liability.—McBroom v. B. Siegel & Co., 175 Mich. 186.

¶ 351. The negligence of a workman in failing to give warning of some act about to be done by him, and which may be dangerous to a fellow-servant, does not come within the scope of the safe place doctrine.

—Mesich v. Tamarack Min. Co., 184 Mich. 363.

¶ 352. The doctrine of safe place to work is not involved in an action by a section hand for damages for injuries received by being struck by a train approaching from the rear while he was carelessly walking on the track to clean a switch of snow, as the place was safe, and was rendered unsafe only by plaintiff's careless act.—Barnhart v. Pere Marquette R. Co., 188 Mich. 537.

¶ 353. The doctrine of safe place to work had no application where a servant engaged in digging a trench along a cement wall and footing of a building that was being razed disobeyed orders of the master not to dig the trench deeper than the footing, as a result of which the concrete tilted and fatally injured the servant when he placed the handle of his shovel against his body and the blade against the concrete.—Aphoresmenos v. McIntosh, 189 Mich. 680.

¶ 354. In an action for personal injuries sustained by a woodsman, as the result of a tree falling upon him, which had been felled by workmen working in another gang near him, held that as the place at which the plaintiff was set to work was in itself safe and was made unsafe only through the act of himself or of his fellow employees and was constantly changing, the doctrine concerning the duty of a master to furnish a servant a safe place to work did not apply. —Stone v. Bennett, 194 Mich. 441.

§ 48d. Appliances or tools procured or selected by servant or coemployees.

¶ 355. Where a servant is permitted to choose tools from among those furnished by the master, the fact that he chose a less efficient tool than others that are at his disposal will not impose liability upon the master.—Wheaton v. Wagner Lake Ice & Coal Co., 151 Mich. 100.

¶ 356. A master owes the duty of furnishing proper tools and materials, but he is not bound to see to it at his peril that an employee and his fellow-servants make proper selections, or that they do not without authority procure tools from others.—Fellows v. Stevens, 170 Mich. 13.

¶ 357. The linemen who used defective poles in the construction of a trolley line are not responsible for negligence in making an improper selection of poles where it appears that the company employing such linemen failed to furnish a sufficient number of good poles.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

¶ 358. Plaintiff employee was injured by the giving way of a platform in a shaft, while engaged with other employees of the defendant in walling up the shaft. The platform was built to aid in the process of walling up the shaft from one level to another. Held, that if the planks furnished were of a species of wood which by its very nature was unfit for the purpose for which it was used, having reference to defendant's usual plan of construction, of which unfitness plaintiff was unaware, he was entitled to recover; but if, however, the timber furnished was of a suitable species, and sufficient sound planks were furnished, the defendant would not be liable for mistakes or negligence in selection, since the employees making such selection would be fellow-servants of the plaintiff.—Risku v. Iron Cliffs Co., 163 Mich. 523.

¶ 359. Defendant sent his foreman and a gang of men of which plaintiff was one, to install a sprinkler system in a manufacturing plant belonging to a third person. Defendant supplied step ladders to be used in the work. There was evidence that the foreman directed plaintiff to use a ladder found in the building, belonging to a third person, but no evidence that the foreman had any authority, general or special, to borrow and use tools in the place of those furnished by the defendant. While using said ladder plaintiff was injured on account of its alleged defects. Held, defendant was not liable for failure to supply proper tools and appliances.—Fellows v. Stevens, 170 Mich. 13. (Bird, J., dissenting.)

§ 49. Railroad tracks, bridges and equipment.

Statutory provisions as to railroad employees, see ante §§ 36, 37.

Proximate cause of injury to railroad employees, see ante § 43.

Methods of operating and unloading trains, see post § 52a.

Fellow-servant rule as applied to railroad employees, see post § 55j et seq.

Assumption of risk by railroad employees, see post § 57.

Contributory negligence of railroad employees, see post § 59i.

Pleading in actions by railroad employees, see post § 60a.

Evidence as to safety of tracks, cars and equipment, see post §§ 64b, 65e.

Jury questions as to cause of injury to railroad employees, see post § 67c.

Jury questions as to contributory negligence of railroad employees, see post §§ 68f, 69.

Instruction as to, see post §§ 71a, 71b.

¶ 360. An employee cannot bring an action against a railroad company upon the obligation which it owes the public to keep its track in safe and suitable condition, and to run its trains with regularity and dispatch for the carriage of passengers and freight.—Henry v. Lake Shore & M. S. Ry. Co., 49 Mich. 495.

¶ 361. The responsibility of a railroad company to its employees for the condition of its road is less strict than it would be

to strangers; and an accident to an employee, involving no liability, might, if it happened to another person, cause an actionable injury.—Batterson v. Chicago & G. T. Ry. Co., 53 Mich. 125.

¶ 362. The rule that the master owes to the employee the duty of furnishing a reasonably safe place to work, applies to railroads as well as to other places.—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 363. The test of negligence in railroading is: "What is usual in railroading?"—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 364. A railroad company is not under obligation to its servants under all circumstances to make use of the safest known appliances and instruments, so as to make it responsible for failure to discard what is not such, and to supply its place with something safer.—Fort Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133.

¶ 365. A railroad company is required to use due care to provide materials, machinery and other means by which an employee is to perform his work, safe for his use, and to keep them in repair and order, so as not unnecessarily to expose him to danger.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 366. Where a brakeman was thrown from a car and injured by the breaking of a brake-chain due to the parting of a link which was not properly welded, and the defect in which might have been discovered by close examination, the company was liable for providing such a chain; and that, as the defects in the chain existed when it was put on the car, notice thereof to the company need not be proved.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 367. A railroad company cannot be said, as a matter of law, to be negligent in using, in the unloading of freight, a gang-plank of the same character as it has used for fifteen years without accident.—La Pierre v. Chicago & G. T. R. Co., 99 Mich. 212.

¶ 368. A street railway must furnish those appliances and means which "measured by the standard of good railroading as actually conducted, can be said to be reasonably safe."—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 369. The construction of a freight shed in accordance with the general plan of such buildings, with doors too narrow to permit an employee to stand in safety beside refrigerator cars with open doors while being placed within the shed, which causes the death of an employee, does not constitute negligence which will render a carrier liable under the Federal Employers' Liability Act.—Miller v. Michigan Cent. R. Co., 185 Mich. 432.

§ 49a. ——Tracks, sidings and switches.

¶ 370. A railway company's duty to the public to keep its track in safe and suitable condition, and run its trains with regularity and dispatch for the carriage and transportation of passengers and freight, is not owed to its employees and is not the measure of negligence towards them.—Henry v. Lake Shore & M. S. Ry. Co., 49 Mich. 495.

¶ 371. The law does not impose upon a railroad company the absolute duty of keeping the tracks in reasonable safe condition but requires reasonable watchfulness and care in inspecting tracks and in keeping them safe for employees.—Culver v. South Haven & E. R. Co., 138 Mich. 443.

¶ 372. A railroad company is not bound to block its frogs, particularly if it does not appear that in doing so it would not entail greater dangers than it would avert.—McGinnis v. Canada Southern Bridge Co., 49 Mich. 466.

¶ 373. Whether How. St. § 3397a, requiring railroad companies so to adjust, fill or block the frogs, switches and guard-rails on their roads as to prevent the feet of employees from being caught therein, applies to "split switches," so called, which were not in use at the time of the passage of said act, quære.—Grand v. Michigan Cent. R. Co., 83 Mich. 564.

¶ 374. The duty imposed upon railroad companies by How. St. § 3397a, so to adjust, fill, or block the switches on their roads as to prevent the feet of employees or other persons from being caught therein, is not satisfied by the adoption of a method which the use of the road renders ineffectual within two or three days.—Eastman v. Lake Shore & M. S. R. Co., 101 Mich. 597.

¶ 375. A brakeman may rightfully assume that the employer has performed its statutory duty (§ 6313 Comp. L. '97, How. 2nd Ed., § 6670), of blocking switches, frogs and guard rails.—Scott v. Boyne City, G. & A. R. Co., 182 Mich. 514.

¶ 376. A suburban railway company is not obliged to provide targets, lights and locks at a switch in the highway, where it showed that it observed the same care in that regard as was exercised by other electric companies; it need not take all precautions which are taken by steam railroads against the result of a misplaced switch on a private right of way.—Noe v. Rapid Ry. Co., 133 Mich. 152.

¶ 377. It seems that there is no duty as a matter of law to ballast tracks evenly so to afford a smooth surface without depressions between the ties so as to make

a safe place for brakemen to work.—Ragon v. Toledo, A. A. & N. M. R. Co., 97 Mich. 265.

¶ 378. It is negligence on the part of a railroad to leave a hole between ties whereby a brakeman is injured by walking between moving cars.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 379. A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track, even in the neighborhood of depot platforms; and a brakeman suddenly called to supper, who is injured in consequence of slipping on the ice, has no remedy against the company.—Piquegno v. Chicago & G. T. Ry. Co., 52 Mich. 40.

¶ 380. A railroad company is not bound to change its manner of using its sidetracks, or to adopt the most approved ways or appliances in business.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 381. Constructing and maintaining a sidetrack so near a building in its yards and under its control as to endanger the lives of employees switching cars on said track is a violation of a railroad company's duty to provide a safe place for its employees to work in.—Sweet v. Michigan Cent. R. Co., 87 Mich. 559.

¶ 382. Where plaintiff's intestate was killed by a car which had jumped a sidetrack while passing over a switch, held that there could be no recovery, because the defendant owed no duty to the deceased to keep its tracks and switches in the yard in good condition or repair so that its trains and cars would safely pass the switches and sidetracks upon which it was intended to run or shunt cars, unless it should appear that the defendant was guilty of gross carelessness or recklessness in handling and running its cars; railroad companies not being held to the same degree of care in maintaining their sidetracks as in the care of their main tracks.—O'Donnell v. Duluth, S. S. & A. R. Co., 89 Mich. 174.

¶ 383. A railroad company which, without necessity, locates telegraph poles so near to the track over which its employees are required to operate its trains as to render it unsafe for such employees to operate the trains in the ordinary way without meeting with injury from such structures, has failed in its duty to provide a safe place.—Potter v. Detroit & G. H. & M. R. Co., 122 Mich. 179.

¶ 384. A railroad company is not required to keep its sidetracks absolutely even and smooth between the ties; they may be used without ballast and the company will not be liable to an employee who falls in consequence thereof, if he was familiar with the condition and made no objection.—Miller v. Detroit, G. H. & M. Ry. Co., 133 Mich. 564.

¶ 385. The fact that a railroad fails to comply with an order of the railroad commissioner requiring it to erect an interlocking and derailing switch at a crossing, cannot be availed of as constituting negligence by an employee injured during a collision of trains on the same track and not on the intersecting tracks.—Mellish v. Pere Marquette R. Co., 167 Mich. 86.

¶ 386. Where plaintiff's intestate, a brakeman, was killed by being caught between a derailed car and a pile of lumber, no negligence of the railroad company defendant can be predicated upon the location of the pile of lumber where it was piled at the usual and convenient distance from the track.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 387. The rule protecting railroad employees from structures upon the right of way too close to the track does not apply to roundhouse doors.—Hollingshead v. Detroit, G. H. & M. Ry. Co., 181 Mich. 547.

¶ 388. The rule relative to structures erected near the main tracks of a railway company does not apply to buildings within its switch yards, so far as its liability for injuries to employees is concerned.—Miller v. Michigan Cent. R. Co., 185 Mich. 432.

¶ 389. The doctrine requiring the master to furnish a safe place to work applies to a railroad siding built in a shed belonging to a brick company and the railroad company is liable for injuries sustained by a brakeman caused by the roof of the shed falling through apparent faulty construction or lack of repair.—Doyle v. Toledo, S. & M. R. Co., 127 Mich. 94.

¶ 390. The discretion of a railroad company as to the sharpness of the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved, cannot be interfered with by the courts in determining the company's obligations to its employees.—Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166.

§ 49b. ——Bridges and culverts.

¶ 391. Railroad companies may use their own discretion as to what kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe.—Illick v. Flint & Pere Marquette R. Co., 67 Mich. 632.

¶ 392. The width between the trusses of a railroad bridge is of no concern to a brakeman whose duty does not require him to occupy a place of danger while passing over it.—Illick v. Flint & Pere Marquette R. Co., 67 Mich. 632.

¶ 393. A railroad company owes no duty to its employees to make use of the latest improvements in bridges, or to change the structures upon its road so as to conform to the most recent ideas upon such subjects. Accordingly it was not negligence to have a bridge less than usual width but otherwise safe.—Illick v. Flint & Pere Marquette R. Co., 67 Mich. 632.

¶ 393a. A railroad company owes no duty to its employees to build fences from its cattle-guards to the line fence, in order to advise them of the presence of such guards, —especially where the guard is plainly visible, and is located at a place where, by common experience, it may well be expected. —Fuller v. Lake Shore & M. S. R. Co., 108 Mich. 690.

§ 49c. ——Cars and locomotives.

¶ 394. An engineer injured by a collision in which a flat car struck the corner of the tank on the tender of his engine, raising it and "slewing" it around against the cab wherein he was, cannot recover where the only negligence charged was failure to fasten properly the tank to the frame upon which it rested, and where the testimony failed to show that for all practical purposes the fastening was not secure.—Preston v. Chicago & W. M. R. Co., 98 Mich. 128.

¶ 395. The duty of a railroad company to furnish cars reasonably safe and in reasonably good condition for the purpose for which they are to be used, is not performed by furnishing a car designed, suitable and safe for one purpose, to be used for another for which it is unsuitable and unsafe.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 396. By "good railroading" is not meant "that everything should be done possible in equipping a car to insure safety," ordinary care being the proper rule applicable.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 397. A street railway is not guilty of negligence in failing to supply its cars with sand boxes, where there is no evidence that they are essential for safety in running cars, nor is it shown that it was the custom of other roads similarly situated and running similar cars to use them.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 398. Under Act No. 234, Pub. Acts 1907, logging trains having any cars the center of whose couplings is 27¾ inches above the top of the rail must be equipped with automatic couplers.—Betterly v. Boyne City, G. & A. R. Co., 158 Mich. 385.

¶ 399. Where the coupling devices on two freight cars enable the brakeman to uncouple them from either side without going between them, they sufficiently comply with the requirements of Comp. L. '97, § 5511, although the lever on each car extends only to one side so that different levers are used in uncoupling from different sides.—Wight v. Michigan Cent. R. Co., 161 Mich. 216. (Moore, J., dissenting.)

¶ 400. Under a statute providing that no freight car shall be run unless furnished with safety couplers, the test of compliance with the act is not whether a device is provided, but whether the cars can be coupled and uncoupled by its use.—Wight v. Michigan Cent. R. Co., 161 Mich. 216.

¶ 401. A railroad company is bound to furnish for its employees reasonably safe locomotives, and reasonably safe appliances thereto, and a competent engineer and fireman, though it is not required to furnish the best machinery or men that can be procured. —Lyttle v. Chicago & W. M. R. Co., 84 Mich. 289.

¶ 402. Where defendant's cars have slipped on a certain grade and run away on previous occasions, and these accidents were reported to the superintendent, the defendant is negligent if it fails to make all reasonable effort to prevent a recurrence of the dangers. —Mayer v. Detroit, Y., A. A. & J. Ry., 152 Mich. 276.

§ 50. Mines and quarries.

Statutory provisions as to mine employees, see ante § 36.

Mine employees as fellow-servants, see post § 55p.

Assumption of risks by mine employees, see post § 56n.

Contributory negligence of mine employees, see post § 59g.

Pleading in actions by mine employees, see post § 60b.

Jury questions as to sufficiency of appliances, tools and places, see post § 67h.

Jury questions as to knowledge and assumption of risk, see post § 67t.

Jury questions as to contributory negligence of mine employees, see post § 68e.

¶ 403. The doctrine of safe place and nondelegable duty does not apply to a place while in process of construction and being made safe.—Koskell v. Newport Min. Co., 182 Mich. 586.

¶ 404. The doctrine of safe place does not of necessity apply to work in a mine, where a servant is required to make the place in which to work.—Kochin v. Superior Copper Co., 181 Mich. 543.

¶ 405. A mine trammer cannot invoke the doctrine of safe place, where he is injured while assisting in making the place in which he has to work as mining operations are in progress.—Koskell v. Newport Min. Co., 182 Mich. 586; Zap v. Newport Min. Co., 184 Mich. 437.

¶ 406. Defendant was injured while working in an open quarry of from three to four hundred feet in length, where rock was barred or blasted down from time to time and then broken up and loaded into cars for the purpose of manufacture or shipment, as the case might be. The change which was taking place in the face of the quarry was a very gradual one. A small force of men was employed; blasting would take place at considerable intervals of time, and the place was not different from an ordinary open pit. Held, that the usual rule applicable to the duty to furnish a safe place applied.—Druck v. Antrim Lime Co., 167 Mich. 154.

§ 50a. ——Shafts, hoists and ladderways.

¶ 407. Plaintiff was injured by the giving way of a platform in a shaft. The platform was built to aid in the process of walling up the shaft from one level to another. Held, the defendant master owed the duty of supplying materials for the platform reasonably suited to the purpose.—Risku v. Iron Cliffs Co., 163 Mich. 523.

¶ 408. Plaintiff was injured by the giving way of a platform in a shaft. The platform was built to aid in the process of walling up the shaft from one level to another. Held, the master during the process of construction, with its shifting conditions, did not owe the duty of providing a safe place to work.—Risku v. Iron Cliffs Co., 163 Mich. 523.

¶ 409. The doctrine of safe place is inapplicable to a miner injured, while at work in the bottom of a shaft engaged in sinking same, by the fall of a piece of timber from a staging above him upon which timbermen were engaged in timbering the walls of the shaft, the staging being temporary in character and the conditions constantly changing as the work progressed.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 410. An employer who negligently fails to equip a mining shaft in course of construction with a suitable signaling device to control the movements of the bucket from the bottom of the shaft, or a suitable ladder by which miners might escape in case of emergency, is answerable for injuries sustained by an employee as the result of such omissions.—Benson v. Jones & Laughlin Ore Co., 185 Mich. 7. (Brooke, C. J., and Ostrander, J., concurring in reversal on ground that negligence was not shown.)

¶ 411. The doctrine of safe place to work does not apply to a mine timberman who is engaged in putting intermediate platforms, or "sollers," between levels in the mine, the purpose of which is to stop anything falling into the mining shaft or to catch a man's body, thus putting the ladderway and shaft in a safer condition for use by those who have occasion to use them.—Drajicevic v. Champion Copper Co., 194 Mich. 306.

§ 50b. ——Drifts, raises, stopes, walls and timbering.

¶ 412. Plaintiff was employed in defendant's mine at loading upon cars and removing the ore as it was brought to the floor by the miners. As fast as the ore was removed, it was the practice to support the roof by a timbering, which was put in place by a force of men kept for that purpose, upon notification by the miners themselves or by the shift boss, who had charge of the work in the mine, subject to the general supervision of a mining captain. As the work advanced other timbers were placed on top of these as the roof was mined down. Before a newly-opened space had been timbered, and before the timbermen had been notified that their services were required, plaintiff was injured by a fall of ore from the roof. Shortly before the accident the attention of the shift boss had been directed to indications of danger, but he said that the roof was all right, and instructed the men to resume work. Held, that whether the injury was caused by excavating too large a space without placing the timbers, or whether it resulted from the fact that the timbering previously erected had ceased to support the roof by reason of the subsequent dropping of ore therefrom, thus leaving too great an area unsupported, the case was not within the rule requiring the master to provide the servant with a reasonably safe place in which to work; that the so-called "place" was a mere incident of the mining operations, the result of the common labor of those employed in the mine; and that the master's duty was discharged by the exercise of reasonable care in furnishing suitable material and employing competent men to do the work.—Petaja v. Aurora Iron Mining Co., 106 Mich. 463.

¶ 413. Plaintiff was engaged as a loader in mining gypsum. From the main passageway of the mine lateral benches or passageways were cut out as the work of mining proceeded. As these lateral benches developed, electric lights were hung along their tops. In the process of blasting and loading, these passageways were in a state of constant change. Plaintiff while loading a tram car was injured by a rock which broke away and fell on him. There was evidence that the light supplied at the place where plaintiff was working was defective and that he had complained of it, and the foreman had given directions to have it remedied. Held, plaintiff could not recover for his injury, since the defendant company owed him no duty to provide a safe place to work in the midst of constantly changing conditions.—Strepanski v. Grand Rapids Plaster Co., 162 Mich. 696.

¶ 414. Plaintiff had been working as a regular miner in defendant's mine for about three weeks. A blast was exploded in the evening in the raise in which plaintiff was working. Next morning plaintiff's assistant

did not appear to timber the roof of the place blasted. Plaintiff was directed to work in another part until noon, when he was directed with another to timber the blasted place. While so engaged, a quantity of ore fell in from the roof and injured him. Held, defendant could not be held negligent on the theory of a failure to furnish a safe place to work.—Hosking v. Cleveland Iron Mining Co., 163 Mich. 538.

¶ 415. Plaintiff had been working as a regular miner in defendant's mine for about three weeks. A blast was exploded in the evening in the raise in which plaintiff was working. Next morning plaintiff's assistant did not appear to timber the roof of the place blasted. Plaintiff was directed to work in another part until noon, when he was directed with another to timber the blasted place. While so engaged, a quantity of ore fell in from the roof and injured him. Held, defendant could not be deemed negligent on the theory that it failed to furnish an assistant to enable plaintiff to timber the roof immediately in the morning of the day in question.—Hosking v. Cleveland Iron Mining Co., 163 Mich. 538.

¶ 416. Plaintiff, a timberman, was injured by the falling of rock while he was cutting a hitch in which timber called a stull was to be placed. The stulls were put in, not for the purpose of sustaining the hanging wall, but for the purpose of putting back of the stulls lagging which sustained the ore as it was broken down in the stope. Both the hanging wall and foot wall were of solid rock, and the stoping was done to remove all of the vein between these walls. Held, that the rule requiring the master to furnish a safe place to work was applicable. —Danula v. Quincy Min. Co., 166 Mich. 350.

¶ 417. Where a trammer in a mine is denied the time and privilege to pinch down the loose rock in a hanging wall, and the captain and shift boss are accustomed to look after the matter, the master is subject to the common-law duty to make the wall safe. —Scendar v. Winona Copper Co., 169 Mich. 665.

¶ 418. The doctrine of safe place does not apply to a "hitchcutter" in a mine who by reason of his peculiar skill was employed to undertake the hazardous work incident to the timbering of the mine, the dangers incident to the work changing from hour to hour as the work progressed.—Andrews v. Tamarack Mining Co., 180 Mich. 72.

¶ 419. The doctrine of safe place applies to a raise or chute in a mine having two compartments, one for conveying ore and the other to permit workmen to descend in order to loosen clogged ore by pounding with a hammer on the dividing partition.—Ranta v. Newport Min. Co., 180 Mich. 459.

¶ 420. The doctrine of safe place does not apply to a stope in a mine which miners and trammers are preparing so as to permit them to perform their regular duties.—Kochin v. Superior Copper Co., 181 Mich. 543.

¶ 421. The duty of a mine owner to furnish his employees a reasonably safe place to work extends to a passage in a mine through which the latter are obliged to travel.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

¶ 422. A timberman whose duty it is to make repairs in a mine so as to provide a safe place in which miners may work, cannot invoke the doctrine of safe place when injured in the course of his employment.—Juntunen v. Quincy Min. Co., 184 Mich. 341.

¶ 423. The doctrine of safe place is not applicable to the employment of a mine timberman, who with other members of the crew is engaged in replacing some timbers which had previously been knocked down by blasting, as the duty of such person is to make a place safe for work by others.—Vrelenich v. Calumet & Hecla Min. Co., 188 Mich. 407.

¶ 424. The doctrine of safe place does not apply where an experienced miner is engaged with other experienced miners in making the walls of a mine safe by removing old timbers from a drift and replacing them with new ones, and is injured by the falling of a stone through a hole between the top of the second set of timbers and back of the drift, which hole was due to the failure of the miners of the prior shift to use blocking.—Kangas v. Cleveland Cliffs Iron Co., 188 Mich. 255.

¶ 425. The doctrine of safe place has no application where miners are engaged in timbering up a drift so as to make it safe for passage.—Aho v. Cleveland Cliffs Iron Co., 188 Mich. 218.

¶ 426. A mine owner's duty with respect to mine timbermen is fulfilled when reasonable rules are promulgated, the workmen properly instructed, and suitable tools and material furnished for the work with competent men to perform it.—Vrelenich v. Calumet & Hecla Min. Co., 188 Mich. 407.

§ 51. Protecting or guarding dangerous machinery and places.

Duty to furnish safe tools, appliances and places, see ante § 46.

Duty of master to warn and instruct servant, see post § 54.

Nonperformance of duty as bearing on assumption of risk, see post § 56f.

Omission of statutory duty as affecting contributory negligence, see post § 59b.

Jury questions as to guards and signals, see post § 67n.

¶ 427. The statutory duty imposed upon manufacturers by Pub. Acts 1893, No. 126, §§ 11, 12, to provide certain safeguards for machinery in the discretion of the factory inspector, does not exist until the inspector has declared such safeguards necessary.—Monforton v. Detroit Pressed Brick Co., 113 Mich. 39.

¶ 428. The fact that the failure to safeguard a cornhusker as required by Act No. 124, Pub. Acts 1907, may not have contributed to an injury resulting from hazardous work, does not excuse a person under the Act when some device might have made such hazardous work unnecessary.—Garfield v. Lapham, 173 Mich. 217.

¶ 429. An ordinance of the city of Detroit requiring the laying of floors as the work of construction on buildings progresses, for the protection of workmen, is inapplicable to a contractor engaged merely in the construction of a smokestack upon the roof of a building.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

¶ 430. An ordinance of a city as to the manner in which a contractor shall dig and protect trenches in the public streets, is for the protection of the public and not for the employees of a contractor who may be injured by the latter's failure to observe such ordinance.—Baucino v. Fitzpatrick, 186 Mich. 1.

§ 51a. ——Machinery in shops and factories.

¶ 431. The notice contemplated by How. St. § 1997c7, providing that "if * * * belting, shafting, gearing, elevators, drums, and machinery in the shops and factories are located so as to be dangerous to employees, and not sufficiently guarded, * * * after due notice of such defect, said proprietors or agents shall be deemed guilty of violating the provisions of this act," is notice by the inspector mentioned in the preceding section of the act, and until this notice is given, the statutory liability does not exist.—Borck v. Michigan Bolt Works, 111 Mich. 129.

¶ 432. The fact that a defendant employer does not cover the bolts on a revolving shaft coupling, is not negligence, by statute, but may be so in a case where he directs a plaintiff to work in close and dangerous proximity thereto.—MacDonald v. Freeman Mfg. Co., 160 Mich. 380.

¶ 433. The failure to provide the safeguards for pulleys and belts prescribed by Act No. 113, Pub. Acts of 1901, § 8, is evidence of negligence in a suit for personal injuries arising from the absence of such safeguards.—Johnson v. Union Carbide Co., 169 Mich. 651.

¶ 434. Solid emery wheels are included within Act 285, Pub. Acts 1909, providing that in any factory or workshop where wheels or emery belts of any description are in general use, fans or similar apparatus shall be provided to protect those using them from dust.—Drake v. Industrial Works, 174 Mich. 622. (Brooke, McAlvay and Ostrander, JJ., dissenting.)

¶ 435. Pub. Acts 1909, No. 285, requiring protection of gearing applies to gears situated nine feet above the floor, where it was shown that it was necessary for defendant's employees to mount a ladder several times a day to attend to a portion of their work within three feet of the exposed gearing.—Smith v. Mt. Clemens Sugar Co., 179 Mich. 97.

¶ 436. Pub. Acts 1909, No. 285, § 15, How. St., 2nd Ed., § 4023, providing that "all vats, saws, fans, planers, cogs, set screws, gearing and machinery of every description shall be properly guarded when deemed necessary by the factory inspector," held to apply in an action by a factory worker against the owners for damages for injuries received as a result of his clothing becoming entangled in projecting set screws in removable chucks used to hold in place logs for planing purposes in a rotary veneer peeler.—Edward v. Grand Haven Basket Factory, 187 Mich. 505.

¶ 437. There is no violation of the statutory duty on the part of an employer in failing to guard a revolving line shaft situated two feet from the floor of a factory at a point where there are no couplings, set screws, or projections of any kind.—Hertel v. Safety Folding Bed Co., 149 Mich. 223.

¶ 438. The language of Comp. L. 1897, § 5349, indicates a design to make the safeguarding of all gearing or belting, and the provision of loose pulleys where possible, a duty without reference to the factory inspector, although a preceding sentence in the same section makes the duty of furnishing shifters, etc., dependent upon the action of the inspector requiring it.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 439. A factory owner violates Act No. 113, Pub. Acts 1901, § 8, in failing to safeguard the pulleys and belts operating the rollers used in crushing carbide.—Johnson v. Union Carbide Co., 169 Mich. 651.

¶ 440. Plaintiff, a boy of fourteen years, was set to work on a pipe-threading machine which was operated by two sets of gears or cogs both of which were exposed. On returning to his machine from another part of the shop, plaintiff stumbled over a valve lying upon the floor and fell upon the exposed gears of said machine and was injured. Act No. 285, Pub. Acts of 1909, § 15, provides that "all gearing or belting shall be provided with proper guards." Held, the mechanism in question came within the

terms of said section and defendant employer was liable for negligence in failing to safeguard the same.—Tabinski v. A. Harvey's Sons Mfg. Co., 168 Mich. 392.

¶ 441. Under Act No. 285, Pub. Acts of 1909, § 15, the language, "all gearing or belting shall be provided with proper safeguards," places upon the factory owner a positive duty to supply said safeguards, and the language in the latter part of said section to the effect that "gearing shall be properly guarded when deemed necessary by the factory inspector," does not modify the effect of the express mandate contained in the earlier part of said section.—Tabinski v. A. Harvey's Sons Mfg. Co., 168 Mich. 392.

§ 51b. ——Saws and planers.

¶ 442. The liability of a factory owner for negligence, under section 8, Act No. 113, Pub. Acts 1901, which provides that all vats, saws, planers, and other machinery shall be properly guarded when deemed necessary by the factory inspector, depends upon the fact of the order having been made by the factory inspector and brought to the notice of the owner; such an order applies not only to all machinery in use at that time but is broad enough to cover that which is installed later. —Kerr v. National Fulton Brass Mfg. Co., 155 Mich. 191.

¶ 443. Plaintiff's decedent was killed while operating a ripsaw by being struck by a piece of timber thrown back by the saw. Held, that the omission of the defendant to provide a guard for the saw, as required by statute and by the order of the factory inspector, was negligence per se.—Van Doorn v. Heap, 160 Mich. 199.

¶ 444. In an action for injuries claimed to have been caused by plaintiff's coming in contact with circular saw, failure to install a "spreader" held not negligence under evidence that spreaders are designed to prevent boards being sawed from flying or kicking back and it was not shown that there was any "fly-back" or "kick-back" at the time of the accident.—Dombrowski v. Roe-Stephens Mfg. Co., 180 Mich. 202.

¶ 445. A narrow elevated platform in a sawmill is a dangerous place for a boy thirteen years old, charged with the duty of keeping certain chutes clear of slabs by pushing or pulling the slabs with a hook or pike pole six feet long, where while giving entire attention to his work he is liable to be precipitated backward upon an uncovered, rapidly revolving shaft only a few feet distant, and the employer of the boy is liable for any injury caused by the shaft's being uncovered.—King v. Ford River Lumber Co., 93 Mich. 172.

¶ 446. A manufacturer was under no legal duty to provide guards or screens on a small saw contained on an equalizing machine, where he had left sufficient room to carry on the work around such machine and had duly instructed his employees in such work, and warned them of the dangers attending it.—Journeaux v. E. H. Stafford Co., 122 Mich. 396.

¶ 447. A wire screen over a hole in a partition built to protect a sawyer from flying sawdust is not an improper or unsafe appliance tending to obscure the sawyer's vision so as to render the sawmill owner liable for the death of an assistant at the saw in the absence of evidence to show that the vision was obscured at the time of the accident.—Kellogg v. Stephens Lumber Co., 125 Mich. 222.

§ 51c. ——Stairways, elevators, hoisting shafts and trap doors.

¶ 448. Under Act No. 285, Pub. Acts of 1909, § 14, requiring factories to provide safe stairways, it was the legislative intent to require stairways, with the safeguards specified in all cases where means of ascent and descent are needed or desired and are used by employees at their work in the line of their employment.—Davis v. Buss Mach. Works, 169 Mich. 498.

¶ 449. Under sec. 14 of Act 265, Pub. Acts of 1908, recovery may be had where an employer fails to provide a stairway with hand rails, as therein required, and the fact that no attempt to comply with the statute was made is no defense.—Davis v. Buss Machine Works, 175 Mich. 61.

¶ 450. The statute requiring stairways (sec. 14, Act 265, Pub. Acts 1908) applies to all cases where means of ascent and descent are needed or desired and are used by employees at their work in the line of their employment.—Davis v. Buss Machine Works, 175 Mich. 61.

¶ 451. Under sec. 12 of Act 285, Pub. Acts of 1909, defendants held liable for the death of plaintiff's intestate for failure to provide automatic gates for an elevator into which plaintiff's intestate fell.—Noack v. Williams, Davis, Brooks & Hinchman Sons, 175 Mich. 15.

¶ 452. If an employer's failure to inclose an elevator shaft as required by § 12 of Act No. 285, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 4020, was not the actual cause of an employee's injury as he was leaving an elevator which was suddenly started by a fellow-servant, the employer is not liable where a full compliance with the section would not have prevented the accident.—Fifelski v. Grand Rapids Light Co., 181 Mich. 503.

¶ 453. Pub. Acts 1901, No. 113, § 5, making it the duty of the owner, agent, or lessee of any manufacturing establishment where hoisting shafts or well holes are used to

cause the same to be properly inclosed and secured was passed with the intent to protect everybody who might be in danger of injury, and cannot be said to require only such inclosure and security as will prevent people from the outside from falling in but people inside must also be protected from the danger of falling down elevator shafts. —Murphy v. Grand Rapids Veneer Works, 142 Mich. 677.

¶ 454. The Manufacturer's Act requiring the installation of automatic gates on elevators does not apply where a company operates a gypsum mine and near it a manufacturing plant in connection with said mine, the question being whether defendant is liable for an elevator accident occurring in the shaft of the mine, said accident being attributable to the lack of said automatic gates.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 455. Trap doors are dangerous openings and when open should be properly guarded. —Hayes v. Frederick Stearns & Co., 130 Mich. 287.

¶ 456. Where an employee was injured by falling into an open trap door in a platform over which he was directed to carry a box of shavings which prevented him from seeing the floor over which he was walking, and he was not familiar with the premises, it is not a sufficient defense to an action for the injury that the buildings were new and the business just being moved in, and that the employees knew that it was not wholly completed and articles therein were not all in their proper places, it appearing that the platform in question was wholly completed and was being used for unloading goods and for a passageway for the employees in their work.—Hayes v. Frederick Stearns & Co., 130 Mich. 287.

C. METHODS OF WORK, RULES, ORDERS AND INSPECTION.

§ 52. In general; precautions against injury.

Duty, care and diligence of master, see ante § 33.
Duty to protect and guard dangerous machinery and places, see ante § 51.
Duty of master to inspect and repair, see post § 53.
Duty to warn and instruct, see post § 54.
Assumption of risk of complying with orders and commands, see post § 56i.
Assumption of risks from violation of rules and orders, see post § 56j.
Assumption of risks from improper methods of work, see post § 56k.
Contributory negligence in disregarding rules and regulations, see post § 59 l.
Evidence as to methods of work, see post §§ 64e, 65g.
Instructions as to methods of work, rules and orders, see post § 71d.

¶ 457. An employer who introduces improved and complex machinery must take such corresponding precautions to keep his employees from harm in using it as are customary with prudent men.—Swoboda v. Ward, 40 Mich. 420.

¶ 458. When the master orders the servant into a situation which may become dangerous by the starting of machinery or the act of other servants, it becomes the duty of the master to guard against such contingencies.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 459. It is the master's duty to provide the servant with a safe place to work, and, when the service required of an employee is of a particularly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 460. A quarry company using high explosives in carrying on its work must exercise reasonable care commensurate with the danger, and cover the blasts to prevent them from throwing rock or give adequate warning of expected explosions.—Moronen v. McDonnell, 177 Mich. 691.

¶ 461. A quarry company in the country is not negligent to an employee eating his dinner during his noon hour at a place of his own selection by failing to cover the blast if proper notice and warning were given.—Moronen v. McDonnell, 177 Mich. 691.

§ 52a. Methods of operating or unloading trains.

Proximate cause of injuries to railroad employees, see ante § 43.
Duty to furnish safe tracks and railroad equipment, see ante § 49.

¶ 462. A railroad company is under no legal obligation to maintain, for the protection of its employees, a station agent at a flag-station where there is an unblocked siding. All that is required of it is that it construct and equip its side tracks and cars, and station its agents, in the manner usual with well-managed railroads, and as good railroading requires.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 463. A sectionman cannot base a right of action on the failure of a railroad to sound the statutory whistle at a highway crossing.—Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 464. A railroad company does not owe a section hand the duty to give statutory crossing signals.—Barnhart v. Pere Marquette R. Co., 188 Mich. 537.

¶ 465. Making "flying switches," being a practice in common use by railroads, is not negligence on their part towards an employee.—Carr v. St. Clair Tunnel Co., 131 Mich. 592.

¶ 466. Keeping a certain switch east of the crossing to which plaintiff was assigned as a crossing tender securely locked and fastened when not in use, so as to guard plaintiff from derailments, was not one of the absolute duties of defendant but one relating to the details of operation which could be properly delegated to an employee. —Dixon v. Grand Trunk Western Ry. Co., 147 Mich. 667.

¶ 467. Where the defendant railroad company had made a general order directing all car-inspectors and repair-men, before going between or under any cars, to place a red signal-flag on the end of the car or cars in the direction from which a train or engine could approach, and forbidding all train-men to back against or couple onto any car while such signal was displayed, held, that defendant was not negligent in not having a watchman or "bumpers"; nor was it negligence to run other cars upon the same track where cars were being repaired, when space was left between them, and the red flag was respected according to the rule.—Peterson v. Chicago & N. W. R. Co., 67 Mich. 102.

¶ 468. A roadmaster directing an engineer to move an engine is not bound to see that the track is clear of all persons before communicating such order to the engineer.—Hammond v. Michigan Cent. R. Co., 162 Mich. 431.

¶ 469. A railroad company is not guilty of actionable negligence in permitting its locomotives to take fuel and water upon a track without other warning to approaching trains than provided by rules requiring such trains to be on the lookout for trains taking fuel and water at such places.—Mellish v. Pere Marquette R. Co., 167 Mich. 86.

¶ 470. To require a gang of sixteen men to arrange themselves in line along a train of moving cars, and, acting as one man, to lift from the ground, and throw upon a car as it passes them, a steel rail weighing from six hundred to seven hundred pounds, and then to run fast enough along rough ground along the side of the track to be able to have the next rail in position to throw on the car at the proper moment as it passes, at least without notifying a new and inexperienced employee of the great danger attending the work, is negligence per se.—Palmer v. Michigan Cent. R. Co., 93 Mich. 363.

¶ 471. It is not negligence for a railroad company to require a member of one of its section gangs to assist other employees in unloading logs from a car, and to arrange such as have fallen out of line.—Roepcke v. Michigan Cent. R. Co., 100 Mich. 541.

¶ 472. A railroad company slowly moving its cars by a switch engine in its yard without sending a man in front of the cars to notify employees of their approach is not guilty of negligence as against an employee. —Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835.

§ 52b. Necessity, construction and operation of rules and regulations.

Evidence as to rules and orders, see post §§ 64e, 65h.

¶ 473. Rules promulgated by a railroad company, which define the duties of certain employees to whom the running and immediate control of trains is confided, are essentially private regulations of the railroad in the orderly and prudent conduct of its business, and do not fix the obligations and liability of the defendant to its employees, nor even to third persons; these are fixed by law, and are neither diminished nor, ordinarily, increased thereby.—Dixon v. Grand Trunk Western Ry. Co., 155 Mich. 169.

¶ 474. In an action by an employee against a railroad company for injuries sustained by being struck by a derailed train, right to recovery was based on defendant's alleged failure to see to it that the rules directing employees to keep switches locked were obeyed. Held, that plaintiff could not recover, for the existence of the rule did not add to defendant's obligations to plaintiff.—Dixon v. Grand Trunk Western Ry. Co., 155 Mich. 169.

¶ 475. One of the rules adopted by the railroad company for the guidance of engineers reads as follows: "All passenger trains will use four minutes between east switch at J. Junction and J." The preceding rule stated that signals had been erected east and west of J., and east and west of J. Junction, and directed that all trains should come to a full stop when a red signal was displayed, and not proceed until the signal had been changed. The succeeding rule declared that all trains approaching J. and J. Junction must be under full control, so as to be able to stop in case the track should from any cause be occupied, and that a sharp lookout must be kept for signals in approaching such points. Held, that the rule as to time indicated the minimum, not the maximum, time which should be used between J. and J. Junction.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 476. A rule of a railroad company requiring conductors to know that there is a reliable brake on the rear car of their train does not relieve the company from liability for injury to a freight conductor caused by the breaking of a brake chain which had been repaired by using a wire, where he had

tried the brake in the usual way by setting and releasing it, and found that it worked properly, and the wire repair was below the car platform and concealed, since he had violated no duty imposed by the rule.—McDonald v. Michigan Cent. R. Co., 132 Mich. 372.

¶ 477. A rule requiring a lookout on the foot-board of an engine backing across a highway is for the benefit of the public and is not available in favor of a section hand injured by a backing engine at a street crossing.—Carlson v. Cincinnati, S. & M. R. Co., 120 Mich. 481.

¶ 478. The rule requiring a lookout on the rear of a backing train cannot be said to apply to a track laborer working on the construction of a track where the train is a construction train used in the work and moved in the course thereof.—Burrman v. Grand Trunk W. R. Co., 143 Mich. 689.

¶ 479. A railroad company rule prohibiting a brakeman from entering between moving cars except under favorable conditions leaves it to the brakeman's judgment as to whether or not the footing is sufficient to warrant such action.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 480. A book of rules of a railroad company prohibiting northbound trains from going upon the southbound main of a double track applies to engines going to roundhouses without cars attached thereto.—Jones v. Pere Marquette R. Co., 168 Mich. 1.

¶ 481. A train is within yard limits at a station within a rule of the company regulating the manner in which trains must pass into stations though there is no post on the line in question defining the limits, where there is such a post on the company's parallel line and the train is within it.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 482. A train is at a station within a rule of a railway company relating to the manner in which certain trains must pass into all stations and to the possibility of striking trains within the station switches though such train is not within the switches where it is in the immediate vicinity of side tracks which the rule requires must be approached cautiously and it stands within yard limits, since the word station as used covers so much of the track as is commonly used by trains which are compelled to stop at the station by adverse signals.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 483. A point designated by a railway company on its time card as a station is a station within a rule of the company relating to the manner in which certain trains must pass into and through all stations, where a telegraph operator is maintained there, books are kept in which certain trains must register and the company issues running orders to such point.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 484. A train dispatcher is not chargeable with notice that the trainmen will disregard the well-understood rules of the railroad, and in giving his orders he is not guilty of negligence in relying upon their observance.—Veit v. Ann Arbor R. Co., 150 Mich. 358.

¶ 485. In an action for personal injuries by a brakeman against a railroad company, a waiver of an express rule agreed to by the employees can be established only by showing the custom of coupling cars followed by employees to have been so universal and notorious that the company is presumed to know it.—Nichols v. Chicago & W. M. R. Co., 125 Mich. 394.

¶ 486. Rules and regulations of a board of public works of a city as to the manner in which contractors shall dig and protect trenches in the public streets are for the protection of the public and not for the employees of a contractor who may be injured by the latter's failure to observe such regulations.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 487. Where a rule or notice is habitually violated by employees, with the knowledge and acquiescence of the master, or is not enforced, then the rule or notice may be treated as abrogated.—Johnson v. Burke, 167 Mich. 349.

§ 53. Duty of master to inspect and repair.

Care and diligence required of master, see ante § 33.

Duty to furnish safe tools, appliances and places, see ante § 46.

Assumption of risks from reliance on promise to repair, see post § 56h.

Evidence as to inspection and repair, see post §§ 64d, 65f.

Instructions as to test and inspections, see post § 71c.

¶ 488. It is not necessary, in order to recover for injuries resulting from defective machinery, that the master had actual knowledge of such defects, but it is enough to show such facts and circumstances to exist that, if he had exercised reasonable care and diligence, he would have ascertained its true condition by examination and inspection.—Johnson v. Spear, 76 Mich. 139; Johnson v. Spear, 82 Mich. 453.

¶ 489. The owner of a coal-dock who contracts for unloading coal during the season of navigation at a specified price per ton, his engineer and foreman supervising the work and renewing necessary hoisting chains, and to furnish the contractor a stationary engine upon the dock, and the appliances therewith, including the chain attached to the buckets in which the coal is hoisted from the vessels to the dock (under which ascending buckets

the contractor's employees are obliged to work during the early part of such unloading), which contract is silent as to repairs, is charged with the duty of examining and inspecting such engine and appliances, and is liable for any injury resulting to said employees by reason of the weak and worn condition of said chain, if he knows, or could know by such inspection, of its insufficiency.—Johnson v. Spear, 76 Mich. 139; Johnson v. Spear, 82 Mich. 453.

¶ 490. The statutory requirement that every railroad shall impartially and diligently receive and forward the cars of other roads does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch.—Smith v. Flint & P. M. R. Co., 46 Mich. 258.

¶ 491. The duty resting upon the master to provide a reasonably safe place for the employee to perform his services is a continuing duty, to the extent that it requires the master to provide reasonably for the inspection, and, if need be, for the repair, of premises or appliances.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606; Anderson v. Michigan Cent. R. Co, 107 Mich. 591.

¶ 492. The duty of diligence in maintaining machinery in a reasonably safe condition necessarily involves the duty of the master to take such reasonable measures to inform himself from time to time of its condition as common prudence dictates.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 493. A master is bound to inspect appliances from time to time and to use ordinary care and skill to discover and repair defects in them.—Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275.

¶ 494. The master need not inspect an appliance to prevent injury from falling weights, when he has placed a guard efficient for that purpose had the injured servant not tampered with it.—Schwandt v. William Wright Co., 126 Mich. 609.

¶ 495. Plaintiff's intestate, an engineer duly licensed, was employed by defendant, and during such employment assisted in the installation of a boiler in defendant's hotel, and made an inspection of such boiler; later he assisted the public inspector in several inspections. Three years later plaintiff's intestate was killed by the bursting of the mud pipe elbow attached to the boiler, and his administratrix brings this suit to recover for the negligent causing of his death. It appears that the explosion was caused either by an original defect in said elbow or by corrosion, either of which would have been disclosed by proper inspection. Held, that as defendant had no notice of any incompetence in deceased rendering further inspection necessary, plaintiff cannot recover.—Vincent v. Clements, 150 Mich. 406.

¶ 496. An elevator is a dangerous instrument, and the employer owes a duty to exercise a care in keeping it in repair and safe condition commensurate with the gravity of accidents which a reasonably prudent man would anticipate under the circumstances.—Wilson v. Escanaba Woodenware Co., 152 Mich. 540.

¶ 497. Where in the process of quarrying rock, it is customary to examine the face of the quarry after each blast, and the master can find and remove loose rock by the exercise of reasonable care and examination, it is its duty to do so.—Druck v. Antrim Lime Co., 167 Mich. 154.

¶ 498. It is the defendant employer's duty not only to provide in the first place a safe apparatus for starting and stopping a milling machine, but he must continue to keep the same in repair.—Deary v. Hecla Co., 161 Mich. 677.

¶ 499. The negligence of an employee in failing to give warning of some act about to be done by him, which may be dangerous to a fellow-servant, is not within the rule requiring inspection on the part of the employer.—Mesich v. Tamarack Min. Co., 184 Mich. 363.

¶ 500. A railway company whose track is broken without any fault of its own is under no obligation to its employees to repair it within any specified time, if it duly warns them so that they shall not be injured in consequence thereof.—Henry v. Lake Shore & M. S. Ry. Co., 49 Mich. 495.

§ 53a. ——Delegation of duty.

Delegation of duty to furnish safe tools, appliances and places, see ante § 47.
Delegation of duty to warn and instruct, see post § 54a.
Vice principals and representatives of master as fellow-servants, see post § 55f.
Burden of showing negligence of master, see post § 62a.

¶ 501. The duty which the master owes to his servants to provide a reasonably safe place in which to work, and machinery in a reasonably safe condition, is not discharged for all time by providing machinery or premises safe in the first instance, nor can it be discharged by providing for an inspection by a fellow-servant.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 502. The duty of inspecting machinery for the purpose of determining its safety is imposed by law upon the employer, and no delegation of that duty will lessen his responsibility. On the other hand the duty of

inspection for the purpose of keeping the machinery in good working order is a duty which may be delegated, and the employer thereby absolved of responsibility.—Clark v. Goldie, 146 Mich. 303.

¶ 503. The existence of the distinction of the duty of the master to inspect machinery for the purpose of determining its safety, a duty which he cannot delegate, and the duty of inspection for the purpose of keeping the machinery in good working order, a duty which may be delegated, is important, and to refuse to recognize it would be to assert that the class of employees to whom is entrusted the duty of keeping the machinery in good working order are vice principals, while in fact they are fellow-servants.—Clark v. Goldie, 146 Mich. 303.

¶ 504. A mill owner, who selects one of his employees and imposes upon him the duty of seeing that all the machinery and structure with which the work is done are kept in repair, assumes responsibility for the negligence of the employee so selected in performing the duty.—Van Dusen v. Letellier, 78 Mich. 492.

¶ 505. The master of a servant employed in a lumber mill and injured as the result of the giving way of a dock, owing to the breaking of a post by reason of a latent defect, cannot, if he has neglected the duty of personal inspection of the premises, escape liability by having delegated the duty to another.—Van Dusen v. Letellier, 78 Mich. 492.

¶ 506. An employer owes to his employees the duty to furnish a safe place to work; such duty is a continuing one to be reasonably performed by inspection and repair, and cannot be delegated for performance so as to relieve the employer from responsibility. —Gillespie v. Grand Trunk Ry. Co. of Canada, 150 Mich. 308.

¶ 507. The duty to furnish a reasonably safe boiler, and have all necessary inspections made, is a primary duty of the employer, which cannot ordinarily be delegated so as to escape liability.—Vincent v. Clements, 150 Mich. 406.

¶ 508. Muckers working at the bottom of a mine ascended with the bucket at noontime, and after letting go of the bucket the hoisting cable broke and the bucket fell, injuring plaintiff. The weight of the bucket and men was much less than the safe working strain of the cable, which after the accident appeared to be badly frayed and in a weakened condition. Held, it was not only the duty of the defendant to furnish a safe cable but to inspect it, and the fact that inspection was left to miners was evidence of negligence.—Maki v. Mohawk Min. Co., 176 Mich. 497.

§ 53b. ——Simple tools and appliances.

¶ 509. Since an inspection of a "snap hammer" used in riveting would not have shown any defect therein, a machinist injured by a sliver flying from the hammer could not recover for such injury as the duty of the inspection does not extend to small and common tools in everyday use, of the fitness for use of which the employee may reasonably be supposed to be a better judge than the master.—Wachsmuth v. Shaw Elec. Crane Co., 118 Mich. 275.

¶ 510. Where a hammer, owned by a fellow-servant, had been purchased from a reputable dealer, the master owed other servants no duty to inspect it.—Dompier v. Lewis, 131 Mich. 144.

¶ 511. A pick is a tool of such common use as to impose upon the master no duty of inspection.—Toth v. Osceola Min. Co., 180 Mich. 274.

D. WARNINGS AND INSTRUCTIONS.

§ 54. In general; duty to warn or instruct.

Care and diligence required of master, see ante § 33.

Contributory negligence in disregarding warnings and instructions, see post § 59 l.

Burden of showing negligence of master, see post § 62a.

Evidence as to warnings and instructions, see post §§ 64f, 65i.

Jury questions as to warnings and instructions, see post § 67 l.

Instructions as to warnings and instructions, see post § 71d.

¶ 512. The absolute and nondelegable duty to warn an employee of dangers arises as an incident of the employer's duty to furnish and maintain a reasonably safe place for the employee to perform his work.—Kangas v. Cleveland Cliffs Iron Co., 188 Mich. 255.

¶ 513. A master is not required to anticipate every possible accident and give warning or instructions accordingly and may leave an employee to learn the hazards of the business from his associates and experience, where the hazards are not extraordinary.—Nowakowski v. Detroit Stove Works, 130 Mich. 308.

¶ 514. An employer is not required to either give instructions in regard to the work or inquire into the experience of a person he sets at work of a nonhazardous nature not requiring any particular skill.—Jackson v. Schillinger Bros. Co., 182 Mich. 504, 7 N. C. C. A. 576.

¶ 515. An obligation rests upon an employer to acquaint an employee with the dangers which can be ascertained by a knowledge of scientific principles, and to which he would be, in his ignorance, otherwise sub-

jected.—Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590.

¶ 516. Unless the master warns, instructs and informs the servant as to all the dangers incident to the work which are not discoverable from ordinary observation by an inexperienced person who would have no reason to anticipate danger, the master is liable where injury follows because of the servant's lack of knowledge, and because he was unwarned and uninformed.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

¶ 517. Where extraordinary risks or latent dangers, of which the workmen, either from ignorance or inexperience, lack knowledge, attend the employment, the employer should caution such workmen accordingly.—Smith v. Peninsular Car Works, 60 Mich. 501.

¶ 518. A railroad company is guilty of negligence in sending a switchman into a lumber yard without warning him of dangers arising from a pile of lumber known to be too near the track.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 519. The general superintendent and manager of a railway construction company was negligent in placing loaded cars on a spur track that had recently been shortened, and in failing to give notice of that fact to those in charge of the train on which plaintiff was riding, where in consequence a servant of such company riding the cars was injured in a collision of the train with the loaded cars.—Milbourne v. Arnold Elec. Power Station Co., 140 Mich. 316.

¶ 520. Where a plaintiff is injured by a dangerous machine which he was expected to make use of in his work, he may recover if there was a failure on the part of the defendant, his employer, to properly instruct him.—Marklewitz v. Olds Motor Works, 152 Mich. 113.

¶ 521. Where the deceased left his usual duties, took a scow and went out into a stream for the purpose of repairing a dam in process of construction, recovery for his death by drowning is not defeated by the fact that he was instructed to load the scow but not to leave the shore, where the superintendent stood near by on the dam and gave the deceased no warning of hidden dangers.—Snow v. Escanaba Power Co., 162 Mich. 579.

¶ 522. A mining corporation is liable for the death of a miner killed by falling rock in the course of his employment as a "hitch cutter," preparing footings for stull timbers, where it put him at work in an excavation wherein the work had been carried forward so there was room for two or three sets of such supports as they are commonly placed, without informing him of the fact, which it well knew, but of which he was ignorant, that the walls of the excavation had been left unsupported since the preceding day, and that the character of the walls was such that those left for that length of time without support might break suddenly and fall, though apparently solid.—Andrews v. Tamarack Min. Co., 114 Mich. 375.

¶ 523. Where a quarry laborer is required to be in the vicinity of his place of employment during his noon hour, and in eating his dinner on the highway at a place of his own selection, is injured by stone from a blast, his master has a duty to give reasonable and timely warning of blasts.—Moronen v. McDonnell, 177 Mich. 691.

¶ 524. If persons engaged in dangerous occupations are not informed by their employers of the accompanying dangers, and if, remaining in ignorance of such danger, they suffer in consequence, their employers will be chargeable for the injuries sustained.—Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

§ 54a. Delegation of duty.

Of duty to furnish safe tools, appliances and places, see ante § 47.
Of duty to inspect and repair, see ante § 53a.

¶ 525. The action of a foreman in directing a cleansing poison to be put in a water cooler used by employees without accompanying the direction with instructions to adopt precautionary measures to prevent injury, was within the foreman's powers, and the employer was liable to an employee who was poisoned by drinking the contents.—Geller v. Briscoe Mfg. Co., 136 Mich. 330.

¶ 526. A mill company was bound by the instructions given to its employees by its foreman, as to the dangers of their employment, in an action for personal injuries, where such instruction as it was defendant's duty to give had been intrusted to such foreman.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 527. In an action for personal injuries where the plaintiff was injured through his ignorance of the use of the tool which he was using, the failure of his overseer and foreman to properly instruct him in the proper use of the tool was not the negligence of a fellow-servant which would bar recovery.—Brockmiller v. Industrial Works, 148 Mich. 642.

¶ 528. Where the owner of a drug store delegates to a person the duty of instructing an employee how to fill the soda fountain tank, such person's negligence in carrying out these instructions is the negligence of the owner.—McDonnell v. Central Drug Co., 170 Mich. 291.

¶ 529. Where miners are accustomed to work in pairs in timbering drifts so that they may be safely used as passageways the duty to warn as to risks is a delegable duty, and is fully performed when the master selects a suitable and competent fellow-workman and makes it his duty to give warning.—Aho v. Cleveland Cliffs Iron Co., 188 Mich. 218.

§ 54b. Master's knowledge or notice of danger.

Notice or knowledge of incompetency of employee, see post § 55c.

Rule that notice of danger to agent is notice to principal, see Agency, II, E.

¶ 530. Until a master knows or appreciates or in the exercise of ordinary care should know or appreciate a danger to his employee, there is no obligation upon him to warn the employee of such danger.—Stone v. Bennett, 194 Mich. 441.

¶ 531. Where a miner was injured by the explosion of an unexploded charge left by members of the preceding shift it was held that the master was not bound as a matter of law to discover and notify plaintiff of the existence of the unexploded charge.—Conradsen v. Osceola Consolidated Mining Co., 180 Mich. 155.

¶ 532. The knowledge of an assistant foreman in a foundry, that a hoist fell, is not imputed to the owner so as to charge him with the duty to warn the employees of the danger therefrom.—Bauer v. American Car & Foundry Co., 132 Mich. 537.

¶ 533. In an action for personal injuries sustained by a woodsman as the result of a tree falling upon him, which was felled by a member of another gang working near him, held that the plaintiff's employer who was within a few feet of him at the time of the accident was not guilty of negligence in failing to warn the plaintiff of danger, the defendant, as soon as he appreciated the danger, having jumped aside himself and shouted a warning to the plaintiff.—Stone v. Bennett, 194 Mich. 441.

¶ 534. In an action by a car repairer against his employer to recover damages for injuries sustained in the course of his employment by a broken drawbar carrying iron not discovered by the employer's car inspectors and reported by them for repair falling upon him when he went under the car to repair another defect reported by the inspectors, held that plaintiff could only recover for some neglect of duty which the employer or its servants owed to plaintiff, and the failure of the inspectors to discover the broken drawbar carrying iron was a failure of duty owed to the employer and not to plaintiff.—Sims v. Minneapolis, St. P. & S. S. M. Ry. Co., 196 Mich. 114.

§ 54c. Dangers or defects known or apparent to servant.

Assumption of known or obvious risks, see post § 56b.

Contributory negligence in failing to avoid known or obvious dangers, see post § 59e.

¶ 535. It seems that a master need not expressly notify his servant of a risk where the nature of the business and of the risk is such that the only effective notice he can have is from his own general experience and the visible presence of that from which the danger is to be apprehended.—Michigan Cent. R. Co. v. Smithson, 45 Mich. 212.

¶ 536. A master is not bound to inform an employee of dangers that are open to ordinary observation.—Findlay v. Russel Wheel & Foundry Co., 108 Mich. 286.

¶ 537. A master is not required to give warning of danger apparent and readily comprehended to a servant of ordinary intelligence and years of discretion.—Livingstone v. Saginaw Plate Glass Co., 146 Mich. 236.

¶ 538. There is no duty to warn the servant of a known danger or of one so obvious that the servant in view of his years and experience ought to perceive it.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 539. Where an employee whose duty it is to remove hides from vats in a tannery, and to put them in wash-wheels, knows the time when the wheels are to be started, it is not negligence to start, without notice to him, a wheel in a vat in which he is not working.—Balle v. Detroit Leather Co., 73 Mich. 158.

¶ 540. Warning or instructions are not necessary to a mature man familiar with a mill and its machinery, though he is called from his usual work to assist in starting the mill in which he is employed, and is injured while oiling a shaft, by getting his arm between some cog wheels, where the room was properly lighted and the danger was visible and the work he was doing was neither dangerous nor difficult and there was no defect in the machinery.—Hathaway v. Washington Milling Co., 139 Mich. 708.

¶ 541. It is not a master's duty to inform a laborer of the particular ingredients used in the manufacture of Paris green, if such laborer is notified of their poisonous character, and of the precautions necessary.—Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

¶ 542. The duty to provide a safe place to work does not cover the case of a safe place made unsafe by the temporary removal of a guard over a belt and the failure to warn the servant of such removal at the time of

sending him there to work, where the absence of the guard was as obvious to the servant as to the master.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 543. It is implied in the contract of hiring of a person as a telephone lineman that he knows those things with reference to the creating of groundings and circuits which a telephone lineman must necessarily know in order to conduct his business with any degree of safety to himself, his employer, or his coemployees.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 544. Plaintiff upon being employed by defendant company did not know how to handle live electric wires, and so informed defendant. He climbed a pole to solder a dead wire and while attempting to straddle it, rose up too high, came in contact with a high voltage wire, and was injured. He knew that live wires were strung on the poles and that there was danger. Held, he could not predicate negligence against defendant upon its failure to instruct him how to handle live wires.—Argersinger v. Commonwealth Power Co., 164 Mich. 282.

¶ 545. Among the several gangs of laborers employed in excavating a ship canal was the pipe gang, whose duty it was to extend the air and water pipes used for the air drills and shovels. Plaintiff was a member of this gang. Two parallel lines of track were laid for the cars used to carry off the rock. Plaintiff was ordered by the foreman of his gang to adjust a valve on a pipe lying between the two lines of track, upon which cars were standing ready to be filled. While he was so engaged, the shovel gang caused a shovelful of rock to be lifted into one of the cars, and a rock fell off and injured plaintiff. Plaintiff knew that rocks often fell off the shovel and knew as soon as his foreman, standing some six feet away, that the shovel was at that moment being operated. Held, plaintiff's foreman owed him no duty to warn him of the danger.—Dunn v. Great Lakes Dredge & Dock Co., 161 Mich. 551.

¶ 546. An employer is under no duty to warn a man who has had extensive experience in the use of machinery, and is of mature years, of the danger in attempting to put a belt upon a moving pulley by hand.—Neifert v. Metler, 165 Mich. 354.

¶ 547. The operator of a power driven wringer, who knows that if he permits his hand to go between the rollers of the machine he will be hurt, and who had been cutting burlap and wrapping it about the rollers for four months, need not be informed of the consequences if his hand be attached so tightly to the burlap that he cannot withdraw it.—Fryezynski v. W. W. Rice Leather Co., 171 Mich. 113.

¶ 548. Plaintiff, whose hand was injured while he was operating a sausage grinder, when it was drawn into the hopper, cannot recover for alleged negligence of defendant in failing to properly instruct him how to operate the machine where it appears that he was 25 years of age and was possessed of more than average intelligence, that he was familiar with machinery and with the grinder in question since he had often taken it apart and cleaned it, that he knew of the danger of putting his hands into the hopper to crowd the meat down and was instructed concerning a safe way which he did not follow.—Oest v. Hendershot, 175 Mich. 140.

¶ 549. A miner, one of a shift engaged in drilling and blasting rock which followed another shift engaged in the same work who had left an unexploded charge in one of the holes, which was discharged by the drilling, cannot hold the master guilty of negligence in failing to notify him of the existence of the unexploded charge where the evidence showed that he was in a position to have all the knowledge of the conditions that anyone could have.—Conradsen v. Osceola Consolidated Mining Co., 180 Mich. 155.

¶ 550. Where an employee was injured while breaking rock with a dull pick by being struck in the eye by a splinter of rock, it was held that negligence could not be predicated upon the master's failure to warn him of the danger of flying splinters as the result of using a dull pick.—Toth v. Osceola Min. Co., 180 Mich. 274.

¶ 551. In an action for injuries claimed to have been caused by coming in contact with a circular saw upon the jumping of a board being sawed, plaintiff testified that he had used the saw for seven months, knew how to operate it and the danger in connection therewith; that the saw had always worked well while he operated it and had never given any trouble, and that he knew of no reason why it did not work well when he was injured, it was held that defendant was not liable.—Dombrowski v. Roe-Stephens Mfg. Co., 180 Mich. 202.

¶ 552. The danger of riding on the side of the tender of a locomotive when passing through roundhouse doors, with a clearance of from eleven to sixteen inches, is so obvious that the failure of an employer to warn a servant of the danger is not negligence.—Hollingshead v. Detroit, G. H. & M. Ry. Co., 181 Mich. 547.

¶ 553. Where a night switchman had been in the employ of a railroad company for 24 days, and one of his nightly duties as a member of the night crew was to bring from the building of one company a soda ash car and spot it in the building of another company, and only the single unloaded car had been handled previous to the day he was injured, but on the day of his injury a coal car was

found on the way to the latter building and placed between the engine and the ash car, and, after the ash car passed through the door, near the jamb of which and on the outside of the building the plaintiff was standing to report signals to the engineer which were given by a switchman inside the building, he was hit by the coal car, which used three inches more of the clearance space than the other car, and was squeezed between it and the jamb of the door, held that the defendant was not guilty of negligence in failing to notify the plaintiff that the coal car was of a different dimension than the other car or in failing to provide a reasonably safe place to work.—Sage v. Wyandotte Terminal R. Co., 193 Mich. 194.

§ 54d. Immature and inexperienced employees.

Statutory provisions as to employment of children, see ante § 35.

Age or experience of employee as bearing on assumption of risk, see post § 56d.

Jury questions as to violation of Child Labor Law, see post § 67e.

¶ 554. In determining what notice the master should see that a young servant has of the dangerous character of machinery, youth and inexperience must be considered, also the nature of the service and the degree to which his attention while at work would need to be devoted to its performance.—King v. Ford River Lumber Co., 93 Mich. 172.

¶ 555. The proprietor of a lime-kiln was in the habit of having the stone removed from the base of the kiln, as it was burned, and of pushing the mass, wedged into the crater above, down into the emptied space. When the mass gave way those who were upon it and crowding it down would step back to the margin of the crater to escape going down with it. The proprietor had an inexperienced laborer helping him at his work when an unusually large quantity of burned stone had been removed, and he did not warn him of the danger. When the mass dropped the workman fell with it and was burned to death. Held, that his employer was liable for causing his death by negligence.—Parkhurst v. Johnson, 50 Mich. 70.

¶ 556. An employer or foreman, when setting an unlearned servant to work carrying molten iron over an icy footway, has a duty to the servant that is not satisfied by merely telling him not to go too fast.—Smith v. Peninsular Car Works, 60 Mich. 501.

¶ 557. An employer's failure to instruct a boy eighteen years old that he must keep his hands away from knives which formed part of the machine at which he is working or he will be injured, is not negligence where the working of the machine is apparent at a glance, and where it appears that the boy has been apprenticed to a plumber and has worked in a pulp mill, so that he has some knowledge of mechanics if not of machinery.—Mackin v. Alaska Refrigerator Co., 100 Mich. 276.

¶ 558. No recovery can be had in favor of an infant 15 years of age injured by a feed cutter which he was operating, based on the failure of the master to warn him of the danger, where it appears affirmatively that he knew of the danger and appreciated it.—Ertz v. Pierson, 130 Mich. 160.

¶ 559. Plaintiff, less than 18 years old, had been employed for more than a month in a foundry filling molds. When returning from the cupola he met a fellow-employee carrying a ladle of molten iron, a teaspoonful of which was spilled and upon striking the wet floor exploded and a portion struck plaintiff putting out his eye. Action was brought alleging failure to provide a safe place to work and failure to warn of the danger. The evidence showed that the general condition of the floor was safe, and that the spilling of molten iron was a common occurrence, and plaintiff had seen it spilled and had spilled it himself. Held that the employer was not liable.—Nowakowski v. Detroit Stove Works, 130 Mich. 308.

¶ 560. It was the duty of a mill company employing boys to work behind shears in a long and narrow passage gathering scraps of iron from such shears and binding them into bundles, where the gears and other machinery were so exposed that if the scraps accumulated on the floor, one passing through the passage would be in danger of coming in contact with the cogwheels of such machinery, to take reasonable precautions to keep the passageway clear, and to that end to give instructions to such employees before setting them to work at these shears; where it appeared that the infant killed had come in contact with such cogwheels while attempting to pass over such obstructions in the passage.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 561. A boy of 17 working on a resawing machine and having some experience with machines, including a swing saw, assumes the risk of reaching under the revolving saw to clean out the sawdust from a trough beneath, where the space between the teeth of the saw and the trough was six or seven inches and he took a short stick in his hand to clear the trough so that it was necessary to reach under the saw; and it is not necessary that he should have been warned of the danger. (Decided on authority of Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277; Hathaway v. Washington Milling Co., 139 Mich. 708.)—Martin v. Detroit Lumber Co., 141 Mich. 363.

¶ 562. It is the master's duty to warn the servant of latent dangers, which he (the servant) through ignorance or inexperience is not capable of understanding or appre-

ciating, or which he would not be likely to know; and the liability of an explosion following the mixing of molten metal and water is such a latent danger.—Borkowski v. American Radiator Co., 165 Mich. 266.

¶ 563. Where an applicant for employment as a brakeman on a regular freight train, in order to obtain the position, falsely states to the agent of the railroad company to whom the application is made, and to the conductor to whose train he is assigned under such employment, that he has had experience in the line of work mentioned, the company has a right to believe that he is familiar with the work, and to govern itself, as to instructions regarding the manner of its performance, accordingly.—Stanley v. Chicago & W. M. R. Co., 101 Mich. 202.

¶ 564. Plaintiff having represented, at the time of seeking employment as a brakeman from defendant, that he had had twenty-seven days' experience, there was no negligence in failing to warn him of the danger in coupling cars supplied with double deadwoods.—Fenlon v. Duluth, S. S. & A. R. Co., 108 Mich. 284.

¶ 565. In a suit for personal injuries sustained by plaintiff while temporarily operating a molding machine in defendant's mill, the evidence was that plaintiff for a period of nine years had been employed as a common laborer to shovel coal and handle lumber about the mill; that occasionally and for brief periods of time, upon a shortage of hands, he operated some of the machines located in defendant's old building; that the molding machine in question located in defendant's new building differed in construction from those located in the old building; that plaintiff was called from his usual work as a common laborer to operate said machine on the occasion in question; that he informed defendant's foreman he did not know how to run said machine; that he was given no instructions or warnings; and that he was injured by invisible revolving knives while placing his hand upon the bed plate of said machine in an attempt to discover, while standing at the rear of the same, the reason for its failure to work properly. Held, the defendant was guilty of negligence for failure to warn and instruct the plaintiff.—Molyneaux v. Bradley, Miller & Co., 167 Mich. 278. (Ostrander, C. J., dissenting.)

¶ 566. Where a man only twenty-four years old, not a miner by profession, was employed in handling dynamite and fulminating caps kept in an engine-house where they were continually in danger, both from the heat and from constant jarring, as well as from their confused and disorderly position, and where his employers made no effort to lessen the heat and the jarring, and did not inform him of the danger although he was ignorant thereof, held, that the employers were negligent, and that they were liable for injuries to him from an explosion.—Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

§ 54e. Work outside scope of employment.

Liability for injuries sustained while acting beyond scope of employment, see also ante § 34.

Assumption of risks outside scope of employment, see post § 56e.

¶ 567. The rule that the law does not impose upon the master the duty to warn or instruct his servant in regard to work he is neither employed nor required to do, applied where a driller in a stone quarry, at the request of a fellow-servant who had no right to direct him, forced a stick of dynamite into too small a hole, thereby causing an explosion resulting in the injury in question.—Kopf v. Monroe Stone Co., 133 Mich. 286.

¶ 568. Where a servant is put to dangerous work, or is sent into a dangerous place to work, outside of the scope of his employment, it is the master's duty to know, not to infer, that the servant had knowledge of the danger.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

§ 54f. Sufficiency and construction of warnings and instructions.

Evidence as to warnings and instructions, see post §§ 64f, 65i.

¶ 569. In order to relieve a railroad company from liability for an injury which occurred through the failure of the brakeman or conductor of a passenger train equipped with air brakes to pull the automatic cord by which such brakes are operated, it is not necessary that the instructions as to the use of the cord should have been embodied in the company's printed rules; it is enough that the employees were orally instructed as to their duties.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 570. Where a servant was warned generally concerning the operation of a polishing machine in a tannery, no further instructions were necessary unless there was something peculiar to the particular machine upon which he was set to work which necessitated other instruction.—Sabin v. Northwestern Leather Co., 157 Mich. 579.

¶ 571. Plaintiff, a man 25 years of age and possessed of more than average intelligence, is sufficiently instructed as to the dangers of operating a sausage grinder with which he is familiar when he is told to crowd the meat into the hopper with his hands and is shown a safe way to do it.—Oest v. Hendershot, 175 Mich. 140.

¶ 572. Where a quarry company gives warning of a blast to an employee, who is eating his dinner during his noon hour at a place, on the highway, of his own selection,

it is not negligent in not giving distinct warning of a subsequent blast.—Moronen v. McDonnell, 177 Mich. 691.

¶ 573. Where instructions are given by one servant to another in the presence of the master, it may be inferred that the instructions are approved by the master.—Sipes v. Michigan Starch Co., 137 Mich. 258.

¶ 574. A printed notice to switchmen setting out non-clearing points on the tracks and naming among others, The American Car Company, Forge Department, and immediately underneath, in the same type, "material piled along side of tracks," is held to refer to material at the particular point, so as not to constitute notice of material that might be piled at any place along the track.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 575. Where a plaintiff is found by the jury to be unlikely to appreciate the danger of following instructions given to him as to the operation of the machine, then, regardless of the condition of the machine, the giving of instructions by the person charged with the duty of giving them, under which the employee was made to do the work in a dangerous way when there was a safe way, is actionable negligence.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

E. ACTS AND OMISSIONS OF FELLOW-SERVANTS.

§ 55. In general; liability for acts of fellow-servant.

Who deemed fellow-servants, see post § 55d.
Railroad employees as fellow-servants, see post § 55j.
Mine employees as fellow-servants, see post § 55p.
Assumption of risks of fellow-servants' acts or negligence, see post § 56 l.
Evidence as to competency or negligence of fellow-servants, see post §§ 64g, 65j.
Jury questions as to care or negligence of fellow-servants, see post § 67a.
Directing verdict on ground of fellow-servant's negligence, see post § 70c.
Instructions as to acts of fellow-servant, see post § 71e.

¶ 576. An employer is not liable to an employee for injuries resulting from negligence, misconduct or unskilfulness of fellow-servants engaged in the same general employment, where the employer himself is not in fault.—Michigan Cent. R. Co. v. Leahey, 10 Mich. 193; Davis v. Detroit & M. R. Co., 20 Mich. 105; Michigan Cent. R. Co. v. Dolan, 32 Mich. 510; Henry v. Lake Shore & M. S. R. Co., 49 Mich. 495; Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 577. A master is liable for injuries to servants that spring from such negligent acts of fellow-servants as are due to their incompetency if the master himself has been negligent in selecting competent servants, or has kept incompetent ones after hearing of their unfitness, or when he might have heard of it by using ordinary care in making inquiry.—Hilts v. Chicago & G. T. Ry., 55 Mich. 437.

¶ 578. A master is not liable for injuries personally suffered by his servant through a fellow-servant's negligence.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409.

¶ 579. If a porter in a store was working in the cellar, near an elevator, when a plank, used in removing heavy boxes from the elevator to trucks in the alley back of the store, slid down the shaft and struck and injured him, he cannot recover for the injury, since the use of the plank in removing boxes was not in itself negligence and if the accident happened through the fault of others, who like him were engaged in removing the goods, it was the negligence of fellow-employees, and he could not recover therefor.—Alford v. Metcalf Brothers & Co., 74 Mich. 369.

¶ 580. Where the engineer of defendant's sawmill, by whose action in starting the engine of the mill plaintiff's decedent was killed, was decedent's fellow-servant, his negligence could not be imputed to defendants.—Bergstrom v. Staples, 82 Mich. 654.

¶ 581. Actionable negligence of an employer was not shown where an employee, an experienced carpenter, was injured by the breaking of a scaffold on which he and another carpenter, whom he called to his assistance, were working; where it appeared that defendant's foreman had directed such employee to use at least two planks for the platform of such scaffold, but at the time of the accident, the scaffold had but one plank for a platform.—Dewey v. Parke, 76 Mich. 631.

¶ 582. A blacksmith is not liable as being negligent in allowing a defective sledge-hammer, awaiting repairs, to remain in the shop open to view, in case an employee picks up this hammer without instructions to do so and without necessity, and in course of the use of it on work in the shop a fragment flies off and injures the eye of another employee.—Rawley v. Colliau, 90 Mich. 31.

¶ 583. A ship carpenter cannot recover for injuries received, while working on a vessel, by falling down a hatchway known to him and left uncovered by his fellow-servants, the place to work being safe but for that.—Baron v. Detroit & C. Steam Nav. Co., 91 Mich. 585.

¶ 584. Plaintiff's employer had contracted to fill defendant's ice-house, and to that end to use a hoisting apparatus furnished by defendant. Plaintiff was injured by an ice bucket falling upon him by reason of the breaking of a wire cable attached to the buckets. Held, that defendant's duty was

discharged when it furnished the hoisting apparatus in a reasonably safe condition, and that it cannot be held responsible for injuries to plaintiff resulting from the improper management of the apparatus by plaintiff's fellow-servants.—Piette v. Bavarian Brewing Co., 91 Mich. 605.

¶ 585. If, owing to the use of a defective flask in making a mold, the heated metal escapes from the mold and injures a molder, the fault, if any, must be regarded as that of a fellow-servant, where the molds are made by the employees, to whom numerous flasks have been supplied without requirement to use the defective one.—Kehoe v. Allen, 92 Mich. 464.

¶ 586. If a cable was reasonably safe for the purpose for which it was intended, and the accident was due to the negligence of an engineer in sending the car down the incline with the cable slack, defendant master was not liable.—Hennig v. Globe Foundry Co., 112 Mich. 616.

¶ 587. Negligence, if any, in failing to curb a sewer trench, was the negligence of a fellow-servant of a digger who sustained injury by the caving in of the ground, where the contractor had furnished plenty of sound material, and a competent man to do the curbing.—Lenderink v. Village of Rockford, 135 Mich. 531.

¶ 588. An employer, who has furnished good material for the building of scaffolds and has employed an experienced scaffold builder, is not liable for injury to a bricklayer caused by the breaking of a plank in a scaffold at a point weakened by a knot, for if negligence existed it was that of a fellow-servant.—Landowski v. Chapoton, 137 Mich. 429.

¶ 589. In an action by a servant for injuries sustained by the operation of a dredge, where from the evidence it appeared that three concurrent acts made the injury possible, the slipping of the plaintiff on the deck, the clutching of a steam-operated clamp, and the turning of steam into the cylinder, and the competency or incompetency of the fireman had nothing to do with it, if he was competent to perform his duty and his act was in any respect negligent, it was the negligence of a fellow-servant.—Hartnett v. Owosso Sugar Co., 147 Mich. 650.

¶ 590. The use by a fellow-servant of ice tongs, which are patently insufficient to secure a sufficient hold upon a cake of ice to support its weight, is negligence for which the master is not liable.—Wheaton v. Wagner Lake Ice & Coal Co., 151 Mich. 100.

¶ 591. Plaintiff, a mason's tender, was employed by defendant railway in the construction of an addition to defendant's roundhouse used for the storage of engines. He was hurt while carrying a window cap to be placed over a window in the oilroom, which was used for storing the oil used in the engines housed in the roundhouse while being prepared to be used in drawing trains. The accident resulted from the faulty construction of a scaffold by a fellow-servant of plaintiff. Held, plaintiff came within the provisions of section 1, Act No. 104, Pub. Acts of 1909, abolishing the fellow-servant rule, and was entitled to recover, and did not come within the provision of section 7 of said Act, to the effect that said act should not apply to employees working in shops or offices.—Furguson v. Lake Shore & M. S. Ry. Co., 169 Mich. 260.

¶ 592. A car repairer employed in a car shop held a shop hand, and within the exception of § 7 of Act No. 104, Pub. Acts 1909, § 4116, How. St., 2nd Ed., although at the time of his injury he was on his way from the shop to make repairs on a locomotive in the immediate vicinity.—Revolinski v. Manistee & N. E. R. Co., 186 Mich. 501.

Acts and omissions of fellow-servants for which employer is liable under Federal Employers' Liability Act, see note, 8 N. C. C. A. 167-184.

§ 55a. Concurrent negligence of master and fellow-servant.

¶ 593. An abandoned railroad switch was reopened and used without restoring the switch lights and without notifying engineers of trains, who, when passing an existing switch, are required to slow up. Held, that if the presence of the lights would have prevented the train of which plaintiff was engineer from running into the switch whereby he was injured, the company's negligence in not having lights was a concurrent cause of the accident and plaintiff could recover if he did not know of the reopening, though the switch was left unlocked by a trespasser or fellow-servant.—Town v. Michigan Cent. R. Co., 84 Mich. 214.

¶ 594. Where it appears that plaintiff employee was injured by falling over a pile of gravel which had fallen from a car being moved in defendant railway company's yard, and that the pile of gravel had been allowed to remain in said yard for a period of from two to four days, defendant cannot escape liability for its failure to maintain a safe place for its employees, on the ground that such duty had been delegated to the section gang, who were fellow-servants of plaintiff.—Gillespie v. Grand Trunk Ry. Co. of Canada, 150 Mich. 308.

¶ 595. A railroad company is not relieved from liability for the negligent killing of an employee because one of his fellow-servants was contributorily negligent.—Hunn v. Michigan Cent. R. Co., 78 Mich. 513.

¶ 596. An action will lie by an employee against his master for injuries sustained by

reason of the concurring negligence of the master and of a fellow-servant.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 597. A suburban street railway employee engaged in construction work, who sustained injury as the result of a car of his company on which he was being transported, running into an open unguarded switch at full speed, was entitled to recover even if the motorman was negligent and even if he might have been regarded as a fellow-servant of such employee, as the fault if any was in failing to provide a safe system in running the cars.—Noe v. Rapid Ry. Co., 133 Mich. 152.

¶ 598. An employee injured without fault on his part, may recover therefor against the master who is negligent though the negligence of a fellow-servant contributed to the injury.—Lockwood v. Tennant, 137 Mich. 305.

¶ 599. An employee may recover for the negligence of his employer, though the negligence of a fellow-servant contributes to the injury.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 600. Where the negligence of the master concurs with the negligence of a fellow-servant in producing a personal injury, the latter's negligence does not preclude plaintiff's recovery.—Menere v. Copper Range Consol. Co., 169 Mich. 367.

¶ 601. Plaintiff's intestate got upon the cage at the mine shaft to ascend. A fellow-servant got on at the same time with an iron pipe or rod. The cage was not provided with handholds, as required by section 15, Act No. 100, Pub. Acts 1905. During the ascent the pipe got entangled with the wall of the shaft, the occupants were thrown to the floor of the cage, and the deceased was killed between the cage and the wall. Held, that the fact that the negligence of the fellow-servant in carrying the pipe concurred with the negligence of the master in failing to provide the handholds did not relieve the defendant of liability, where the absence of the handholds may well have been a proximate cause of the death.—Kleinfelt v. J. H. Somers Coal Co., 156 Mich. 473.

¶ 602. Plaintiff was injured by falling into a chute or raise while employed in the mine. Held, the duty of the defendant to place a light at the raise was part of his duty to provide a safe place to work, and plaintiff was not barred from recovery of damages on the theory that the failure to place the light there was an act of a fellow-servant.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 603. Where the deceased left his usual duties, took a scow and went out into a stream for the purpose of repairing a dam in process of construction, recovery for his death by drowning is not defeated by the fact that a fellow-servant failed to warn him of hidden dangers, where the superintendent stood near by and failed to give such warning.—Snow v. Escanaba Power Co., 162 Mich. 579.

¶ 604. Where a plaintiff operating defendant's hand feeding rip-saw machine knows that the tailer has nothing to do with the operation of the machine, and that his duties are of the simplest character, requiring no instructions, he has no right to recover for an injury due to the failure of said tailer to shut off the power upon signal from the plaintiff, on the ground that defendant was negligent in not instructing said tailer what to do in the event of such an emergency.—Burton v. Brunswick-Balke-Collender Co., 166 Mich. 45.

§ 55b. Care in selection and retention of employees.

Statutory provisions regulating employment of children, see ante § 35.

¶ 605. Employers are bound to have safe rules of business, use care in selecting their immediate agents, and remove such persons or change such regulations as they believe to be unfit.—Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

¶ 606. Employers are not bound to treat an agent as incompetent unless for some error or misconduct going to his general fitness.—Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

¶ 607. A master cannot, by delegating it to another, relieve himself of the duty of exercising due care in the employment and retention of competent servants, and, if he does delegate it to a general manager, foreman or superintendent, he remains responsible.—Quincy Mining Co. v. Kitts, 42 Mich. 34.

¶ 608. Actions by employees against their employer, for injuries caused by fellow-servants, are based on the actual negligence of the defendant or of some representative who is held in law to personate him; and, where the business requires the employment of many servants, beyond the possible constant supervision of either the employer or of such representative, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require.—Smith v. Potter, 46 Mich. 258.

¶ 609. A master does not insure the competency of his servants, but contracts to use all ordinary care in their selection and retention.—Lewis v. Emery, 108 Mich. 641.

¶ 610. A master is not responsible for the acts of a fellow-servant unless there is evidence to show that the master was at fault in employing an incompetent servant.—Mc-

Clure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 611. The law of master and servant with reference to fellow-servants does not sanction the doctrine that before a man may be employed he must have attained the highest standard of skill and never fail to do the right thing under the circumstances.—Kellogg v. Stephens Lumber Co., 125 Mich. 222.

¶ 612. Due care in the selection of employees is "such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered."— Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 613. In an action for wrongful death caused by the alleged incompetence of the yardmaster, held that the degree of care required is to be determined by the business itself; that while one might be competent and qualified to act as yardmaster of a small station, he might be totally unfitted to take charge of a large yard with many tracks, and where many trains were arriving and departing daily.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 614. Whether a yardmaster and a switchman are or are not fellow-servants of a railroad company, the company is liable for such injuries to the switchman as result from the yardmasters' incompetency.—Lee v. Michigan Cent. R. Co., 87 Mich. 574.

§ 55c. ——Master's notice or knowledge of servant's incompetency.

Evidence as to master's knowledge or notice of defects, see post §§ 64d, 65f.

Notice to agent while serving predecessor as affecting principal, see Agency ¶ 447.

¶ 615. Employers have a right to trust that an agent or officer carefully chosen will use good judgment in making his appointments and doing his own duties, and to rest in that belief until, in the exercise of the general vigilance which devolves on them, they find they have erred.—Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

¶ 616. The master is not liable if the servant whose carelessness caused the injury is not shown to be incompetent.—Peterson v. Chicago & N. W. R. Co., 67 Mich. 102.

¶ 617. An employer is liable for injuries to servants that result from the negligence of incompetent fellow-servants, if he was negligent in selecting the latter, or if he retained them after notice of their incompetency.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409; Lee v. Michigan Cent. R. Co., 87 Mich. 574.

¶ 618. Personal presence of officers and directors all along the line of a railroad being impossible, subordinates with more or less discretionary authority are indispensable; and the company has a right to trust that an agent or officer carefully chosen will use good judgment in making his own appointments and doing his own duties, and is not bound to treat an employee as incompetent unless for some error or misconduct going to his general fitness for the place.—Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

¶ 619. If a locomotive engineer has for several months habitually used intoxicating liquors to such an extent that those who come in contact with him notice his condition, the failure of his superiors to notice it, and their omission to make such inquiries as would disclose it, is negligence.—Hilts v. Chicago & G. T. Ry., 55 Mich. 437.

¶ 620. Where any one of fair intelligence and the requisite physical ability is competent to perform a certain class of work, an employer is not bound to inquire into the experience of an employee who is hired to perform such work, and who possesses those qualifications, or give instructions in regard to the work.—Timm v. Michigan Cent. R. Co., 98 Mich. 226.

¶ 621. Notice to the caller whose business it is merely to call the conductors in a certain order when trains are ready, and, if one cannot go, to call the next, of a special temporary incapacity of a conductor called by him, is not notice to the company.—Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

¶ 622. Knowledge on the part of the foreman in the core room of an iron foundry, who is charged with the duty of directing employees where to go and assist the molders in filling the molds, that boys of the age and size of one so sent are competent to perform said work, and that said boy has performed it for six months to the satisfaction of all with whom he has worked, justifies the foreman in the assumption that he is dealing with a boy of the average size and strength, ordinarily competent to do the work, and who has shown himself competent, and in instructing said boy to do said work, notwithstanding his statement, made in answer to such instruction, that he is not strong enough to do it.—Jungnitsch v. Michigan Malleable Iron Co., 105 Mich. 270.

¶ 623. Plaintiff, a station agent of defendant railway, was injured by a conductor of defendant while they were engaged in unloading a freight car. The conductor was under the influence of liquor. The evidence showed that in the month before the accident the defendant had learned of the conductor's drinking habits, and has received his promise to quit them. Held, this fact did not excuse defendant from the duty of seeing that the conductor did not continue in such habits, where his excesses were notorious.—Johnson v. Lake Shore & M. S. Ry. Co., 162 Mich. 301.

¶ 624. Knowledge by a railroad company that a conductor uses intoxicating liquors as a beverage without notice or knowledge of incompetency therefrom is insufficient ground at common law on which to base recovery for an injury to a brakeman caused by the act of the conductor in signalling the engineer without the knowledge of the brakeman to back into a car on which the brakeman was preparing the coupling.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

¶ 625. An employer is justified in disregarding a warning given by an employee, that there would be an accident unless another employee was given a man instead of a boy, to help him, where there was no statement of any specific instance of misconduct or incompetency calling for such warning.—Jackson v. Schillinger Bros. Co., 182 Mich. 504, 7 N. C. C. A. 576.

§ 55d. Who deemed fellow-servants or co-employees.

¶ 626. The doctrine of the nonliability of the master for injuries sustained by a servant through the negligence of his fellow-servant has no application unless the one injured and the one at fault were engaged in the same general employment.—Sadowski v. Michigan Car Co., 84 Mich. 100.

¶ 627. The general rule in this state is that the question whether or not one is a fellow-servant is to be settled by the nature of the act, rather than the rank of the respective servants.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 628. The criterion of the fellow-servant rule is the delegability of the duty involved; if it is a delegable one the fellow-servant rule may apply, but if it is not delegable the master is liable whatever may be the relative rank of the plaintiff and the negligent other servant.—Page v. Battle Creek Pure Food Co., 142 Mich. 17.

¶ 629. All who serve the same master, work under the same control, derive their authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants.—McCauley v. Michigan Cent. R. Co., 167 Mich. 230; Kangas v. Cleveland Cliffs Iron Co., 188 Mich. 255.

¶ 630. A building owner employed workmen under direction of an architect. He furnished suitable materials to competent carpenters to construct scaffolding to be used by them in putting the cornice upon his house. Afterward the same scaffolding was used by painters hired to paint the cornice. It fell injuring one of the painters. Held the carpenters and painters were fellow-servants.—Hoar v. Merritt, 62 Mich. 386.

¶ 631. A scaffold builder employed by a large building contractor is a fellow-employee of a bricklayer employed by the same contractor.—Landowski v. Chapoton, 137 Mich. 429.

¶ 632. A boat's mate and her captain are fellow-servants, and if one is injured through the other's negligence the owner of the boat is not liable.—Caniff v. Blanchard Nav. Co., 66 Mich. 638.

¶ 633. Whether one who works at odd jobs around a mill-yard wherein are his employer's sawmill and salt-block, and who occasionally loads salt on a barge for market, is the fellow-servant of men in the salt-warehouse handling barrels, so as to preclude his recovery for injuries received from a descending elevator through their negligence, quære.—Sell v. Charles Rietz & Bros.' Lumber Co., 70 Mich. 479, affirming judgment by equal division.

¶ 634. Plaintiff was employed by a builder of steel vessels to go over the work, and supply omitted rivets, after the riveters of the plates of the vessel had completed their work. Artisans of various kinds were employed to do their respective shares of the work. The building of stagings, the erection of derricks, and the raising of materials were parts of the necessary work, incident to and simultaneous with, and in fact a part of, the building of the vessel. All was under the charge of one superintendent, who directed the different gangs through their respective foremen. Plaintiff, while working upon a scaffold, was injured by the breaking of a weak cross-piece, selected and used by the carpenters who built the scaffold. In a suit to recover damages for the injury, there was nothing to indicate a contract on the part of the defendant to provide a safe scaffold to work upon, or an assumption by it of that duty. Held, that plaintiff and the carpenters who built the scaffold were fellow-servants in such a sense as to prevent the application of the rule that it is the duty of the master to provide a reasonably safe place for the servant to work.—Beesley v. Wheeler & Co., 103 Mich. 196.

¶ 635. Employees in charge of sets of rollers in a flour roller mill are fellow-servants and the fact that two such employees by direction of the foreman, took out dull rollers and put in sharp ones does not change the relation so as to make the master liable for injury to the employee in charge of that set of rollers, though the injury may have been caused by negligence in replacing the rollers.—Frazee v. Stott, 120 Mich. 624.

¶ 636. Where there was a question as to negligence in not furnishing necessary lights for night work, and it appeared that defendant had employed an electrician with abundant supplies of wire and lamps to place lamps where required, and there was an abundant supply of torches for the use of employees, those entrusted with the duty of

placing or supplying the lights furnished are fellow-servants of one who was injured in the course of his employment and the master is not liable for any alleged negligence on their part.—Livingstone v. Saginaw Plate Glass Co., 146 Mich. 236.

¶ 637. Where a corporation engaged in the erection of bridges employs an experienced man to erect a bridge, and such man employs the necessary help, their wages being paid by him with money furnished by the corporation, he is a fellow-servant of the helpers employed by him.—Corey v. Joliet Bridge & Iron Co., 151 Mich. 558.

¶ 638. In an action for personal injuries, it appeared that plaintiff was employed in a mill, and that he was directed by the master mechanic, whose orders he was bound to obey, to climb upon the machinery to extinguish a fire caused by friction. The master mechanic assured plaintiff that the machinery would remain stopped while he was on it, but the machine unexpectedly started, whereby plaintiff was injured. Held, that such assurance was an act of a fellow-servant.—Maxwell v. Elk Cement & Lime Co., 157 Mich. 631.

¶ 639. Where plaintiff, a saleswoman in defendant's store, is injured by an electric fan falling from a show case which is being moved by the floor manager, the injury being the result of the negligence of a fellow-servant, defendant is not liable.—McBroom v. B. Siegel & Co., 175 Mich. 186.

¶ 640. In determining whether a plaintiff sixteen years old is a fellow-servant of one with whom he was working, consideration may be given to the likelihood of the plaintiff to defer to the judgment of this other person placed there to direct his work.—Belmer v. Boyne City Tanning Co., 160 Mich. 669.

¶ 641. In an action for personal injuries sustained by a woodsman as the result of a tree falling upon him which was felled by a member of a gang working near him, held that the employee who felled the tree was a fellow-servant of the plaintiff.—Stone v. Bennett, 194 Mich. 441.

§ 55e. ——Infants or others employed in violation of statute.

¶ 642. Where the law forbids that a person of a particular class shall be employed as a servant, he cannot be regarded as a fellow-servant.—Syneszewski v. Schmidt, 153 Mich. 438.

¶ 643. Where a child under sixteen years of age is employed in dangerous work in violation of Pub. Acts 1901, No. 113, he is not a fellow-servant with a servant who directs him to do the particular work on which he is injured, but such servant acts in giving the directions as a representative of the master.—Daim v. Bryant Paper Co., 157 Mich. 550.

§ 55f. Vice principals or representatives of master and other employees.

¶ 644. The fact that one employee has authority to hire and discharge other employees is not conclusive of his relation of fellow-servant to other employees.—Belmer v. Boyne City Tanning Co., 160 Mich. 669.

¶ 645. Where a servant is exposed to danger not in the line of the duties he has engaged to perform, by one whom the master has placed over him, and to whose orders he is subjected, this wrongful act of his superior may be treated as the wrongful act of the master.—Belmer v. Boyne City Tanning Co., 160 Mich. 669.

¶ 646. Where defendant has given an employee full control of erecting a building and of the men employed thereon, he is liable for an injury to a workman from such superior employee's negligence, even though such superior himself worked about the building.—Slater v. Chapman, 67 Mich. 523.

¶ 647. One to whom his employer had given the general supervision of a coal and freight business, including the unloading of vessels laden with coal, and the employment and direction of men for that purpose, was not a fellow-servant of such men so as to absolve the master from responsibility to them for his negligence in constructing a scaffold of such poor material that it broke and caused injury to a servant of such employer.—Brown v. Gilchrist, 80 Mich. 56.

¶ 648. In the absence of the officers and corporators of a corporation, it may be inferred that a servant who assumes to and does discharge the duty of keeping the machinery and appliances necessary to the prosecution of the corporate business in repair is the representative of the corporation in so doing.—Fox v. Spring Lake Iron Co., 89 Mich. 387.

¶ 649. Where it is the duty of the head engineer of a blast-furnace to make repairs in certain hoisting apparatus, his neglect, knowing of a defect therein, to take precautions against an accident from such defect to an employee who, under his orders, is repairing the same, is that of his employer; he is not a mere fellow-servant of such employee.—Fox v. Spring Lake Iron Co., 89 Mich. 387.

¶ 650. Defendant's superintendent, to whom it had delegated general authority to manage the business, including the duty to see that the machinery in its factory was kept in good order, is held to have been plaintiff's superior servant while starting a planer which plaintiff was oiling, and thereby causing the injury complained of.—Shumway v. Walworth & N. Mfg. Co., 98 Mich. 411.

¶ 651. The general superintendent and manager of a company was not a fellow-servant of a construction laborer employed by such company, but was a vice-principal, for whose negligence resulting in injury to such laborer, such company was responsible. —Milbourne v. Arnold Elec. Power Station Co., 140 Mich. 316.

¶ 652. A superintendent having charge of four or five hundred men doing concrete construction work, with authority to employ and discharge men, and to give directions for the work, is a vice principal, and not a fellow-servant of a man under his charge.—Brown v. Lennane, 155 Mich. 686.

¶ 653. Defendant sent an experienced employee, one Berlin, to instruct plaintiff's intestate, an employee, how to charge a soda water tank. Held, the defendant was liable for the negligence of Berlin whereby the tank exploded and killed plaintiff's intestate, as Berlin was not acting as a fellow-servant.—McDonnell v. Central Drug Co., 160 Mich. 455.

¶ 654. Where a millwright in a paper mill sends assistants to repair the belt used to run the machinery in the washing vats, they are not fellow-servants of an employee whose duties are to go into the vat and keep it clean after each operation.—Courtois v. King Paper Co., 172 Mich. 305.

¶ 655. Where one who had general charge of the construction of a bridge ordered a workman to use a certain piece of timber in the erection of a scaffold which scaffold broke because the timber so selected was defective, held, that the superintendent was a vice-principal and not a fellow-servant of the workman injured.—Buck v. Western Concrete Bridge Co., 177 Mich. 646.

¶ 656. Where defendant's superintendent ordered the foreman to take decedent, who was employed as a hoisting engineer and was inexperienced as an iron worker, to do some riveting on a smokestack eighty-five feet from the ground, and while the foreman and decedent were at work upon a scaffold, the latter fell to the ground and was killed, it was held that the negligence complained of was that of the superintendent, and hence not that of a fellow-servant.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

¶ 657. An employee, to whom is delegated the master's duty of providing a safe place for his servants to work, is a vice-principal; and the fact that in the discharge of his regular duties he is a fellow-servant of an injured employee will not relieve the employer from liability.—Maki v. Isle Royale Copper Co., 180 Mich. 624.

¶ 658. The superintendent of the construction department of a large manufacturing company is a vice-principal, and his employer is answerable for his negligence in not properly guarding the work of chipping iron from a machine while being installed under the former's direction, so as to protect from flying chips employees of other departments who, in the discharge of their duties, have occasion to pass that way. (Ostrander and Kuhn, JJ., dissenting.)—Webb v. Buick Motor Co., 182 Mich. 551.

¶ 659. Those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and are not, as to each other, fellow-servants.—Sadowski v. Michigan Car Co., 84 Mich. 100.

§ 55g. Foremen and other employees.

¶ 660. Ordinarily a foreman of a shop is not a vice-principal.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 661. A common laborer employed in a lumber-yard was held not to have been a fellow-servant with the yard foreman and his men, who by the direction of the superintendent dug a ditch in which to lay a water-pipe, and left it uncovered, whereby the laborer was injured.—Sadowski v. Michigan Car Co., 84 Mich. 100.

¶ 662. The foreman of a mill whose duty it is to keep machinery supplied with guards cannot be regarded as the fellow-servant of workmen injured for want of guards.—Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607.

¶ 663. The foreman of a car shop who works with the men under his charge is a fellow-servant of the men as to all acts that it is not the master's duty to perform; e. g., in hoisting a car body by tackle.—Findlay v. Russel Wheel & Foundry Co., 108 Mich. 286.

¶ 664. While finishing the work of putting elevators into a building defendant's foreman and plaintiff had to do some work in one of the elevators, and before beginning it the foreman went to the ground floor and secured the elevator and then started to work with plaintiff. Soon after a man in charge of the elevator, who was ignorant of the foreman's action, started it, and plaintiff was hurt. Held, that as the injury was caused by the neglect of the foreman, plaintiff's fellow-servant, to take the proper precautions to stop the elevator, there could be no recovery.—Andre v. Winslow Bros.' Elevator Co., 117 Mich. 560.

¶ 665. A mill-owner who has furnished a safe place, proper machinery and appliances, and competent men to perform the work, is not liable to an employee whose hand is crushed through the alleged negligence of

fellow-servants in replacing mill rollers by direction of the foreman, this not being work which the master was bound to superintend. —Frazee v. Stott, 120 Mich. 624.

¶ 666. It is not the grade of the servant but the employment that determines the question of fellow-servants and a foreman running a spoke lathe for the moment to adjust it so that the proper size spoke may be turned out is a fellow-servant with the regular attendant at the machine injured while oiling it during the foreman's trial.—Wellihan v. National Wheel Co., 128 Mich. 1.

¶ 667. The foreman of a sawmill with power to employ men and to direct their labor, who is also engaged part of the time in manual labor, is a fellow-servant of an employee injured through the foreman's negligent direction as to the conduct of certain work.—Lepan v. Hall, 128 Mich. 523.

¶ 668. A laborer in a warehouse engaged in shoveling and wheeling salt is a fellow-servant of the foreman of the men so engaged so as to render the employer not liable for injuries sustained through the action of workmen in breaking off a part of a pile of salt where the foreman is not a general manager or superintendent but engaged merely to boss the men in one of the various departments.—Mikolojczak v. North American Chemical Co., 129 Mich. 80.

¶ 669. An employee in a punch shop was injured by the fall of a steel plate, alleged to have been caused by a nut fitting the bolt too loosely, the bolt being used to raise the steel plate. The bolt and nut were obtained by the foreman from another foreman, and, after being examined, were fastened to the plate, which, when lifted, dropped because the nut came off. Held that he could not recover since it required no special skill to see if the nut fitted the bolt, and the negligence, if any, was that of a fellow-servant.—Flaws v. West Bay City Shipbuilding Co., 132 Mich. 169.

¶ 670. The placing of an emery wheel upon the wrong machine by a foreman of a machine shop, so that it burst on account of high speed, is the act of a fellow-servant.—Randa v. Detroit Screw Works, 134 Mich. 343.

¶ 671. An employer was bound to use due care that a water cooler furnished for the use of his employees should in the first instance be reasonably safe for use, and he was chargeable with the negligence of any subordinate to whom he delegated that duty, and in performing such duty the foreman was not acting as a fellow-servant of an employee who drank poison which had been placed in the cooler at the foreman's direction for purposes of cleaning, but was acting as a representative of the employer.—Geller v. Briscoe Mfg. Co., 136 Mich. 330.

¶ 672. One of the grade of foreman in "charge of the mason department on construction and repairs" of the master's ovens, who had under him a subforeman in immediate charge, was fellow-servant of a mason sent into the inside of an oven to make repairs in so far as the first named superior assumed to turn on a blower for the purpose of cooling the oven and in so doing sent in a blast of air which stirred up dust and ashes injuring plaintiff's eyes.—Page v. Battle Creek Pure Food Co., 142 Mich. 17.

¶ 673. A laborer and a foreman of a sawmill engaged in moving a loaded car along a side track are fellow-servants in such work. —Younggren v. I. Stephenson Co., 150 Mich. 488.

¶ 674. The foreman of an electric lighting company does not become a vice principal by an agreement with an electrician to watch a certain switch box, and see that the switch was not closed.—Guest v. Edison Illuminating Co., 150 Mich. 438.

¶ 675. A company engaged in the installation of electric appliances is not liable for the negligence of a foreman who is the fellow-servant of an electrician injured.—Guest v. Edison Illuminating Co., 150 Mich. 438.

¶ 676. A servant cannot recover for injuries sustained by the falling of iron plates improperly piled and carried to the deck of a steamboat in process of construction by defendant, a builder of steamboats, the duty of diligently carrying and piling plates being a delegable duty, though the work was in charge of a foreman.—Amoe v. Great Lakes Engineering Works, 151 Mich. 212.

¶ 677. Defendant put a foreman in charge of a gang of men to keep in repair a certain portion of its line of wires used to transmit electric power. The foreman had power to hire and discharge men, to make requisitions for supplies, and to direct the work. Plaintiff, upon being employed by defendant, informed his foreman that he did not know how to handle hot or live wires. The foreman promised him that either he or his assistant would inform plaintiff when they came to poles whether the wires thereon were dangerous. Plaintiff was sent up a pole to solder a dead wire and, while attempting to straddle it, rose up too high and touched a live wire and was injured. Held, the foreman had authority to make said promise and was not a fellow-servant of plaintiff so as to exempt defendant from liability for the foreman's neglect to warn plaintiff.—Argersinger v. Commonwealth Power Co., 164 Mich. 282. (Hooker, J., dissenting.)

¶ 678. Defendant sent a gang of men of which plaintiff was one, with a foreman, to install a sprinkler system in the plant of a third person. Defendant supplied step lad-

ders to be used in the work. At the direction of the foreman plaintiff used a straight ladder found in the building belonging to the third person, and while using the same was injured. Held, the foreman and plaintiff were fellow-servants so as to preclude plaintiff's recovery.—Fellows v. Stevens, 170 Mich. 13. (Bird, J., dissenting.)

¶ 679. If a foreman having permission to use lumber not belonging to the master selects a defective plank therefrom to use in building a scaffold when there was sufficient other material on hand from which a proper plank could be selected, or if there was no other material at hand when the scaffold was erected but there was proper material that could be used to replace the plank when its scaffold was removed and rebuilt, a servant stepping on the plank who is injured by its breaking may recover.—Bittner v. Howie Roofing Co., 176 Mich. 674.

¶ 680. A foreman in charge of a gang of men engaged in unloading logs from cars is a fellow-servant of the driver of a team engaged in moving the car from place to place.—Hilgbrandt v. Oval Wood Dish Co., 180 Mich. 43.

¶ 681. A promise of a foreman to have sufficient power to operate machinery with safety is merely the promise of a fellow-servant, and failure to keep such promise is a fellow-servant's negligence, where the defect in the power was due to inadequacy of boiler capacity, and there was nothing to show that the foreman had any authority to get a new boiler, or that the servant supposed or was told that he could or would get such boiler.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

§ 55h. Employees in different departments.

¶ 682. A Detroit fire engine driver is not a fellow-servant of the board of public works of that city so that he may not recover for an injury to him arising from a defect in a public street and received by him while performing his duty, which it was the board's duty to repair.—Coots v. City of Detroit, 75 Mich. 628.

¶ 683. A janitress employed by defendant, owner of a building, and injured by the fall of an elevator in said building while riding in the same in the morning to her work on the third floor, where she is accustomed to change her clothes before beginning her labor, is not a fellow-servant of the operator of said elevator so as to preclude recovery for said injury.—Mirabile v. Simon J. Murphy Co., 169 Mich. 522.

¶ 684. Where defendant's repair man fails to put a cotter pin in the lever controlling the clutch apparatus of a milling machine, by reason of which plaintiff employee is injured, the doctrine of fellow-servant does not apply so as to deprive plaintiff of the right to recover.—Deary v. Hecla Co., 161 Mich. 677.

¶ 685. Those employed to make a road safe for drawing logs are engaged in making a safe place, and are not fellow-servants with a teamster driving a team over it.—Scoop v. W. H. White Co., 182 Mich. 539.

§ 55i. Employees of separate masters in same work.

¶ 686. Plaintiff's decedent was employed by the Pere Marquette Railroad as a yardmaster. The defendant railroad used the Pere Marquette tracks up to a point of a mile from the latter's passenger station. The decedent had nothing to do with the defendant's trains except to cut off a sleeper which was then taken in charge by the Pere Marquette, and became its sleeper. Held, the decedent was not a fellow-servant of the defendant's train men.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 687. A plaintiff employed by a carpenter contractor in work upon a bay window is not the fellow-servant of one employed by a painting contractor in painting such window.—Haxer v. Griessel, 162 Mich. 310.

¶ 688. Where an automobile company employs a person to inspect and test motors at a factory supplying the same, such employee and an employee of the factory assisting in the tests are not fellow-servants as they are not servants of the same master.—Johnson v. E. C. Clark Motor Co., 173 Mich. 277.

¶ 689. A teamster in the employ of a trucking company is not a fellow-servant of an employee of the consignee of goods engaged in unloading same from railroad car to the truck.—Shadduck v. Grand Rapids & I. Ry. Co., 179 Mich. 433.

§ 55j. Railroad employees.

Statutory provisions regulating employment of railroad workers, see ante § 36.

¶ 690. If a railroad company has used proper diligence in choosing competent servants, it is not liable in damages for an injury to one of them caused by the carelessness of another.—Gardner v. Michigan Cent. R. Co., 58 Mich. 584.

¶ 691. Train men and section hands are fellow-servants within the rule precluding recovery by one such servant for injury through another's negligence.—Schaible v. Lake Shore & M. S. R. Co., 97 Mich. 318.

¶ 692. If, while an employee is helping at unloading logs from a car, logs are rolled upon him by the other workmen on the car of their own volition and without the authority or direction of the roadmaster, this is an act of fellow-servants, for which he cannot recover.—Roepcke v. Michigan Cent. R. Co., 100 Mich. 541.

¶ 693. Where the collision in which plaintiff, a railroad engineer, was injured was caused by a flat-car moving from a side track out upon the main track, it was held that if the motion which was the cause of the flat-car's being hauled out was imparted to it by a freight train which had shortly before backed upon the side track, such fact might establish negligence on the part of the men in charge of the freight train, but that for such negligence there could be no recovery against the railroad company, it being the negligence of fellow-servants.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 694. Where the fireman on a freight train was hurt in consequence of the train being ditched through the engineer's neglect to obey signals, which he saw and was bound by the company's rules to observe, the company was not held liable.—Henry v. Lake Shore & M. S. Ry. Co., 49 Mich. 495.

¶ 695. Where the train dispatcher has telegraphed a report of a washout on the right of way to the station agent, whose duty was to report the danger to the train men on a repair crew, the railroad company had performed its duty, and is not liable for the negligence of the station agent in failing to inform the train men.—Graham v. Detroit, G. H. & M. Ry. Co., 151 Mich. 629.

¶ 696. A tower man was employed at the crossing of two railroads, his pay coming half from each road. He had absolute control of the passing of trains by means of an interlocker and derailer. Held, his employment was not that of a train dispatcher, but was analogous to that of a switchman, and he was the fellow-servant of an engineer of one of the roads.—Stever v. Ann Arbor R. Co., 160 Mich. 207.

¶ 697. A telegraph operator, in receiving a dispatch from the train dispatcher, and in transcribing and delivering same to an engineer, is a fellow-servant of said engineer, and the latter cannot recover for injuries suffered in a collision due to a negligent mistake of the operator in transcribing the dispatch.—Rogers v. Pere Marquette R. Co., 166 Mich. 42.

§ 55k. ——Vice principals or agents of company and other employees.

¶ 698. Where, by direction of the company's division superintendent, an abandoned switch has been reopened and used, failure to notify the engineers of trains or to restore the switch lights must be regarded as the negligence of the company and not of the section-master, a fellow-servant of an injured engineer, and the company is liable.—Town v. Michigan Cent. R. Co., 84 Mich. 214.

¶ 699. A railroad station agent selecting cars to be loaded, and who furnishes an open rack car for the transportation of refuse from a planing mill, is not the fellow-servant of a section man injured by the derailment of a hand car caused by a piece of wood which had fallen from the car, since the duty of selecting proper cars cannot be delegated.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 700. A station agent was employed and paid by two railroads crossing each other. The agent was given authority to hire and discharge the tower men at the intersection, but had no power to prescribe rules governing them, these being promulgated by the companies. Plaintiff engineer was injured by the alleged negligence of the tower man in giving signals. Held, the station agent was not the master of the tower man or the vice principal of the defendant railroad, so as to render defendant liable.—Stever v. Ann Arbor R. Co., 160 Mich. 207.

¶ 701. An assistant roadmaster who in the absence of the conductor was in charge of a train from which rails were being unloaded was not a fellow-servant of a section man engaged in unloading such rails, but was a vice-principal.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

§ 702. A section man specially directed to mount a stepladder on top of a box car and to cut an overhead trolley wire is not a fellow-servant of the division roadmaster who directs him to do it.—Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606, per Montgomery, J., and McGrath, C. J.

¶ 703. The duty to furnish a safe place for its employees to work being one that a railroad company cannot delegate so as to relieve itself from responsibility, section men within the scope of whose duties it may have been to remove from the track ice which subsequently causes the derailing of a car and the consequent killing of a brakeman, are not fellow-servants of his with respect to the performance of such duties.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 704. A train-dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a "fellow-servant" with other employees acting under his orders.—Hunn v. Michigan Cent. R. Co., 78 Mich. 513.

¶ 705. A yardmaster, who has full charge of the yards of a railroad company and who hires and discharges men and assigns them to their work, is not their fellow-servant, but is the agent or vice-principal of the company, and notice to him of defects in appliances and of the incompetency of a fireman handling a switch-engine is notice to the company, and upon his promise to remedy those evils a switchman, complaining of them, has a right to rely for a reasonable time and to a reasonable extent, and if he continues in the service relying on such promise the rule that an employee accepts the risks of his employ-

ment when he continues in it knowing of defects does not apply, unless the company fails for an unreasonable time to make repairs, etc.—Lyttle v. Chicago & W. M. R. Co., 84 Mich. 289.

¶ 706. In an action by a switchman for injuries received because of an unblocked frog while uncoupling cars, it is no defense that defendant had employed men to see that the frogs in its yards are kept blocked, and that it furnished the necessary material; the statutory duty cannot be delegated to an employee so as to relieve the employer, and the negligence of the former in this regard is that of the latter.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567.

¶ 707. An assistant road-master controlling a gang of men with power of direction and discharge is a superior servant, and for his negligence the employer is liable.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409; Palmer v. Michigan Cent. R. Co., 93 Mich. 363.

¶ 708. A servant, to whom the master has delegated the care and management of the entire business or of a distinct department thereof, so as to charge him with the performance of duties toward subordinates that the law imposes upon the master, stands in the latter's place, and the rule of respondeat superior applies to render the master liable for injury where this superior servant, abusing his authority, orders an inferior to perform work differing from that for which he was employed.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409.

§ 55l. ——Inspector and other employees.

¶ 709. A car inspector, whose duty it is to inspect cars and their apparatus, is not a brakeman's fellow-servant, and the company is liable for his negligence in permitting the putting on the car of a defective brake-chain if injury results to the brakeman.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 710. A brakeman on a freight train, and a car inspector charged by the common employer with the duty of inspecting cars received from other companies for transportation, and of seeing that they are properly loaded and in good condition, are fellow-servants.—Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329.

¶ 711. A switchman in the employ of a board composed of representatives of three railroad companies, to whose general control of a union depot, tracks, and yard, the individual companies are subject, is not a fellow-servant of a car inspector employed by one of the companies, even when the switchman is engaged in handling the business of that particular road, and a car inspector so employed does not assume the risk of injury from the negligence of such switchman, so as to preclude a recovery for his death in an action against the roads in their associate capacity.—Kastl v. Wabash R. Co., 114 Mich. 53.

¶ 712. Where a railroad employed a competent inspector to inspect cars coming in from other roads, and the inspector made a faulty inspection of the car in question, or none at all, thus failing to detect a defective stake or stakes, which latter fell upon and killed a switchman at work in the yard, there was no liability, as the inspector and the switchman were fellow-servants.—Lellis v. Michigan Cent. R. Co., 124 Mich. 37.

¶ 713. Car inspectors are not such fellow-servants of a freight conductor as to relieve the railroad company from liability for injury to the conductor resulting from their negligence.—McDonald v. Michigan Cent. R. Co., 132 Mich. 372.

¶ 714. Where a railroad company makes no provision for inspection of its engines except by the engineers in charge, who are expected at all practicable times to perform that duty and report defects, they must be held to be the representatives of the company.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 715. The inspector of a roadbed is not the fellow-servant of an engineer in regard to a failure to inspect.—Hamilton v. Michigan Cent. R. Co., 135 Mich. 95.

§ 55m. ——Foremen and other employees.

¶ 716. The foreman of a gang of car-repairers and the engineer of a switch-engine are fellow-servants of one of the repairers, who, if he is injured through their negligence, cannot recover against the employing railroad company.—Peterson v. Chicago & N. W. R. Co., 67 Mich. 102.

¶ 717. Whether a section foreman can be considered a fellow-servant of the men working under him so as to relieve the common employer from liability for his negligence, quære.—Hammond v. Chicago & G. T. R. Co., 83 Mich. 334.

¶ 718. Where a gang of section-men is propelling a hand-car along the track, the foreman's failure to send a look-out ahead near a curve to give warning of an expected train must be regarded as shared in by the section-men who voluntarily and without express orders remain on the car; and no recovery can be had for the death of one of the men from a collision.—Hammond v. Chicago & G. T. R. Co., 83 Mich. 334.

¶ 719. A foreman who has charge of a gravel-train, with power to hire and discharge all men working thereon, and to whom alone they can make complaint, is not a fellow-servant of said employees.—Erickson v. Milwaukee, L. S. & W. R. Co., 93 Mich. 414.

¶ 720. Where, in an action against a railroad company by an employee who was one of a gang of men at work for the company under a foreman's charge, unloading and levelling dirt hauled upon its premises, and who was injured by the backing of an engine against the loaded cars from which it had been detached, the sole act of negligence alleged as ground for recovery was that the foreman failed to give notice to the men under his charge that the train was about to move, held, as he and plaintiff were fellow-servants there could be no recovery.—Schroeder v. Flint & P. M. R. Co., 108 Mich. 213.

¶ 721. A section man engaged with other members of the section gang in moving a loaded car by shoving against it an empty car, was ordered by the section boss to climb upon the loaded car and set the brake, and while climbing a ladder on the loaded car to execute the order was injured by the empty car's being pushed against him. Held, that the negligence, if any, was that of the section boss or of the men under his control, all of whom were fellow-servants of the injured employee, so that he could not recover against the employer.—Gavigan v. Lake Shore & M. S. R. Co., 110 Mich. 71.

¶ 722. A roadmaster, being prevented by illness from accompanying a work train sent out to distribute railroad ties along the right of way, placed a section foreman in charge of the train, with instructions as to the loading, removing, and handling of the ties. No general power was conferred upon the foreman to make up and send out trains, to determine when and where they should go, to employ and discharge workmen, or to represent the roadmaster other than upon the particular occasion, and in accordance with his instructions. Held, that the foreman did not become a vice-principal of the company, so as to render it liable for injuries to one of the workmen resulting from the negligence of the foreman while in charge of the train.—Morch v. Toledo, S. & M. R. Co., 113 Mich. 154.

¶ 723. While the foreman of a gang of men employed in putting in a bridge may be their fellow-servant with respect to the manner of use of materials and appliances furnished by the master, or with respect to the selection of the same from among those near at hand, he represents the master when he undertakes the duty of selecting suitable materials from a supply in a warehouse eighty miles distant, and for a negligent selection, resulting in injury to an employee, the master is liable.—Thomas v. Ann Arbor R. Co., 114 Mich. 59.

¶ 724. The negligence of a conductor and brakemen in placing timbers on a flat car without complying with the rules requiring the proper securing of the timbers, and the failure of the station agent to inspect the loading, whereby the foreman of a gang of section hands at work surfacing the track was injured by a projecting timber, was the act of fellow-servants for which the railroad company, which provided safe appliances and a safe place to work, is not liable.—Miller v. Michigan Cent. R. Co., 123 Mich. 374.

¶ 725. The foreman of the car department of a railroad supervising men who do repair work is the fellow-servant of one working in the woodworking department who in the line of his duties has been called out to assist in the repair of a loaded freight car.—McClure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 726. Where a car repairer, before going in between two cars, was assured by the car foreman that he would be protected, and the duties of such car foreman were delegable and of a limited character, and he sometimes worked with the men, the failure of such foreman to protect plaintiff is the negligence of a fellow-servant.—Garlinghouse v. Michigan Cent. R. Co., 174 Mich. 73.

¶ 727. A car repairer and a roundhouse foreman are fellow-servants.—Revolinski v. Manistee & N. E. R. Co., 186 Mich. 501.

¶ 728. Defendant railroad's foreman in charge of constructing a branch line took plaintiff and other laborers so employed and set them to work clearing up a wreck. Plaintiff was directed by the said foreman to turn the cog wheel of a derrick by taking hold of its spokes, and while so engaged was injured. Held, the foreman was a fellow-servant and not a vice principal of the plaintiff.—Peters v. Michigan Cent. R. Co., 165 Mich. 217.

¶ 729. A car repairer and a roundhouse foreman are fellow-servants.—Revolinski v. Manistee & N. E. R. Co., 186 Mich. 501.

§ 55n. ——Conductors and other employees.

¶ 730. A conductor of a freight train, under whose direction a brakeman is assisting in the unloading of freight, is the fellow-servant of the brakeman.—LaPierre v. Chicago & G. T. R. Co., 99 Mich. 212.

¶ 731. Conductor and brakemen are fellow-servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers.—Greenwald v. Marquette, H. & O. R. Co., 49 Mich. 197.

¶ 732. If a conductor of a freight train be killed through the negligence of the engineer of another train whereby a collision has been occasioned, there can be no recovery against their employer, the conductor and the engineer being fellow-servants.—Enright v. Toledo, A. A. & N. M. R. Co., 93 Mich. 409.

¶ 733. Where a fireman on a passenger train while in the cab of his engine and passing a freight train on a side track was struck and injured by the projecting limb of a tree

on a flat car loaded with trees, he cannot recover, the negligence, if any, being the failure of the conductor of the freight train—a fellow-servant—to see, under a rule known to the plaintiff, that the flat car was properly loaded before receiving it into his train.—Jarman v. Chicago & G. T. R. Co., 98 Mich. 135.

¶ 734. The failure of the brakeman or conductor of a passenger train equipped with air brakes, in the use of which they have been properly instructed, to pull the automatic cord by which the brakes are operated in response to the engineer's signal, is, as to the engineer, the negligence of a fellow-servant, for which the railroad company is not liable.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 735. A railroad company was not liable, in an action for injuries to a freight conductor who was struck by a movable platform of a milkhouse as he was climbing the ladder on a car of his moving train, where, it appears that the station agent, whose duty it was to raise and lower such platform as occasion required, had lowered the same just before the accident, and where no evidence of defect on such platform was given; since in the discharge of such duty, the station agent, as fellow-servant of the plaintiff was responsible.—Henry v. Ann Arbor R. Co., 140 Mich. 446.

¶ 736. Plaintiff was a street car conductor, and was on the running board of the car, collecting fares, while it was in motion. A section man had left the handles of a wheelbarrow loaded with bricks projecting near the track. Plaintiff in passing along got entangled therewith and was injured. Held, the case presented was not one where the defendant had failed to provide a safe place to work, but plaintiff was injured by the negligent act of a fellow-servant, and could not recover.—Wickham v. Detroit United Ry., 160 Mich. 277.

§ 55o. ——Brakemen or switchmen and other employees.

¶ 737. A boy about 17 years old was employed as brakeman by the engineer of an ore train. The engineer had power to employ and discharge brakemen, and the boy was capable and experienced in the business. The engineer directed the fireman to back the locomotive upon a side track to the train, and told the brakeman to attend a switch. He himself went to attend another switch further on. While this was being done the bell and whistle of a train on the main track near by were both sounding. The first switch was passed, and the engineer was about throwing the second when he heard an outcry and saw the brakeman under the locomotive. The brakeman died in a few minutes from his injuries, and his administrator sued the railroad company for the injury. It was proved that the brakeman knew the train was about moving back, and that there was room enough for him to perform his duties. Held, that he needed no further warning of his danger, and that the accident was due to his own negligence; also, that if the failure to sound the bell and whistle of the locomotive was negligence, it was the fault of the fireman, who was a fellow-servant of the brakeman, and for whose negligence towards a fellow-servant the company would not be liable.—Greenwald v. Marquette, H. & O. R. Co., 49 Mich. 197.

¶ 738. A brakeman cannot hold the company which employs him responsible for the failure of fellow-servants to take peculiar precautions.—Day v. Toledo, C. S. & D. R. Co., 42 Mich. 523.

¶ 739. If, owing to the engineer's negligence, the step of an engine becomes loose, whereby a brakeman attempting to board the engine is injured, such negligence is that of a fellow-servant, and the company is not liable.—Miller v. Chicago & G. T. R. Co., 90 Mich. 230.

¶ 740. A brakeman who in attempting to board a moving engine is injured in consequence of the step's being loose and turning may not recover in an action for negligence against the company, if he offers no evidence that the engineer whose duty it was to see to the step was incompetent or did not have the proper tools to repair the step, and where there is produced nothing to show how long the step was loose or whether the company knew of its insecurity.—Miller v. Chicago & G. T. R. Co., 90 Mich. 230.

¶ 741. A conductor of a freight train desired to leave two box cars on a siding, and directed a brakeman to get upon an empty flat car next to the tender, and assist in making a running switch. The brakeman mounted the flat car, and kneeled down at the rear end. The conductor climbed upon the first box car, which was attached to the flat car, and took his station at the rear, to apply the brake, in which position he was out of sight of the brakeman. The brakeman pulled the pin at the proper time, and just as he was reaching over the end of the flat car to lay it on the bumper of the detached box car, the engine suddenly started ahead, and he was thrown onto the track, and his leg so injured as to render amputation necessary. Neither the conductor nor the brakeman gave the engineer any signal to go ahead when the pin was drawn. Held, that the engineer should not have started up his engine until notified; that the sudden starting of the engine and flat car was the proximate cause of the accident, for which the engineer alone was responsible; and, being a fellow-servant of the brakeman, the railroad company was not liable for the consequent injury to the brakeman.—Stanley v. Chicago & W. M. R. Co., 101 Mich. 202.

¶ 742. It is no defense to a brakeman's action against a railroad company for in-

juries sustained because of an abrupt depression in one of the rails of its track, that the immediate cause of the accident was the negligence of the section men who were charged with the duty of keeping the track in repair; they not being the brakeman's fellow-servants in relation to that duty.—Anderson v. Michigan Cent. R. Co., 107 Mich. 391.

¶ 743. Where a brakeman was injured in consequence of his stumbling against a pile of ashes and cinders dumped upon a track by a passing engine, although the proper dumping place was at the turn-table, it was held, that the fireman who did the dumping, and the section men whose duty it was to remove the ashes and cinders, were with the brakeman fellow-servants for whose negligence the company was not liable unless it had actual notice of the obstruction, or unless the same had existed so long that notice would be implied.—Loranger v. Lake Shore & M. S. R. Co., 104 Mich. 80.

¶ 744. A switchman and a crossing watchman are fellow-servants, and the latter cannot recover from the railroad company for injuries sustained by reason of the negligence of the former.—Dixon v. Grand Trunk Western Ry. Co., 135 Mich. 169.

¶ 745. Plaintiff employed in the operation of making up trains on defendant's tracks was injured by the fact that after he had been caught between a car and engine another engine was backed down upon the car. Said engine was backed in through the direction of a servant of defendant who had charge of the general operation of trains in and about the station, to give an order previous to it. Held, that plaintiff and such other employees were fellow-servants and that plaintiff was not entitled to recover.—McCarthy v. Michigan Cent. R. Co., 97 Mich. 539.

¶ 746. The engineer of a switch engine [illegible] a [illegible] switch tracks [illegible] a [illegible] and another work [illegible] [illegible] [illegible]

ants of members of a night shift engaged on the same work, and employed by the same master.—Kangas v. Cleveland Cliffs Iron Co., 188 Mich. 255.

¶ 759. A miner, who with another workman, is engaged in timbering up a drift so that it may be used as a passageway, and tests overhanging rock preliminary to timbering is the fellow-servant of the other workman.—Aho v. Cleveland Cliffs Iron Co., 188 Mich. 218.

¶ 760. An employer who has provided a safe place, proper appliances and competent employees fully instructed as to their duties, and who has established proper rules and regulations for the safe conduct of his business, is not liable for the negligence of an employee in failing to notify a fellow-servant of a transitory or temporary danger caused by his act which for the moment renders the environment unsafe.—Mesich v. Tamarack Min. Co., 184 Mich. 363.

¶ 761. A mining captain who has the entire management of the mine without direction or interference by the owner occupies the owner's place and is not a mere fellow-servant of a laborer employed in the mine, even though he was not appointed directly by the owner, but only by the owner's agent. And the owner is liable for his negligence.—Ryan v. Bagaley, 50 Mich. 179.

§ 55q. ——Shift or timber boss and other employees.

¶ 762. A timber boss is a fellow-servant of employees working in the shaft of a mine.—Erickson v. Victoria Copper Min. Co., 130 Mich. 476.

¶ 763. No recovery can be had for injury to an employee in a mine caused by the falling of a plank which was being lowered in the shaft by means of a rope fastened with a halfhitch around each end of the plank, the evidence being conflicting whether fastening by means of halfhitches or by means of holes bored in the plank was the customary way for lowering planks, but it appearing that augers were furnished for boring the holes and if there was negligence it was that of the timber boss, who was a fellow-servant, in failing to use the augers.—Erickson v. Victoria Copper Min. Co., 130 Mich. 476.

¶ 764. In the case of injury to a mine trammer injured by a top fall while he was loading ore upon cars and removing it as fast as it was brought to the floor by the miners, the fall being because timbers were not yet set or because ore on top of timbering had been loosened in progress of mining, it was held that, if there was any negligence, it was that of the miners or of the shift boss, who were fellow-servants of plaintiff, and whose duty it was to see to timbering.—Petaja v. Aurora Iron Min. Co., 106 Mich. 463.

¶ 765. A shift boss in a mine who fails to notify the succeeding mining crew of dangerous conditions is not a fellow-servant of the miners.—Panela v. Castile Min. Co., 177 Mich. 669.

¶ 766. The custom or rule that a mine timber boss must first go into the place where a blast is fired, inspect conditions, and notify the other timbermen does not constitute him a vice principal.—Vrelenich v. Calumet & Hecla Mining Co., 188 Mich. 407.

¶ 767. Defendant mining company directed plaintiff trammer where to work, and instructed him that he was neither employed nor paid to pinch down rock from the overhanging walls, and that he must spend no time in making the place safe in that regard; that such work should be attended to by the captain, shift boss and miners, and the place would be kept safe for him; and that he must abide by their judgment whether or not the place was safe. Held, upon injury to the plaintiff from falling rock, defendant could not urge that the negligence was that of the captain, shift boss and miners, and not its own.—Scendar v. Winona Copper Co., 169 Mich. 665.

F. RISKS ASSUMED BY SERVANT.

§ 56. In general; nature and basis of doctrine.

Risks of fellow-servants' acts or negligence, see post § 56 l.
Risks assumed by miners, see post § 56n.
Risks assumed by factory, shop, and mill employees, see post § 56o.
Risks assumed by linemen, see post § 56p.
Risks assumed by railroad employees, see post § 57.
Risks assumed under Federal Employers' Liability Act, see post § 58.
Weight and sufficiency of evidence as to assumption of risk, see post § 65k.
Jury questions as to assumption of risk, see post § 67q.
Directing verdict on ground that risk assumed, see post § 70b.
Instructions as to assumption of risk, see post § 71f.
Under Workmen's Compensation Act, see Workmen's Compensation Act.

¶ 768. The principle of assumed risks rests upon the ground that it is an implied contract that the employee shall assume all obvious dangers.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 769. The principle of assumed risk rests upon the ground that it is an implied contract between the employer and the employee that the employee shall assume the risk of all dangers obviously incident to his employment.—Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312.

¶ 770. The principle of assumed risk is applicable in cases in which the employer is

fellow-servants in replacing mill rollers by direction of the foreman, this not being work which the master was bound to superintend. —Frazee v. Stott, 120 Mich. 624.

¶ 666. It is not the grade of the servant but the employment that determines the question of fellow-servants and a foreman running a spoke lathe for the moment to adjust it so that the proper size spoke may be turned out is a fellow-servant with the regular attendant at the machine injured while oiling it during the foreman's trial.—Wellihan v. National Wheel Co., 128 Mich. 1.

¶ 667. The foreman of a sawmill with power to employ men and to direct their labor, who is also engaged part of the time in manual labor, is a fellow-servant of an employee injured through the foreman's negligent direction as to the conduct of certain work.—Lepan v. Hall, 128 Mich. 523.

¶ 668. A laborer in a warehouse engaged in shoveling and wheeling salt is a fellow-servant of the foreman of the men so engaged so as to render the employer not liable for injuries sustained through the action of workmen in breaking off a part of a pile of salt where the foreman is not a general manager or superintendent but engaged merely to boss the men in one of the various departments.—Mikolojczak v. North American Chemical Co., 129 Mich. 80.

¶ 669. An employee in a punch shop was injured by the fall of a steel plate, alleged to have been caused by a nut fitting the bolt too loosely, the bolt being used to raise the steel plate. The bolt and nut were obtained by the foreman from another foreman, and, after being examined, were fastened to the plate, which, when lifted, dropped because the nut came off. Held that he could not recover since it required no special skill to see if the nut fitted the bolt, and the negligence, if any, was that of a fellow-servant.—Flaws v. West Bay City Shipbuilding Co., 132 Mich. 169.

¶ 670. The placing of an emery wheel upon the wrong machine by a foreman of a machine shop, so that it burst on account of high speed, is the act of a fellow-servant.—Randa v. Detroit Screw Works, 134 Mich. 343.

¶ 671. An employer was bound to use due care that a water cooler furnished for the use of his employees should in the first instance be reasonably safe for use, and he was chargeable with the negligence of any subordinate to whom he delegated that duty, and in performing such duty the foreman was not acting as a fellow-servant of an employee who drank poison which had been placed in the cooler at the foreman's direction for purposes of cleaning, but was acting as a representative of the employer.—Geller v. Briscoe Mfg. Co., 136 Mich. 330.

¶ 672. One of the grade of foreman in "charge of the mason department on construction and repairs" of the master's ovens, who had under him a subforeman in immediate charge, was fellow-servant of a mason sent into the inside of an oven to make repairs in so far as the first named superior assumed to turn on a blower for the purpose of cooling the oven and in so doing sent in a blast of air which stirred up dust and ashes injuring plaintiff's eyes.—Page v. Battle Creek Pure Food Co., 142 Mich. 17.

¶ 673. A laborer and a foreman of a sawmill engaged in moving a loaded car along a side track are fellow-servants in such work. —Younggren v. I. Stephenson Co., 150 Mich. 488.

¶ 674. The foreman of an electric lighting company does not become a vice principal by an agreement with an electrician to watch a certain switch box, and see that the switch was not closed.—Guest v. Edison Illuminating Co., 150 Mich. 438.

¶ 675. A company engaged in the installation of electric appliances is not liable for the negligence of a foreman who is the fellow-servant of an electrician injured.—Guest v. Edison Illuminating Co., 150 Mich. 438.

¶ 676. A servant cannot recover for injuries sustained by the falling of iron plates improperly piled and carried to the deck of a steamboat in process of construction by defendant, a builder of steamboats, the duty of diligently carrying and piling plates being a delegable duty, though the work was in charge of a foreman.—Amoe v. Great Lakes Engineering Works, 151 Mich. 212.

¶ 677. Defendant put a foreman in charge of a gang of men to keep in repair a certain portion of its line of wires used to transmit electric power. The foreman had power to hire and discharge men, to make requisitions for supplies, and to direct the work. Plaintiff, upon being employed by defendant, informed his foreman that he did not know how to handle hot or live wires. The foreman promised him that either he or his assistant would inform plaintiff when they came to poles whether the wires thereon were dangerous. Plaintiff was sent up a pole to solder a dead wire and, while attempting to straddle it, rose up too high and touched a live wire and was injured. Held, the foreman had authority to make said promise and was not a fellow-servant of plaintiff so as to exempt defendant from liability for the foreman's neglect to warn plaintiff.—Argersinger v. Commonwealth Power Co., 164 Mich. 282. (Hooker, J., dissenting.)

¶ 678. Defendant sent a gang of men of which plaintiff was one, with a foreman, to install a sprinkler system in the plant of a third person. Defendant supplied step lad-

ders to be used in the work. At the direction of the foreman plaintiff used a straight ladder found in the building belonging to the third person, and while using the same was injured. Held, the foreman and plaintiff were fellow-servants so as to preclude plaintiff's recovery.—Fellows v. Stevens, 170 Mich. 13. (Bird, J., dissenting.)

¶ 679. If a foreman having permission to use lumber not belonging to the master selects a defective plank therefrom to use in building a scaffold when there was sufficient other material on hand from which a proper plank could be selected, or if there was no other material at hand when the scaffold was erected but there was proper material that could be used to replace the plank when its scaffold was removed and rebuilt, a servant stepping on the plank who is injured by its breaking may recover.—Bittner v. Howie Roofing Co., 176 Mich. 674.

¶ 680. A foreman in charge of a gang of men engaged in unloading logs from cars is a fellow-servant of the driver of a team engaged in moving the car from place to place.—Hilgbrandt v. Oval Wood Dish Co., 180 Mich. 43.

¶ 681. A promise of a foreman to have sufficient power to operate machinery with safety is merely the promise of a fellow-servant, and failure to keep such promise is a fellow-servant's negligence, where the defect in the power was due to inadequacy of boiler capacity, and there was nothing to show that the foreman had any authority to get a new boiler, or that the servant supposed or was told that he could or would get such boiler.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

§ 55h. Employees in different departments.

¶ 682. A Detroit fire engine driver is not a fellow-servant of the board of public works of that city so that he may not recover for an injury to him arising from a defect in a public street and received by him while performing his duty, which it was the board's duty to repair.—Coots v. City of Detroit, 75 Mich. 628.

¶ 683. A janitress employed by defendant, owner of a building, and injured by the fall of an elevator in said building while riding in the same in the morning to her work on the third floor, where she is accustomed to change her clothes before beginning her labor, is not a fellow-servant of the operator of said elevator so as to preclude recovery for said injury.—Mirabile v. Simon J. Murphy Co., 169 Mich. 522.

¶ 684. Where defendant's repair man fails to put a cotter pin in the lever controlling the clutch apparatus of a milling machine, by reason of which plaintiff employee is injured, the doctrine of fellow-servant does not apply so as to deprive plaintiff of the right to recover.—Deary v. Hecla Co., 161 Mich. 677.

¶ 685. Those employed to make a road safe for drawing logs are engaged in making a safe place, and are not fellow-servants with a teamster driving a team over it.—Scoop v. W. H. White Co., 182 Mich. 539.

§ 55i. Employees of separate masters in same work.

¶ 686. Plaintiff's decedent was employed by the Pere Marquette Railroad as a yardmaster. The defendant railroad used the Pere Marquette tracks up to a point of a mile from the latter's passenger station. The decedent had nothing to do with the defendant's trains except to cut off a sleeper which was then taken in charge by the Pere Marquette, and became its sleeper. Held, the decedent was not a fellow-servant of the defendant's train men.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 168.

¶ 687. A plaintiff employed by a carpenter contractor in work upon a bay window is not the fellow-servant of one employed by a painting contractor in painting such window.—Haxer v. Griessel, 162 Mich. 310.

¶ 688. Where an automobile company employs a person to inspect and test motors at a factory supplying the same, such employee and an employee of the factory assisting in the tests are not fellow-servants as they are not servants of the same master.—Johnson v. E. C. Clark Motor Co., 173 Mich. 277.

¶ 689. A teamster in the employ of a trucking company is not a fellow-servant of an employee of the consignee of goods engaged in unloading same from railroad car to the truck.—Shadduck v. Grand Rapids & I. Ry. Co., 179 Mich. 433.

§ 55j. Railroad employees.

Statutory provisions regulating employment of railroad workers, see ante § 36.

¶ 690. If a railroad company has used proper diligence in choosing competent servants, it is not liable in damages for an injury to one of them caused by the carelessness of another.—Gardner v. Michigan Cent. R. Co., 58 Mich. 584.

¶ 691. Train men and section hands are fellow-servants within the rule precluding recovery by one such servant for injury through another's negligence.—Schaible v. Lake Shore & M. S. R. Co., 97 Mich. 318.

¶ 692. If, while an employee is helping at unloading logs from a car, logs are rolled upon him by the other workmen on the car of their own volition and without the authority or direction of the roadmaster, this is an act of fellow-servants, for which he cannot recover.—Roepcke v. Michigan Cent. R. Co., 100 Mich. 541.

¶ 693. Where the collision in which plaintiff, a railroad engineer, was injured was caused by a flat-car moving from a side track out upon the main track, it was held that if the motion which was the cause of the flat-car's being hauled out was imparted to it by a freight train which had shortly before backed upon the side track, such fact might establish negligence on the part of the men in charge of the freight train, but that for such negligence there could be no recovery against the railroad company, it being the negligence of fellow-servants.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 694. Where the fireman on a freight train was hurt in consequence of the train being ditched through the engineer's neglect to obey signals, which he saw and was bound by the company's rules to observe, the company was not held liable.—Henry v. Lake Shore & M. S. Ry. Co., 49 Mich. 495.

¶ 695. Where the train dispatcher has telegraphed a report of a washout on the right of way to the station agent, whose duty was to report the danger to the train men on a repair crew, the railroad company had performed its duty, and is not liable for the negligence of the station agent in failing to inform the train men.—Graham v. Detroit, G. H. & M. Ry. Co., 151 Mich. 629.

¶ 696. A tower man was employed at the crossing of two railroads, his pay coming half from each road. He had absolute control of the passing of trains by means of an interlocker and derailer. Held, his employment was not that of a train dispatcher, but was analogous to that of a switchman, and he was the fellow-servant of an engineer of one of the roads.—Stever v. Ann Arbor R. Co., 160 Mich. 207.

¶ 697. A telegraph operator, in receiving a dispatch from the train dispatcher, and in transcribing and delivering same to an engineer, is a fellow-servant of said engineer, and the latter cannot recover for injuries suffered in a collision due to a negligent mistake of the operator in transcribing the dispatch.—Rogers v. Pere Marquette R. Co., 160 Mich. 42.

§ 55k. ——Vice principals or agents of company and other employees.

¶ 698. Where, by direction of the company's division superintendent, an abandoned switch has been reopened and used, failure to notify the engineers of trains or to restore the switch lights must be regarded as the negligence of the company and not of the section-master, a fellow-servant of an injured engineer, and the company is liable.—Town v. Michigan Cent. R. Co., 84 Mich. 214.

¶ 699. A railroad station agent selecting cars to be loaded, and who furnishes an open rack car for the transportation of refuse from a planing mill, is not the fellow-servant of a section man injured by the derailment of a hand car caused by a piece of wood which had fallen from the car, since the duty of selecting proper cars cannot be delegated.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 700. A station agent was employed and paid by two railroads crossing each other. The agent was given authority to hire and discharge the tower men at the intersection, but had no power to prescribe rules governing them, these being promulgated by the companies. Plaintiff engineer was injured by the alleged negligence of the tower man in giving signals. Held, the station agent was not the master of the tower man or the vice principal of the defendant railroad, so as to render defendant liable.—Stever v. Ann Arbor R. Co., 160 Mich. 207.

¶ 701. An assistant roadmaster who in the absence of the conductor was in charge of a train from which rails were being unloaded was not a fellow-servant of a section man engaged in unloading such rails, but was a vice-principal.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

§ 702. A section man specially directed to mount a stepladder on top of a box car and to cut an overhead trolley wire is not a fellow-servant of the division roadmaster who directs him to do it.—Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606, per Montgomery, J., and McGrath, C. J.

¶ 703. The duty to furnish a safe place for its employees to work being one that a railroad company cannot delegate so as to relieve itself from responsibility, section men within the scope of whose duties it may have been to remove from the track ice which subsequently causes the derailing of a car and the consequent killing of a brakeman, are not fellow-servants of his with respect to the performance of such duties.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 704. A train-dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a "fellow-servant" with other employees acting under his orders.—Hunn v. Michigan Cent. R. Co., 78 Mich. 513.

¶ 705. A yardmaster, who has full charge of the yards of a railroad company and who hires and discharges men and assigns them to their work, is not their fellow-servant, but is the agent or vice-principal of the company, and notice to him of defects in appliances and of the incompetency of a fireman handling a switch-engine is notice to the company, and upon his promise to remedy those evils a switchman, complaining of them, has a right to rely for a reasonable time and to a reasonable extent, and if he continues in the service relying on such promise the rule that an employee accepts the risks of his employ-

ment when he continues in it knowing of defects does not apply, unless the company fails for an unreasonable time to make repairs, etc.—Lyttle v. Chicago & W. M. R. Co., 84 Mich. 289.

¶ 706. In an action by a switchman for injuries received because of an unblocked frog while uncoupling cars, it is no defense that defendant had employed men to see that the frogs in its yards are kept blocked, and that it furnished the necessary material; the statutory duty cannot be delegated to an employee so as to relieve the employer, and the negligence of the former in this regard is that of the latter.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567.

¶ 707. An assistant road-master controlling a gang of men with power of direction and discharge is a superior servant, and for his negligence the employer is liable.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409; Palmer v. Michigan Cent. R. Co., 93 Mich. 363.

¶ 708. A servant, to whom the master has delegated the care and management of the entire business or of a distinct department thereof, so as to charge him with the performance of duties toward subordinates that the law imposes upon the master, stands in the latter's place, and the rule of respondeat superior applies to render the master liable for injury where this superior servant, abusing his authority, orders an inferior to perform work differing from that for which he was employed.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409.

§ 55l. ——Inspector and other employees.

¶ 709. A car inspector, whose duty it is to inspect cars and their apparatus, is not a brakeman's fellow-servant, and the company is liable for his negligence in permitting the putting on the car of a defective brake-chain if injury results to the brakeman.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 710. A brakeman on a freight train, and a car inspector charged by the common employer with the duty of inspecting cars received from other companies for transportation, and of seeing that they are properly loaded and in good condition, are fellow-servants.—Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329.

¶ 711. A switchman in the employ of a board composed of representatives of three railroad companies, to whose general control of a union depot, tracks, and yard, the individual companies are subject, is not a fellow-servant of a car inspector employed by one of the companies, even when the switchman is engaged in handling the business of that particular road, and a car inspector so employed does not assume the risk of injury from the negligence of such switchman, so as to preclude a recovery for his death in an action against the roads in their associate capacity.—Kastl v. Wabash R. Co., 114 Mich. 53.

¶ 712. Where a railroad employed a competent inspector to inspect cars coming in from other roads, and the inspector made a faulty inspection of the car in question, or none at all, thus failing to detect a defective stake or stakes, which latter fell upon and killed a switchman at work in the yard, there was no liability, as the inspector and the switchman were fellow-servants.—Lellis v. Michigan Cent. R. Co., 124 Mich. 37.

¶ 713. Car inspectors are not such fellow-servants of a freight conductor as to relieve the railroad company from liability for injury to the conductor resulting from their negligence.—McDonald v. Michigan Cent. R. Co., 132 Mich. 372.

¶ 714. Where a railroad company makes no provision for inspection of its engines except by the engineers in charge, who are expected at all practicable times to perform that duty and report defects, they must be held to be the representatives of the company.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 715. The inspector of a roadbed is not the fellow-servant of an engineer in regard to a failure to inspect.—Hamilton v. Michigan Cent. R. Co., 135 Mich. 95.

§ 55m. ——Foremen and other employees.

¶ 716. The foreman of a gang of car-repairers and the engineer of a switch-engine are fellow-servants of one of the repairers, who, if he is injured through their negligence, cannot recover against the employing railroad company.—Peterson v. Chicago & N. W. R. Co., 67 Mich. 102.

¶ 717. Whether a section foreman can be considered a fellow-servant of the men working under him so as to relieve the common employer from liability for his negligence, quære.—Hammond v. Chicago & G. T. R. Co., 83 Mich. 334.

¶ 718. Where a gang of section-men is propelling a hand-car along the track, the foreman's failure to send a look-out ahead near a curve to give warning of an expected train must be regarded as shared in by the section-men who voluntarily and without express orders remain on the car; and no recovery can be had for the death of one of the men from a collision.—Hammond v. Chicago & G. T. R. Co., 83 Mich. 334.

¶ 719. A foreman who has charge of a gravel-train, with power to hire and discharge all men working thereon, and to whom alone they can make complaint, is not a fellow-servant of said employees.—Erickson v. Milwaukee, L. S. & W. R. Co., 93 Mich. 414.

¶ 720. Where, in an action against a railroad company by an employee who was one of a gang of men at work for the company under a foreman's charge, unloading and levelling dirt hauled upon its premises, and who was injured by the backing of an engine against the loaded cars from which it had been detached, the sole act of negligence alleged as ground for recovery was that the foreman failed to give notice to the men under his charge that the train was about to move, held, as he and plaintiff were fellow-servants there could be no recovery.—Schroeder v. Flint & P. M. R. Co., 108 Mich. 213.

¶ 721. A section man engaged with other members of the section gang in moving a loaded car by shoving against it an empty car, was ordered by the section boss to climb upon the loaded car and set the brake, and while climbing a ladder on the loaded car to execute the order was injured by the empty car's being pushed against him. Held, that the negligence, if any, was that of the section boss or of the men under his control, all of whom were fellow-servants of the injured employee, so that he could not recover against the employer.—Gavigan v. Lake Shore & M. S. R. Co., 110 Mich. 71.

¶ 722. A roadmaster, being prevented by illness from accompanying a work train sent out to distribute railroad ties along the right of way, placed a section foreman in charge of the train, with instructions as to the loading, removing, and handling of the ties. No general power was conferred upon the foreman to make up and send out trains, to determine when and where they should go, to employ and discharge workmen, or to represent the roadmaster other than upon the particular occasion, and in accordance with his instructions. Held, that the foreman did not become a vice-principal of the company, so as to render it liable for injuries to one of the workmen resulting from the negligence of the foreman while in charge of the train.—Morch v. Toledo, S. & M. R. Co., 113 Mich. 154.

¶ 723. While the foreman of a gang of men employed in putting in a bridge may be their fellow-servant with respect to the manner of use of materials and appliances furnished by the master, or with respect to the selection of the same from among those near at hand, he represents the master when he undertakes the duty of selecting suitable materials from a supply in a warehouse eighty miles distant, and for a negligent selection, resulting in injury to an employee, the master is liable.—Thomas v. Ann Arbor R. Co., 114 Mich. 59.

¶ 724. The negligence of a conductor and brakemen in placing timbers on a flat car without complying with the rules requiring the proper securing of the timbers, and the failure of the station agent to inspect the loading, whereby the foreman of a gang of section hands at work surfacing the track was injured by a projecting timber, was the act of fellow-servants for which the railroad company, which provided safe appliances and a safe place to work, is not liable.—Miller v. Michigan Cent. R. Co., 123 Mich. 374.

¶ 725. The foreman of the car department of a railroad supervising men who do repair work is the fellow-servant of one working in the woodworking department who in the line of his duties has been called out to assist in the repair of a loaded freight car.—McClure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 726. Where a car repairer, before going in between two cars, was assured by the car foreman that he would be protected, and the duties of such car foreman were delegable and of a limited character, and he sometimes worked with the men, the failure of such foreman to protect plaintiff is the negligence of a fellow-servant.—Garlinghouse v. Michigan Cent. R. Co., 174 Mich. 73.

¶ 727. A car repairer and a roundhouse foreman are fellow-servants.—Revolinski v. Manistee & N. E. R. Co., 186 Mich. 501.

¶ 728. Defendant railroad's foreman in charge of constructing a branch line took plaintiff and other laborers so employed and set them to work clearing up a wreck. Plaintiff was directed by the said foreman to turn the cog wheel of a derrick by taking hold of its spokes, and while so engaged was injured. Held, the foreman was a fellow-servant and not a vice principal of the plaintiff.—Peters v. Michigan Cent. R. Co., 165 Mich. 217.

¶ 729. A car repairer and a roundhouse foreman are fellow-servants.—Revolinski v. Manistee & N. E. R. Co., 186 Mich. 501.

§ 55n. ——Conductors and other employees.

¶ 730. A conductor of a freight train, under whose direction a brakeman is assisting in the unloading of freight, is the fellow-servant of the brakeman.—LaPierre v. Chicago & G. T. R. Co., 99 Mich. 212.

¶ 731. Conductor and brakemen are fellow-servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers.—Greenwald v. Marquette, H. & O. R. Co., 49 Mich. 197.

¶ 732. If a conductor of a freight train be killed through the negligence of the engineer of another train whereby a collision has been occasioned, there can be no recovery against their employer, the conductor and the engineer being fellow-servants.—Enright v. Toledo, A. A. & N. M. R. Co., 93 Mich. 409.

¶ 733. Where a fireman on a passenger train while in the cab of his engine and passing a freight train on a side track was struck and injured by the projecting limb of a tree

on a flat car loaded with trees, he cannot recover, the negligence, if any, being the failure of the conductor of the freight train—a fellow-servant—to see, under a rule known to the plaintiff, that the flat car was properly loaded before receiving it into his train.—Jarman v. Chicago & G. T. R. Co., 98 Mich. 135.

¶ 734. The failure of the brakeman or conductor of a passenger train equipped with air brakes, in the use of which they have been properly instructed, to pull the automatic cord by which the brakes are operated in response to the engineer's signal, is, as to the engineer, the negligence of a fellow-servant, for which the railroad company is not liable.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 735. A railroad company was not liable, in an action for injuries to a freight conductor who was struck by a movable platform of a milkhouse as he was climbing the ladder on a car of his moving train, where, it appears that the station agent, whose duty it was to raise and lower such platform as occasion required, had lowered the same just before the accident, and where no evidence of defect on such platform was given; since in the discharge of such duty, the station agent, as fellow-servant of the plaintiff was responsible.—Henry v. Ann Arbor R. Co., 140 Mich. 446.

¶ 736. Plaintiff was a street car conductor, and was on the running board of the car, collecting fares, while it was in motion. A section man had left the handles of a wheelbarrow loaded with bricks projecting near the track. Plaintiff in passing along got entangled therewith and was injured. Held, the case presented was not one where the defendant had failed to provide a safe place to work, but plaintiff was injured by the negligent act of a fellow-servant, and could not recover.—Wickham v. Detroit United Ry., 160 Mich. 277.

§ 55o. ——Brakemen or switchmen and other employees.

¶ 737. A boy about 17 years old was employed as brakeman by the engineer of an ore train. The engineer had power to employ and discharge brakemen, and the boy was capable and experienced in the business. The engineer directed the fireman to back the locomotive upon a side track to the train, and told the brakeman to attend a switch. He himself went to attend another switch further on. While this was being done the bell and whistle of a train on the main track near by were both sounding. The first switch was passed, and the engineer was about throwing the second when he heard an outcry and saw the brakeman under the locomotive. The brakeman died in a few minutes from his injuries, and his administrator sued the railroad company for the injury. It was proved that the brakeman knew the train was about moving back, and that there was room enough for him to perform his duties. Held, that he needed no further warning of his danger, and that the accident was due to his own negligence; also, that if the failure to sound the bell and whistle of the locomotive was negligence, it was the fault of the fireman, who was a fellow-servant of the brakeman, and for whose negligence towards a fellow-servant the company would not be liable.—Greenwald v. Marquette, H. & O. R. Co., 49 Mich. 197.

¶ 738. A brakeman cannot hold the company which employs him responsible for the failure of fellow-servants to take peculiar precautions.—Day v. Toledo, C. S. & D. R. Co., 42 Mich. 523.

¶ 739. If, owing to the engineer's negligence, the step of an engine becomes loose, whereby a brakeman attempting to board the engine is injured, such negligence is that of a fellow-servant, and the company is not liable.—Miller v. Chicago & G. T. R. Co., 90 Mich. 230.

¶ 740. A brakeman who in attempting to board a moving engine is injured in consequence of the step's being loose and turning may not recover in an action for negligence against the company, if he offers no evidence that the engineer whose duty it was to see to the step was incompetent or did not have the proper tools to repair the step, and where there is produced nothing to show how long the step was loose or whether the company knew of its insecurity.—Miller v. Chicago & G. T. R. Co., 90 Mich. 230.

¶ 741. A conductor of a freight train desired to leave two box cars on a siding, and directed a brakeman to get upon an empty flat car next to the tender, and assist in making a running switch. The brakeman mounted the flat car, and kneeled down at the rear end. The conductor climbed upon the first box car, which was attached to the flat car, and took his station at the rear, to apply the brake, in which position he was out of sight of the brakeman. The brakeman pulled the pin at the proper time, and just as he was reaching over the end of the flat car to lay it on the bumper of the detached box car, the engine suddenly started ahead, and he was thrown onto the track, and his leg so injured as to render amputation necessary. Neither the conductor nor the brakeman gave the engineer any signal to go ahead when the pin was drawn. Held, that the engineer should not have started up his engine until notified; that the sudden starting of the engine and flat car was the proximate cause of the accident, for which the engineer alone was responsible; and, being a fellow-servant of the brakeman, the railroad company was not liable for the consequent injury to the brakeman.—Stanley v. Chicago & W. M. R. Co., 101 Mich. 202.

¶ 742. It is no defense to a brakeman's action against a railroad company for in-

juries sustained because of an abrupt depression in one of the rails of its track, that the immediate cause of the accident was the negligence of the section men who were charged with the duty of keeping the track in repair; they not being the brakeman's fellow-servants in relation to that duty.—Anderson v. Michigan Cent. R. Co., 107 Mich. 591.

¶ 743. Where a brakeman was injured in consequence of his stumbling against a pile of ashes and cinders dumped upon a track by a passing engine, although the proper dumping place was at the turn-table, it was held, that the fireman who did the dumping, and the section men whose duty it was to remove the ashes and cinders, were with the brakeman fellow-servants for whose negligence the company was not liable unless it had actual notice of the obstruction, or unless the same had existed so long that notice would be implied.—Loranger v. Lake Shore & M. S. R. Co., 104 Mich. 80.

¶ 744. A switchman and a crossing watchman are fellow-servants, and the latter cannot recover from the railroad company for injuries sustained by reason of the negligence of the former.—Dixon v. Grand Trunk Western Ry. Co., 155 Mich. 169.

¶ 745. Plaintiff employed in the operation of making up trains on defendant's tracks was injured by the fact that after he had been caught between a car and engine another engine was backed down upon the car. Such engine was backed in through the failure of a servant of defendant who had charge of the general operation of trains in and about the station, to give an order preventing it. Held, that plaintiff and such other employee were fellow-servants and that plaintiff was not entitled to recover.—McCauley v. Michigan Cent. R. Co., 167 Mich. 230.

¶ 746. The engineer of a switch engine owned by one having private switch tracks to a stone crushing plant, and another workman whose duty it is to pinch down empty cars to the crusher after they are switched to a certain point by the engineer, are fellow-servants.—Salo v. Martin, 187 Mich. 617.

§ 55p. Mine employees.

Statutory provisions regulating employment of mine workers, see ante § 36.
Assumption of miner's risks, see post § 56n.

¶ 747. A common workman employed about a mine, but not himself a miner, is not a fellow-employee of the miners in any such sense that he cannot recover for an injury caused him by the mining operations.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 748. There can be no recovery against a mine owner for the death of a pumpman in the mine based upon the negligence of a brakeman having control of the machinery inasmuch as the pumpman and brakeman must be considered fellow-servants.—Williams v. Verona Min. Co., 149 Mich. 45.

¶ 749. The engineer of a mining hoist charged with the duty of keeping the friction lever in place, to prevent the skip from falling, is not a fellow-servant of one employed to load the skip.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 750. An engineer at a mine whose duty it was to promptly operate a hoisting apparatus on given signals, in order that the miners might be removed to a safe place during blasting held a fellow-servant of the miners.—Panela v. Castile Min. Co., 177 Mich. 669.

¶ 751. A miner employed at the bottom of a shaft, and timbermen working above him engaged in timbering the shaft, held to be fellow-servants.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 752. Miners, trammers and timbermen engaged in a common undertaking of driving a drift and digging out ore and rock in a mine, are fellow-servants.—Koskell v. Newport Min. Co., 182 Mich. 586.

¶ 753. The members of a timber crew engaged in making a mine safe for miners to work in are fellow-servants.—Juntunen v. Quincy Min. Co., 184 Mich. 341.

¶ 754. The failure of a block-holer to give warning to a trammer before casting a rock down the stope of a mine, held to be the negligence of a fellow-servant.—Mesich v. Tamarack Min. Co., 184 Mich. 363.

¶ 755. Where a trammer on observing the unsafe position of a large loose rock in a stope was assured by the miners of its safety, and it soon after fell and killed the former, the negligence, if any, of the miners was that of the fellow-servants of the deceased.—Lesh v. Tamarack Min. Co., 186 Mich. 399.

¶ 756. Miners and trammers are fellow-servants.—Lesh v. Tamarack Min. Co., 186 Mich. 399.

¶ 757. Where a miner while going to his work by the usual route through a cross-cut in a mine was injured by tram cars which were being run without a headlight by a conductor who was charged with the duty of placing a miner's lamp on the forward car, the lamp provided having been broken before the cars were started, held that the accident was due to the negligence of a fellow-servant of the injured employee.—Lahti v. Tamarack Min. Co., 186 Mich. 18. (Bird, Moore and Kuhn, JJ., dissenting); Arfman v. Tamarack Min. Co., 187 Mich. 344.

¶ 758. The members of a day shift employed in timbering a mine are fellow-serv-

ants of members of a night shift engaged on the same work, and employed by the same master.—Kangas v. Cleveland Cliffs Iron Co., 188 Mich. 255.

¶ 759. A miner, who with another workman, is engaged in timbering up a drift so that it may be used as a passageway, and tests overhanging rock preliminary to timbering is the fellow-servant of the other workman.—Aho v. Cleveland Cliffs Iron Co., 188 Mich. 218.

¶ 760. An employer who has provided a safe place, proper appliances and competent employees fully instructed as to their duties, and who has established proper rules and regulations for the safe conduct of his business, is not liable for the negligence of an employee in failing to notify a fellow-servant of a transitory or temporary danger caused by his act which for the moment renders the environment unsafe.—Mesich v. Tamarack Min. Co., 184 Mich. 363.

¶ 761. A mining captain who has the entire management of the mine without direction or interference by the owner occupies the owner's place and is not a mere fellow-servant of a laborer employed in the mine, even though he was not appointed directly by the owner, but only by the owner's agent. And the owner is liable for his negligence.—Ryan v. Bagaley, 50 Mich. 179.

§ 55q. ——Shift or timber boss and other employees.

¶ 762. A timber boss is a fellow-servant of employees working in the shaft of a mine.—Erickson v. Victoria Copper Min. Co., 130 Mich. 476.

¶ 763. No recovery can be had for injury to an employee in a mine caused by the falling of a plank which was being lowered in the shaft by means of a rope fastened with a halfhitch around each end of the plank, the evidence being conflicting whether fastening by means of halfhitches or by means of holes bored in the plank was the customary way for lowering planks, but it appearing that augers were furnished for boring the holes and if there was negligence it was that of the timber boss, who was a fellow-servant, in failing to use the augers.—Erickson v. Victoria Copper Min. Co., 130 Mich. 476.

¶ 764. In the case of injury to a mine trammer injured by a top fall while he was loading ore upon cars and removing it as fast as it was brought to the floor by the miners, the fall being because timbers were not yet set or because ore on top of timbering had been loosened in progress of mining, it was held that, if there was any negligence, it was that of the miners or of the shift boss, who were fellow-servants of plaintiff, and whose duty it was to see to timbering.—Petaja v. Aurora Iron Min. Co., 106 Mich. 463.

¶ 765. A shift boss in a mine who fails to notify the succeeding mining crew of dangerous conditions is not a fellow-servant of the miners.—Panela v. Castile Min. Co., 177 Mich. 669.

¶ 766. The custom or rule that a mine timber boss must first go into the place where a blast is fired, inspect conditions, and notify the other timbermen does not constitute him a vice principal.—Vrelenich v. Calumet & Hecla Mining Co., 188 Mich. 407.

¶ 767. Defendant mining company directed plaintiff trammer where to work, and instructed him that he was neither employed nor paid to pinch down rock from the overhanging walls, and that he must spend no time in making the place safe in that regard; that such work should be attended to by the captain, shift boss and miners, and the place would be kept safe for him; and that he must abide by their judgment whether or not the place was safe. Held, upon injury to the plaintiff from falling rock, defendant could not urge that the negligence was that of the captain, shift boss and miners, and not its own.—Scendar v. Winona Copper Co., 169 Mich. 665.

F. RISKS ASSUMED BY SERVANT.

§ 56. In general; nature and basis of doctrine.

Risks of fellow-servants' acts or negligence, see post § 56 l.
Risks assumed by miners, see post § 56n.
Risks assumed by factory, shop, and mill employees, see post § 56o.
Risks assumed by linemen, see post § 56p.
Risks assumed by railroad employees, see post § 57.
Risks assumed under Federal Employers' Liability Act, see post § 58.
Weight and sufficiency of evidence as to assumption of risk, see post § 65k.
Jury questions as to assumption of risk, see post § 67q.
Directing verdict on ground that risk assumed, see post § 70b.
Instructions as to assumption of risk, see post § 71f.
Under Workmen's Compensation Act, see Workmen's Compensation Act.

¶ 768. The principle of assumed risks rests upon the ground that it is an implied contract that the employee shall assume all obvious dangers.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 769. The principle of assumed risk rests upon the ground that it is an implied contract between the employer and the employee that the employee shall assume the risk of all dangers obviously incident to his employment.—Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312.

¶ 770. The principle of assumed risk is applicable in cases in which the employer is

negligent and the employee free from negligence. It is not restricted to cases where the master was free from negligence or the servant was contributively negligent.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 771. Assumptions of risk arise from the contract of employment, the servant assuming the risk of all obvious dangers incident to the service which were known or should have been known to him.—Molyneaux v. Bradley, Miller & Co., 167 Mich. 278.

¶ 772. In an action against a power company for the wrongful death of a telephone lineman caused by coming in contact with high tension wires of the defendant situated in close proximity to telephone wires which decedent was required to repair, the doctrine of assumed risk is inapplicable, there being no contract relation between the parties.—Teachout v. Grand Rapids, G. H. & M. Ry. Co., 179 Mich. 388.

¶ 773. Extraordinary risks may be assumed by a servant under an express agreement, where such an agreement is permissible, and the agreement may be inferred from circumstances.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

§ 56a. Risks incident to the employment.

Scope of employment, see ante § 34.
Jury questions as to scope of employment, see post § 67a.

¶ 774. An employee assumes the risks usually incident to the employment.—Fort Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133; Quincy Min. Co. v. Kitts, 42 Mich. 34; Day v. Toledo, C. S. & D. R. Co., 42 Mich. 523; Piquegno v. Chicago & G. T. R. Co., 52 Mich. 40; Richards v. Rough, 53 Mich. 212; Gardner v. Michigan Cent. R. Co., 58 Mich. 584; Hewitt v. Flint & P. M. R. Co., 67 Mich. 61; Illick v. Flint & P. M. R. Co., 67 Mich. 632; Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166.

¶ 775. The only risks which a servant assumes are those which properly belong to his employment.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 776. An employee assumes the risks of his employment when the machinery used is not defective and the usual means are adopted to guard against accident.—Swoboda v. Ward, 40 Mich. 420.

¶ 777. An employee must be deemed to have assumed the risks of accidental injuries the results of unexpected causes, where such causes arise in the course of such servant's employment.—Rodman v. Michigan Cent. R. Co., 55 Mich. 57.

¶ 778. The servant assumes only such risks as are incident to his employment.—Snow v. Escanaba Power Co., 162 Mich. 579.

¶ 779. Where a servant engaged in wheeling sand from a sand pile is injured by the falling of a frozen crust which had been undermined by him, there is no negligence in not lighting up the entire place where the work continues in shifts during the entire day and night, the necessity of light at any particular place being an incident to the business.—Livingstone v. Saginaw Plate Glass Co., 146 Mich. 236.

§ 56b. Known, obvious or apparent dangers.

Duty to make safe as against known obvious or apparent dangers, see also ante § 48b
Duty to warn or instruct where the danger known or obvious, see ante § 54c.
Contributory negligence in failing to avoid known or obvious risks, see post § 59e.
Evidence as to servant's knowledge of dangers, see post § 64i.
Jury questions as to knowledge of dangers see post § 67q.

¶ 780. There is no breach of duty in employing a servant subject to the ordinary risks of the employment if the servant himself is aware of the risks and consents to encounter them.—McGinnis v. Canada Southern Bridge Co., 49 Mich. 466.

¶ 781. An employer is not liable in damages for injuries received by employees who have voluntarily assumed the risks of the employment with full knowledge of the methods employed.—Michigan Cent. R. Co. v. Smithson, 45 Mich. 212.

¶ 782. An employee assumes the risks that ordinary observation makes apparent.—Kent v. Detroit Copper & Brass Rolling Mills, 96 Mich. 277; Illick v. Flint & P. M. R. Co., 67 Mich. 632; Gillette v. Grand Trunk Western Ry. Co., 192 Mich. 113.

¶ 783. Where the risks of an employment are not concealed, but are open and visible, an employee is deemed to accept the employment and to continue in it with reference thereto, and the master is not liable for injury.—Fisher v. Chicago & G. T. R. Co., 7 Mich. 546.

¶ 784. Where a danger incident to a given employment is apparent, the employee assumes the risk.—Manning v. Chicago & W. M. R. Co., 105 Mich. 260.

¶ 785. An employee, as a matter of law, assumes the risk of all such dangers incident to his employment, as he knows to exist or should have acquainted himself with.—Harrison v. Detroit, Y., A. A. & J. Ry. Co., 137 Mich. 78.

¶ 786. The doctrine that the employee assumes the risk of all dangers obviously incident to his employment, is limited in its application to dangers which the employee either actually knows or should know.—McDonald v. Champion Iron & Steel Co., 140

Mich. 401; De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 787. Where a machine is not in proper condition, a person operating it assumes only such risks as the jury finds that he knew of, or ought to have known of, and appreciated.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 788. An employee assumes, as a matter of contract, only such risks as are known, or might reasonably be known, to him.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 789. An employee assumes the risk of obvious dangers incident to his employment.—Neifert v. Metler, 165 Mich. 354.

¶ 790. The doctrine of the assumption of obvious risks applies as well to those which arise or become known to the employee during the employment as to those in contemplation at the original hiring.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 791. The risks assumed by an employee on entering an employment are those of which he has actual knowledge or of which he ought to have known.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

¶ 792. An employee assumes all known risks incidental to his place of employment, including those subsequently arising and becoming known to him during his service.—Cole v. Mamer Brick Co., 183 Mich. 290.

¶ 793. The master has a right to expect that a servant will be on the alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance, actual ignorance being insufficient to charge an employer.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

¶ 794. Whether a servant assumes the risks incidental to his place of employment, and those arising from defective appliances, depends upon the capacity and understanding of the servant, the nature of the defects, the obviousness of the same, and consequent danger.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 795. An employee injured by a brick's falling upon him from the top of a partly destroyed chimney near which he was at work cannot recover damages against his employer where no loose bricks at the top of it were visible or known to any one and the danger was as apparent to him as to any one.—Pilucki v. Detroit Steel & Spring Works, 117 Mich. 111.

¶ 796. A servant knowing the hazards of the employment as the business is conducted by the master, assumes the risk of injury due to such hazard, and the same is true where such dangers are obvious.—Wilson v. Escanaba Woodenware Co., 152 Mich. 540.

¶ 797. It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 798. It is a master's duty to instruct a servant as to risks which he will not discover by the exercise of ordinary care, but when the servant is a mature man he assumes such risks as arise from obvious dangers.—Newberry v. Boyne City Tanning Co., 176 Mich. 437.

¶ 799. An experienced employee, who had been engaged for a year prior to an accident caused by a gang-plank's slipping out of the car, into which one end had been placed while unloading freight upon the adjoining platform, and who had been during that time familiar with the plank and the manner of its use, will be held to have voluntarily assumed the attendant risk.—LaPierre v. Chicago & G. T. R. Co., 99 Mich. 212.

¶ 800. An experienced employee familiar with the use of a gang-plank in unloading freight cannot be heard to complain of an injury, incurred while using the plank in the ordinary manner, on the ground that it was not furnished with hooks, spikes, or cleats to prevent its slipping, it appearing that he had used the plank for a year prior to the accident without protest or objection, or even a suggestion that it was unsafe, or a request that the hooks, spikes, or cleats be supplied.—LaPierre v. Chicago & G. T. R. Co., 99 Mich. 212.

¶ 801. A servant proceeding down a dark stairway on a ship, knowing of the darkness, and that there was no means of lighting it, assumes the ordinary risks of injury by reason of the lack of light.—Mero v. Michigan Cent. R. Co., 180 Mich. 1.

¶ 802. Plaintiff was a foreman in charge of defendant railway's coal dock. Defendant's engines were coaled at the dock by means of large buckets, which were hoisted full of coal from the dock to the tenders by power supplied by the engines, and were then unloaded by opening a door in the bottom of the buckets. This door was held closed by a catch or lip, which lip was supported by a spring and a wedge. Plaintiff at the time of the accident was steadying with his hand a bucket of coal as it was being hoisted upon the tender. As the bucket struck the tender on the side, the wedge came out, and the door flew open and caught plaintiff's hand. Plaintiff testified that he knew the doors of the buckets would at

times do this when subjected to a sudden jar. Held, he assumed the risk and could not recover.—Lukovski v. Michigan Cent. R. Co., 164 Mich. 361.

¶ 803. A servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks at the time of his so entering are known to him, or should be readily discernible by a person of his age and capacity, in the exercise of ordinary care, e. g., that a box in the space between tan-vats might trip his feet when working.—Balle v. Detroit Leather Co., 73 Mich. 158.

¶ 804. An employee aged 24 years, experienced in moving and handling heavy iron beams, who was injured by being struck in some unexplained way by an iron beam which he, with others, was unloading from a wagon, and who must have known as much about the danger involved as any one, cannot recover against the employer.—Nephew v. Whitehead, 123 Mich. 255.

¶ 805. A servant who is familiar with the conditions cannot recover for injuries sustained by him while wheeling a heavily loaded truck on narrow boards laid by himself.—Shanke v. United States Heater Co., 125 Mich. 346.

¶ 806. A servant engaged in wheeling a heavily loaded truck on boards laid by himself on soft earth assumes the risk of injury sustained through the sinking of the boards.—Shanke v. United States Heater Co., 125 Mich. 346.

¶ 807. A capable dredge engineer, part of whose duty was to assist in making repairs, and who the year before the accident had assisted in lowering a similar casting into a similar opening, the process not being a complicated one, must be said to have assumed the risk of injury and no recovery can be had for his death incurred where a heavy casting had slipped while being lowered into the hold of a dredge where repairs were being made.—Schneider v. Wolverine Portland Cement Co., 146 Mich. 87.

¶ 808. A servant employed at common labor cannot recover from his master for injuries received from handling a heavy plate, where the danger was obvious, and the master had no knowledge of such danger which such servant did not possess, and the question of safe place to work does not apply.—White v. Owosso Sugar Co., 149 Mich. 473.

¶ 809. A servant employed on a high structure in iron working, including the turning and making of threads on pipes, assumes the risk from falling where the place where he is working requires care to prevent falling.—Sheon v. Kerr-Murray Mfg. Co., 146 Mich. 99.

¶ 810. In an action for injuries sustained by an employee of defendant it was shown the plaintiff was injured by the fall of a log from a car which his fellow-employees were unloading, that at the time of the accident and for a few hours prior thereto plaintiff was employed in driving a team engaged in moving the car, but for a considerable time previous had been engaged in piling the logs after they had been unloaded from the car and was familiar with the method of unloading. Held the risk was assumed.—Hilgbrandt v. Oval Wood Dish Co., 180 Mich. 43.

¶ 811. The risk of injury from the wheel of a wagon running off as the result of the nut or burr coming off the axle is assumed by a driver whose duty it was to inspect his wagon before taking it out, since the defect was one which a casual inspection would have disclosed.—Riffel v. Union Truck Co., Ltd., 180 Mich. 673.

¶ 812. An experienced teamster who uses, under protest, an unsuitable chain furnished him by his employer for binding a load of lumber, assumes the risk of injury therefrom.—Kelley v. Davison, 185 Mich. 123.

¶ 813. An employee of a coal company assumes the risk of injury from being caught between the timbers of a coal tipple and the side of an unusually wide car, as he removed a block from beneath the wheels thereof so as to permit it to run down an incline, where he was aware of the danger and had authority to reject the car because of its width.—Lewis v. Wolverine Coal Co., 186 Mich. 564.

¶ 814. In an action for personal injuries sustained by a woodsman as the result of a tree falling upon him, which was felled by workmen working in another gang near him, evidence held to show that the plaintiff was as well aware of the peculiar danger attendant upon his work as was his master, that his place to work was safe unless by his own acts or the acts of his fellow-servants it was made unsafe, and that therefore he assumed the risk.—Stone v. Bennett, 194 Mich. 441.

§ 56c. Latent or unknown defects and dangers.

Contributory negligence where danger not known or understood, see post § 59j.

Evidence as to experience of servant, see post § 641.

¶ 815. If the peculiar risk commanded by the master is not obvious, the servant has the right to assume that he is not being put in peril, and is not bound to investigate into the risk before obeying his orders.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409.

¶ 816. The doctrine that a servant assumes all the dangers that are apparent to him when he enters the employment has no application to a case where the danger is questionable or debatable and where it is

apparent only to those possessing peculiar skill and knowledge in such matters.—Eddy v. Aurora Iron Mining Co., 81 Mich. 548.

¶ 817. An employee assumes the risk of injury from a danger obviously incident to the discharge of his duties though he is not informed of and does not know of the danger.—Bauer v. American Car & Foundry Co., 132 Mich. 537.

¶ 818. An employee cannot be held to have assumed the risk of injury from a defect which he did not know of, and which it cannot be said as a matter of law that he had occasion to know of.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 819. In the application of the doctrine of assumed risk, actual ignorance of the employee of existing conditions will not alone suffice to charge the master; the ignorance must also be excusable.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 820. The risks which the servant assumes are only such as are directly connected with his work, and not unforeseen and unexpected dangers arising at a distance from his work, because of defendant's negligence, and as to which his surroundings would not in themselves warn him.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 821. An employee assumes the ordinary dangers of his employment, and the risk of defective machinery and methods known to him or so obvious that he should have known them, but it is not the law that the employee must make a minute investigation of machines and methods to ascertain such risks and defects, although he does owe caution and care in these respects.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 822. The assumption of risk rule does not apply to new dangers created by an employer without notice to his employees, unless the danger is such that it is negligence for the employees not to observe it.—Webb v. Buick Motor Co., 182 Mich. 551.

¶ 823. An employee of another department does not assume the risk of an explosion being caused through a steam-fitter and plumber allowing water to come in contact with calcium carbide, where it is not shown that he has knowledge of what such steam-fitter is doing, or that he had any warning of the danger.—Charron v. Union Carbide Co., 151 Mich. 687.

¶ 824. An employee of a railroad riding on the pilot of a locomotive cannot be said to assume the risk where the defect in the pilot (hanging too low) was unknown to him. It is going too far to say that he was bound to discover it when he had never seen the engine before.—Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226.

¶ 825. Plaintiff was injured by defendant's mangle upon her first attempt to use it, owing to the defective condition of a guard. Plaintiff secured no instructions from defendant. She had previously used a different kind of mangle in another laundry. Held, the risk was not an obvious one and plaintiff did not assume it.—Garnsley v. Boyce, 158 Mich. 8.

¶ 826. Plaintiff was employed by defendant to draw off the molten product from the melting pot in the process of manufacturing porcelain. A tank was used to receive the molten mass, and it was necessary to fill it with the proper amount of water before drawing off the mass. Plaintiff filled the tank about one-third full of water, and upon the contact of the molten mass with the water an explosion occurred injuring plaintiff. Held, the possibility of such an explosion was not within ordinary knowledge, and plaintiff, not having been instructed by the master, did not assume the risk.—Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590.

§ 56d. Age, experience or intelligence of servant as factor.

Statutory provisions regulating employment of children, see ante § 35.

Duty to warn immature or inexperienced servant, see ante § 54d.

Infants employed in violation of statute as fellow-servants, see ante § 55e.

¶ 827. A master is liable for injuries to his servant resulting from the master's negligence in exposing the servant to risks which the latter is incapable of appreciating.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 828. A youth of inferior mental and physical power, employed as common laborer on the construction of defendant's road, and who had no experience as a brakeman, was ordered by the superintendent of the work to perform services as a brakeman, and in going to do so was run over and killed. Held, that the company was liable.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 829. The infancy of an employee does not of itself give him a cause of action against his employer for setting him at dangerous work, if it appears that he was of average intelligence, that his duties were explained to him when he entered upon the employment, and that he had in mind its dangers and the purpose to avoid them.—McGinnis v. Canada Southern Bridge Co., 49 Mich. 466.

¶ 830. A youth of nineteen employed for three years in a furniture factory where many different kinds of machinery were used was told by the foreman that unless he wished to run a certain split-saw three or four days he would have to lay off. He chose to run the saw, and on the fourth day

lost his little finger by reason of the flying up of the piece of wood he was cutting. He had already complained that the work was too hard for him, and he had had no previous experience with it. The casualty was of a kind that had never happened before in the experience of the foreman, and consequently could not be foreseen. Held, that it was purely an accident for which he could not recover.—Prentiss v. Kent Furniture Mfg. Co., 63 Mich. 478.

¶ 831. In determining whether or not an infant, injured in an iron mill, assumed the risk of the dangers of his employment, the age and experience of such employee and the necessity for instructions are to be considered.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 832. An intelligent boy 15 years old, who was injured by coming in contact with a small saw in a factory, assumed the risk of his employment, where he had been employed four months in the room where the saw was and had a space four feet wide within which to carry boards fifteen inches wide, and after nearly completing the day's work in safety, stumbled against a rise in the floor of which he was aware and thereby caught his arm in the saw which was without any guard or hood, and where he fully comprehended the situation, the danger and the necessity of keeping away from the saw, and where the fall by which his arm came in contact with the saw was either the result of his own want of care or else was purely accidental.—Journeaux v. E. H. Stafford Co., 122 Mich. 396.

¶ 833. In an action by a boy of sixteen years for personal injuries resulting from the operation of a polishing machine in a tannery, it appeared that plaintiff had been instructed generally as to the operation of the machines, but the one on which he worked jerked more than the ordinary machine, and got out of order more frequently. Although this special defect was known to plaintiff, he had received no warning concerning the danger. Held, that negligence the risk of which plaintiff did not assume was inferable from the circumstances.—Sabin v. Northwestern Leather Co., 157 Mich. 579.

¶ 834. The jury, in deciding the question of the servant's assumption of risks incident to the employment, should consider all the evidence, his age, experience and means of observation.—Cousineau v. Embury, 171 Mich. 23.

¶ 835. Where a plaintiff employed by defendant as a common laborer to shovel coal and handle lumber about defendant's mill is called by defendant's foreman from his usual work to operate temporarily a molding machine; is given no instructions or warning; and is injured by revolving knives invisible to him, by placing his hand on the bed plate of said machine, while standing in the rear of the same in an attempt to discover why said machine failed to work properly, he cannot be held as a matter of law to have assumed the risk, the jury having visited the premises and had an opportunity of seeing the machine in question in operation.—Molyneaux v. Bradley, Miller & Co., 167 Mich. 278.

¶ 836. A girl of seventeen who had been employed in a laundry upon the machine in question for two weeks, and upon other like machines for a year, assumed the risk of an injury to her hand caused by its being drawn under a roller through a jerky motion induced by the looseness of a belt; where the condition was one open to observation and known to the plaintiff.—Kupkofski v. John S. Spiegel Co., 135 Mich. 7.

§ 56e. Risks outside scope of employment.

Scope of employment as bearing on care and diligence of master, see ante § 34.
Duty to warn and instruct servant, see ante § 54.
Warnings and instructions to servant working outside scope of employment, see ante § 54e.
Evidence as to scope of employment, see post §§ 64a, 65a.
Jury questions as to scope of employment, see post § 67a.

¶ 837. Where a railway employee is injured while in the performance of work to which he was wrongfully assigned, and which he had never agreed to do, he is entitled to recover damages from the railroad company.—Jones v. Lake Shore & M. S. Ry. Co., 49 Mich. 573.

¶ 838. A servant cannot recover for injuries resulting from the master's assigning him to a different and more dangerous service than that for which he was employed, if he testifies that he was not going out of the scope of his duties when he went to the work and that the latter was in the line of his employment.—Alford v. Metcalf Brothers & Co., 74 Mich. 369.

¶ 839. An employee assumes all risk of accident from defects or dangers which are open, visible and apparent, this being true whether within or without the regular scope of his employment.—Walters v. Wolverine Portland Cement Co., 148 Mich. 315.

¶ 840. A servant, strong in body and mind, who uses a circular saw in his master's factory after instruction in the use by the master's agent, and has, for a year past, used it, and knows he may be called upon to use it at any time, assumes, by doing the work, all the risks of and incident thereto, even though the same is outside the scope of his employment and he protests when assigned to it.—Wheeler v. Berry, 95 Mich. 250.

¶ 841. A servant working overtime in the line of his employment is subject to its risks. —Kehoe v. Allen, 92 Mich. 464.

¶ 842. The fact that a servant is directed by a superior to perform a service outside of the scope of his employment, and is injured while attempting to perform such service, does not give him a right of action against the master for the injury so received, where the dangers of the service were apparent, and its performance undertaken without objection. So held where an experienced section man, while engaged, with the other members of the section gang, in moving a loaded car by forcibly shoving an empty car against it, was ordered by the section boss to climb upon the loaded car and set the brake, and was injured by the empty car's being pushed against him while he was climbing a ladder on the loaded car to execute the order.—Gavigan v. Lake Shore & M. S. R. Co., 110 Mich. 71.

¶ 843. An oiler of engines on a vessel who is taken away from his accustomed work and put into a dangerous place without warning or caution by one who stands in place of the master, whereby he falls into an open and unguarded hatchway, does not assume the risk of danger.—Brown v. Ann Arbor R. Co., 118 Mich. 205.

¶ 844. Running a line for a signal system for a manufacturing company is not outside the scope of employment of a man engaged as helper in the machine shop, so as to render the company liable for his death by electrocution.—Davis v. Port Huron Engine & Thresher Co., 126 Mich. 429.

¶ 845. An employee who was injured by the fall of a rack suspended from the ceiling of the room in which he worked, did not assume the risk of defective construction as it was no part of the employee's duty to examine or use the rack, nor was it obviously dangerous to one working near it.—Corbett v. American Screen Door Co., 133 Mich. 669.

¶ 846. An employee of a street railway company engaged in construction work, who was injured as the result of a car of his employer on which he was being transported on his way home from work, running into an open switch which had neither light nor target, did not assume the risk of such appliances as he had no duty which would have brought such defects to his attention.—Noe v. Rapid Ry. Co., 133 Mich. 152.

¶ 847. An employee who has worked in the packing department of a mill for several years and who is familiar with the machinery of the mill and its operation and who has occasionally been called in to help in the mill itself, cannot recover for an injury caused by getting his arm into a cog wheel while assisting to start the mill in the absence of one of the millers, this not being a case of wrongfully setting him to work outside of the scope of his employment.—Hathaway v. Washington Milling Co., 139 Mich. 708.

¶ 848. Inasmuch as an employee assumes all risks of accident apparent from defects or dangers which are open, visible and apparent, whether working within his regular scope of employment or not, an employee of a cement factory who was given two wrenches with orders to tighten the bolts in a tube mill that was standing still, and who was injured because the bolt slipped in the wrench and jerked causing him to slip and fall on his back and catching his arm between the trunnion and tire on the tube mill behind him which was being operated, cannot recover for his injuries, because whatever danger of injury there was from the machinery was perfectly apparent to one using ordinary care.—Walter v. Wolverine Portland Cement Co., 148 Mich. 315.

¶ 849. Where the deceased is employed to stay on shore and wheel sand to the mixer, and is shortly afterward directed to perform service on the water with a scow, he is directed to do a service outside his employment, and does not assume the risk unless the risk is plain, open, and obvious.—Snow v. Escanaba Power Co., 162 Mich. 579.

¶ 850. Where an inexperienced servant is put to dangerous work, or is sent into a dangerous place to work, outside of the scope of his employment, the master is liable for all injuries resulting to the servant from being exposed to unusual risks, which were not apparent, were not understood or appreciated by him, and could only be learned by experience in doing the work.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

¶ 851. An employee who recognizes and appreciates the danger of obeying a command to perform a duty without the scope of his employment, assumes the risk of injury from obeying such order.—Hemmila v. Cleveland Cliffs Iron Co., 184 Mich. 567.

§ 56f. Risk from master's negligence or nonperformance of duty.

¶ 852. A servant does not assume the risk of the master's negligence, or of that of any one to whom the master entrusts his superintending authority.—Quincy Mining Co. v. Kitts, 42 Mich. 34.

¶ 853. Servants assume the ordinary risks of their employment, but not those extra hazards which spring from the failure of the master to exercise reasonable care in providing such rules and regulations for the conduct of his business as to afford his servants reasonable means of protection.—Irvine v. Flint & P. M. R. Co., 89 Mich. 416.

¶ 854. Servants assume the ordinary risks of their employments, but not those extra hazards which spring from the failure of

master to exercise reasonable care in providing such rules and regulations for the conduct of his business as to afford his servants reasonable means of protection.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 855. The poisoning of an employee by the drinking of poison, which had, for the purpose of cleaning, been placed in a water cooler furnished for the use of employees, was not an unexpected accident; but was just what should have been anticipated from putting the poison in the drinking water.—Geller v. Briscoe Mfg. Co., 136 Mich. 330.

¶ 856. For a servant to assume the risks of defective appliances and of the dangers incident to the place of employment, it is not enough that he knows the fact of certain conditions; he must know and understand the danger, or the danger must be so obvious that his appreciation of it is a necessary inference.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 857. An employee engaged in oiling a coal conveyor using a narrow walk alongside has the right to assume in the absence of notice that the walk is safe and without loose planks.—Clark v. Wolverine Portland Cement Co., 138 Mich. 673.

¶ 858. A servant of a manufacturing company working upon a boiler on a railroad switch in his employer's yard, where switching was done daily, assumed the risk of his employment, and his employer could not be held liable for injuries to him by being struck by a switch train while so employed, on the ground merely of a failure to furnish a safe place to work.—Breeze v. McKinnon Mfg. Co., 140 Mich. 372.

¶ 859. The lever of the clutch apparatus used for starting a milling machine was repaired in the afternoon, shortly before the hour of plaintiff's injury. The repair man failed to put in a cotter pin in a bolt in the lever. The bolt worked loose and plaintiff in attempting to operate the lever was injured. Held, plaintiff did not assume the risk.—Deary v. Hecla Co., 161 Mich. 677.

§ 56g. ——Of duty imposed by statute.

Statutory provisions and regulations, see ante § 35.

Duty to protect or guard dangerous machinery and places, see ante § 51.

Omission of statutory duty as bearing on contributory negligence, see post § 59a.

¶ 860. A servant does not assume the risk due to the omission of the employer to comply with a statute requiring that set-screws be covered and guarded, since the assumption of risk is the result of the contract of employment and the master cannot legally contract to violate a statute.—Sipes v. Michigan Starch Co., 137 Mich. 258.

¶ 861. The assumption of risk by a servant arises from the contract of employment, and the doctrine cannot be applied where a statutory duty has been neglected by the employer.—Murphy v. Grand Rapids Veneer Works, 142 Mich. 677.

¶ 862. An employee does not assume the risk attending the breach of a statutory duty by his employer.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 863. A servant does not assume the risk of the violation of a duty by a master though he continues in the service after knowledge of a breach of duty, where the duty is imposed by statute, since the master cannot legally contract for its violation.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

¶ 864. The doctrine that the employee does not assume the risk of dangers arising through the negligence of the employer does not apply where the negligence and the resulting danger are known to the employee before entering on the performance of the work, unless the risk grows out of the violation of a statutory provision for the protection of employees.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 865. Where a statute imposes a duty upon the employer for the protection of the employee, injury from the neglect of this duty is not one of the risks assumed by the employee.—Kleinfelt v. J. H. Somers Coal Co., 156 Mich. 473.

¶ 866. A plaintiff brakeman who was injured by reason of the failure of a railroad to provide automatic couplers, as required by Act No. 234, Pub. Acts 1907, cannot be held to have assumed the risk.—Betterly v. Boyne City, G. & A. R. Co., 158 Mich. 385.

¶ 867. Where a mine owner or operator fails to comply with Pub. Acts 1905, No. 100, § 3, requiring competent and trustworthy engineers for the operation of cages and hoisting devices, the defense of assumption of risk or negligence of a fellow-servant is not available against a miner injured by such noncompliance.—Layzell v. J. H. Somers Coal Co., 156 Mich. 268.

¶ 868. Section 3, Act No. 100, Pub. Acts 1905, provides "that only a competent and trustworthy engineer shall be permitted to operate the cages and hoisting devices in all coal mines in this state." Plaintiff was injured, while cleaning out the sump of the shaft, by the negligence of a fireman acting as engineer in letting down the cage. Held, that under the statute plaintiff was not a fellow-servant of the fireman, and did not assume the risk.—Capeling v. Saginaw Coal Co., 156 Mich. 437.

¶ 869. Inasmuch as the assumption of risk is the result of a contract of employment, and

as the master cannot legally contract to violate a statute, he cannot, as against the servant, assert the doctrine of assumption of risk of unguarded gears and belts, even in case the omission of the statutory duty is known to the servant.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 870. Where defendant fails to provide a loose pulley upon which to shift the belt of a machine, in violation of the statute requiring such pulley, the plaintiff employee assumes, in tying the belt away from the machine, no risk not reasonably obvious to him. —Trombley v. McAfee, 152 Mich. 494.

¶ 871. Where a defendant employer has failed to comply with his statutory duty to supply a shaft with loose pulleys for shifting belts, the plaintiff employee does not assume the risk of injury.—Little v. Bousfield & Co., 154 Mich. 369.

¶ 872. Plaintiff's deceased was killed while operating a ripsaw, by being struck by a piece of timber thrown back by the saw. Defendant had failed to provide a guard for the saw, as required by statute and by the order of the factory inspector. Held, that the deceased did not assume the risk.—Van Doorn v. Heap, 160 Mich. 199.

¶ 873. A plaintiff injured by catching his arm in the belt and pulley connected with a roller used for crushing carbide does not assume the risk attendant upon the absence of the guards for such pulley and belt, which are ordered to be installed by Act No. 113, Public Acts 1901, § 8.—Johnson v. Union Carbide Co., 169 Mich. 651.

¶ 874. Where a factory owner has not fulfilled his statutory duty under Pub. Acts 1909, No. 285, How. St., 2nd Ed., § 4023, to properly guard set screws in removable chucks in a rotary veneer peeler the servant does not assume the risk of injury due to such defective appliances.—Edward v. Grand Haven Basket Factory, 187 Mich. 505.

¶ 875. A boy under sixteen employed in violation of Pub. Acts 1901, No. 113, § 3, at working at a machine feeding metal sheets through rollers, does not assume the risk attendant upon such work.—Sterling v. Union Carbide Co., 142 Mich. 284.

¶ 876. A child employed in disobedience to a statute does not assume the risk of violation of the statutory duty.—Syneszewski v. Schmidt, 153 Mich. 438.

¶ 877. Where the negligence of a boss renders the employment in which a child under sixteen years of age was engaged dangerous, hence rendering his employment a violation of Pub. Acts 1901, Act No. 113, the child cannot be said to have assumed the risk.—Syneszewski v. Schmidt, 153 Mich. 438.

(5 Mich. Dig. 64)

¶ 878. A child employed in violation of Act No. 113, Pub. Acts 1901, prohibiting the employment of children under sixteen where dangerous to life or limb, does not assume the risks of a fellow-servant's negligence.—Dalm v. Bryant Paper Co., 157 Mich. 550.

¶ 879. Rev. St. U. S., § 4477, providing that every steamer carrying passengers during the night, shall keep a suitable number of watchmen to guard against disaster and give alarms, has no application to a steamer which had been docked for the winter and upon which members of the crew were asleep, so as to make the owner liable, on the ground of failing to keep a watchman, for the death of one of such persons in a fire which broke out during the nighttime.—Lang v. H. W. Williams Transp. Line, 119 Mich. 80.

§ 56h. Reliance on assurance of safety or promise to repair.

Duty of master to inspect and repair, see ante § 53.

Contributory negligence in relying on promise to repair, see post § 59d.

¶ 880. A pressman has the right to rely upon the superior knowledge of his foreman, and his statement that the machine will not injure the servant, where the cause of improper working of the machine is a mechanism which is wholly concealed, and where the foreman is an expert, familiar with the mechanism and expressly charged by the master with the duty of inspecting and repairing. The doctrine of assumption of risk does not apply to such a case, as an employee who is in doubt about the safety of a machine may defer to the opinions and assurances of those who are supposed to know and who from their positions have special knowledge of the safety of the machine.—Burnside v. Novelty Mfg. Co., 121 Mich. 115.

¶ 881. Plaintiff, a timberman, injured by falling rock while cutting a hitch in which a timber called a stull was to be placed, held, not to have assumed the risk in accepting the judgment of his boss as to the safety of the place, and obeying his order to start to work. —Danula v. Quincy Min. Co., 166 Mich. 350.

¶ 882. Where a servant is induced to continue using a defective instrument by the master's promise to repair the same, he no longer assumes the obvious risk, whether the implement be a simple or complicated one.—Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312. (Brooke, Grant and McAlvay, JJ., dissenting.)

¶ 883. A workman who is operating a saw does not assume the risk of injury when the foreman is notified of defects therein and promises to repair it right away and the injury complained of is received two days after such promise but before repairs are made.—

Le Fleur v. Michigan Alkali Co., 175 Mich. 404.

¶ 884. A servant who continues in an employment with knowledge of a dangerous condition involving an abnormal risk, in reliance on the promise of his employer to remedy such condition, is relieved from the onus of having assumed the risk, during a reasonable time for making the promised repairs or changes.—Cole v. Mamer Brick Co., 183 Mich. 290.

¶ 885. Where no time is specified in which an employer is to make promised repairs or to remedy a defective or dangerous situation, his right to urge assumption of risk by an employee is suspended for a reasonable time in which to perform his promise.—Cole v. Mamer Brick Co., 183 Mich. 290.

¶ 886. On the expiration without performance of the time in which an employer promised to remedy a danger, an employee who remained in the service in reliance on such promise, thereafter assumed the risk of injury, his position being the same as if the promise had never been made.—Cole v. Mamer Brick Co., 183 Mich. 290.

¶ 887. An employee, who without intention of leaving his employment if repairs were not made, worked for an unreasonable length of time after the promise of his employer to make repairs assumed the risk of injury.—Cole v. Mamer Brick Co., 183 Mich. 290.

¶ 888. In determining what is a reasonable time to continue the use of an alleged defective switch-engine after promise to repair was made depends on circumstances, as for instance the frequency with which the engine was used, the danger of using it while out of repair, and the opportunity which the defendant had of repairing it.—Lyttle v. Chicago & W. M. R. Co., 84 Mich. 289.

¶ 889. Where the conductor of a freight train, pursuant to whose orders a hand rail on a way car had been removed for repair by a workman in the company's repair shop, was directed by the assistant superintendent to see that the rail was replaced, and where the conductor, after telling the workman again to repair and replace the rail, continued to use the car without protest until, owing to the absence of the rail, he was thrown from the car and killed, held, that he assumed the risk arising from the car's defective condition, and that the case was not within that exception to the general rule which obtains where the servant has been induced to continue the use of defective appliances by reason of the master's promise to repair.—Shackelton v. Manistee & N. E. R. Co., 107 Mich. 16.

§ 56i. Risk of complying with orders, commands or threats.

Rules and orders, see ante § 52.

Contributory negligence in complying with orders or requests, see post § 59n.

¶ 890. Where a foreman and an inferior employee have equal knowledge of the danger accompanying an act required by the foreman to be performed in respect to certain machinery, the employee can comply with the order or not as he chooses, and the employer is not liable if he is injured in complying, even though the dangerous nature of the act is not explained to him by the foreman.—Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

¶ 891. A direction by a railroad officer to his subordinate to perform an ordinary service, such as his employment contemplated—there being nothing unusual in the mode directed—is not such a special direction as will charge the company for an injury happening during the performance of such service.—Davis v. Detroit & M. R. Co., 20 Mich. 105.

¶ 892. If the master directs the servant to do some act which is dangerous, but which could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken; and, failing to exercise such care, the master is held liable.—Harrison v. Detroit L & N. R. Co., 79 Mich. 409.

¶ 893. A man of 51, who has been at work in a car factory for more than a year, has seen a grindstone trimmed, has been shown by the foreman how to do such trimming, and has actually engaged in the work for brief periods, and who, responding to an order to trim the stone, proceeds to obey and receives an injury through his own mismanagement of the means, sustains such injury from a danger that was apparently incident to the employment, the risks of which were assumed by him.—Melzer v. Peninsular Car Co., 76 Mich. 94.

¶ 894. Where a farm laborer among whose daily duties was the removal of ensilage from the silo for the purpose of feeding stock, took it, by his employer's direction, from the bottom of the pile, which thus became undermined so that part slid off, injuring him, held, that he assumed the risk, and that his employer was not liable.—Welch v. Brainard, 108 Mich. 38.

¶ 895. An employee in a lumber mill, who piles lumber on a dock when from his own observation he knows it is unsafe, and after he has been told by his employer's vice-principal not to work at such place, assumes the risk of an injury by the falling of the dock, although he is directed to work there by a foreman who is a vice-principal in giving the directions.—Soderstrom v. Holland-Emery Lumber Co., 114 Mich. 83.

¶ 896. Plaintiff was engaged in his usual employment of managing the retorts in the

manufacture of wood alcohol. Defendant ordered him to help replace a derailed tram car, without acquainting him with the hidden dangers of the work, and plaintiff was injured. Held, that the sustaining of a demurrer on the ground that plaintiff had assumed the risk, was error.—Johnson v. Desmond Chemical Co., 152 Mich. 84.

¶ 897. In a suit by an employee for personal injuries sustained by reason of the frozen crest of a sand pile falling upon him, a verdict was improperly directed for defendant on the ground that plaintiff assumed the risk, where it appeared that defendant's vice-principal vehemently and with oaths ordered plaintiff to do the work upon the sand pile on pain of losing his job, and at the same time informed him that he had tested the crest of the pile and found that it was safe.—Brown v. Lennane, 155 Mich. 686. (Grant, C. J., Hooker and Ostrander, JJ., dissenting.)

¶ 898. An employee, when commanded to work in an unsafe place, does not assume the risk of injury unless the danger is so obvious and imminent that an ordinarily prudent person would not have obeyed such order.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 899. An employee who was injured by the caving-in of a trench in which he was directed to enlarge the hole about the ends of water pipes so as to permit the calking of the joints, may rightfully assume that he would not be directed to work in an unsafe place.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 900. Defendant sent a gang of men of which plaintiff was one to install a sprinkler system in the plant of a third person. He supplied step ladders to be used for the work. At the direction of defendant's foreman plaintiff picked up a straight ladder found in the building and belonging to said third person, and while using same was injured. Held, plaintiff having assumed the risk of the use of said ladder could not recover. Fellows v. Stevens, 170 Mich. 13. (Bird, J., dissenting.)

§ 56j. Risks from violation of rules, orders and instructions.

Rules and orders, see ante § 52.
Contributory negligence in disregarding rules and orders, see post § 59l.

¶ 901. Plaintiff, a locomotive engineer in defendant's employ, was in charge of a westbound special of eleven coaches. Thirty minutes in advance was another special. While the first train was standing on the tracks at the J. depot, the second crashed into the rear of it, and plaintiff was injured. It appeared that the semaphore east of the J. depot indicated that the tracks at the station were occupied, and that plaintiff, upon seeing the signal, attempted by means of the air brakes to stop his train, but that the brakes, for some unexpected and unaccountable reason, failed to work, though they had just recently operated perfectly. Plaintiff was an experienced engineer; was familiar with the rules and regulations of the company; knew that they required him to approach the station at J. upon the presumption that the track would be occupied; knew the location of the semaphore, and its use; and knew that the air brakes were ordinarily sufficient to stop the train. Neither he nor any one else had made complaint. Held, that he assumed the risk.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 902. Where the operator of a power driven wringer, who has been instructed to keep his fingers six inches away from the rollers, has so cut burlap which he is wrapping about the rollers as to leave loose threads, he assumes the risk of having his fingers entangled and drawn into the rollers.—Fryezynski v. W. W. Rice Leather Co., 171 Mich. 113.

¶ 903. Where a foreman of an automobile company tests cars upon a track having banked curves built by the company, it might well be said that such foreman assumes the risk of injury from driving on the curves at 40 miles per hour, which is contrary to rules, when the operation of the law of centrifugal force is well known to him, and he is familiar with the track.—Blick v. Olds Motor Works, 175 Mich. 640.

§ 56k. Voluntary acts of servant and improper methods of work.

Methods of work, see ante § 52.
Improper methods of work as bearing on contributory negligence, see post § 59h.

¶ 904. Where the sole act of negligence relied on is participated in and voluntarily consented to by the injured workman with full knowledge of the peril, his master cannot be held liable.—Hammond v. Chicago & G. T. R. Co., 83 Mich. 334.

¶ 905. An employee assumes the risk when he voluntarily enters into the danger apparent to him, notwithstanding an agent of his employer tells him there is no danger.—Toomey v. Eureka Iron & Steel Works, 89 Mich. 249.

¶ 906. A brakeman, who by permission sleeps in a caboose-car which during the night stands upon an extension track used to shove in cars upon, must be held to have accepted the risk of his car's being struck by such other cars, and he has no cause of action on account of injuries received in consequence of such condition.—Jacobs v. Lake Shore & M. S. R. Co., 84 Mich. 299.

¶ 907. An employee, by operating his employer's planer without a protecting hood, assumed the risk of using the machine as it

was, and could not recover for injuries received while so working.—Erickson v. Cummer Mfg. Co., 140 Mich. 434.

¶ 908. Accidental injuries to a servant will not sustain an action against the master where they arise from the servant's voluntary use of machinery which he understands and to which no objection has been made as being peculiarly unsafe.—Richards v. Rough, 53 Mich. 212.

¶ 909. Where an employer furnished the means and a perfectly safe place and safe way for an experienced employee engaged on an elevated tramway in a lumber manufacturing plant to lift derailed cars upon the track, and the employee chose to use an unsafe place, he did so at his own risk.—Davey v. Hall & Munson Co., 122 Mich. 206.

¶ 910. An experienced employee who sustained injury by falling from an elevated tramway in a lumber manufacturing plant, through his voluntarily standing on the ends of a plank and using it as a fulcrum for lifting a derailed tramway car with full knowledge that the ends of the planks on the tramway needed repairs and that many were broken and it was dangerous to even walk on them, and without taking any notice of the plank on which he stood, and with knowledge that the space between the tracks was safe, assumed the risk of his action.—Davey v. Hall & Munson Co., 122 Mich. 206.

¶ 911. An employer is not liable where the servant is injured while using for the purposes of his work some material substance which happens to be in a convenient position, but which is not the property of the employer, and which is not used by his authority.—Fellows v. Stevens, 170 Mich. 13.

¶ 912. Where the operator of a power driven wringer, who has full knowledge of the position of the control, operates the machine without a helper, he assumes the risk. —Fryezynski v. W. W. Rice Leather Co., 171 Mich. 113.

¶ 913. A quarry laborer having been warned of blasts during his noon hour and selecting a place on the highway customarily used by other employees to eat their dinners, assumes the risk of being struck by a stone from a blast.—Moronen v. McDonnell, 177 Mich. 691.

¶ 914. An employer who furnishes suitable appliances is not answerable for an injury to a servant resulting from the adoption by himself and his fellow-servants, without the knowledge of the employer, of an improper method of performing work.—Poirer v. Bartlett Lumber Co., 182 Mich. 678.

¶ 915. In an action for wrongful death where plaintiff's intestate was killed while returning from work through the defendant railroad company's yard by being struck by the last car of a train running onto a trestle jumping the track while passing over a switch the company is not liable for his death where it appears that the deceased was using the particular route that he took for his own convenience, and that there were other ways provided for him to return from his work which were safe and which he had frequently used, and the use which he attempted to make of this particular way through the company's ground does not appear to have been known by the company or any of its officers or sanctioned by it.—O'Donnell v. Duluth, S. S. & A. R. Co., 99 Mich. 174.

¶ 916. Where two car repairers are working together on a car, and one of them, having finished the work on which he is engaged, comes to the other and without request or direction assumes to assist the other, and is injured while doing so, such servant is not technically a volunteer, and is acting in the line of his duty, since the relation of master and servant existed, and he was employed to do similar work, yet in another sense he was a volunteer, in that he was not ordered or requested to do that particular work, nor was there any emergency requiring him to assume to do so without an order or request, so that the facts, although not precluding a recovery, have a significant bearing on the question of assumption of risk.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

¶ 917. The fact that an employee is directed by a fellow-servant to work in a dangerous place does not render the master liable for injuries resulting therefrom, where the work was directly in the line of his employment and he was familiar with the danger.—Middaugh v. Mitchell, 120 Mich. 581.

¶ 918. A driller engaged in a stone quarry, who forced a stick of dynamite into too small a hole in the rock, causing the explosion which resulted in the injury complained of, assumed the risk where he acted at the request of a fellow-servant, who had no right to direct him.—Kopf v. Monroe Stone Co., 133 Mich. 286.

¶ 919. A member of an engineer's crew of nine, on a steamer which had been docked for the winter, whose death was caused by a fire on the steamer during the nighttime while the crew was asleep, assumed the risk of sleeping upon the steamer in the absence of a watchman, where the only fire on the steamer was contained in a small upright pony boiler on deck, and the lights consisted of four to six ordinary kerosene lamps, and the deceased was familiar with the situation and must have known that the captain and the watchmen had left the boat.—Lang v. H. W. Williams Transp. Line, 119 Mich. 80.

§ 561. Risk of fellow-servant's acts or negligence.

Fellow-servant rule, see ante § 55.

¶ 920. In an action by a brakeman for an injury received by having an arm crushed while coupling cars, and in particular a car which had been brought by another road, the accident arising from the loosening and leaning down of dead-woods of one car which was lower than the other, it appeared that the different roads had their inspectors to examine cars, and there was nothing to indicate negligence on the part of any of the servants; held, the risk naturally attending the shifting of cars from one road to another is assumed as a part of the brakeman's duties, and the company is not liable for the injury where it may have been caused by the error or mistake of the company's car inspector, who was a fellow-servant.—Smith v. Potter, 46 Mich. 258.

¶ 921. Whether a brakeman can recover against the railway company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence, quære. Judgment denying such liability affirmed by equal division.—Rodman v. Michigan Cent. R. Co., 55 Mich. 57.

¶ 922. A founder in a blast-furnace for the manufacture of pig-iron who has a separate department,—the inside work of the furnace,—and who has nothing to do with the other departments except when acting through the general management or the foreman or boss of such departments, is a fellow-servant of an engineer whose business it is to move the cars on the furnace track as desired in the business, and he assumes the risk that said cars may be handled negligently by said engineer.—Adams v. Iron Cliffs Co., 78 Mich. 271.

¶ 923. Where an engineer on a switch-engine allowed the engine to be operated under his direction by a fireman who had been employed for twenty months as a fireman and six months as a brakeman, and who had been accustomed to handle the engine, there was no such negligence as would enable a fellow-servant of the fireman to recover from the railroad company for an injury sustained in coupling a car to the engine while so operated.—Thompson v. Lake Shore & M. S. R. Co., 84 Mich. 281.

¶ 924. The contract of employment binds an employee to assume the danger of negligence of a coemployee whether he apprehends such danger or not.—Bauer v. American Car & Foundry Co., 132 Mich. 537.

¶ 925. An air hoist in a foundry was suspended from a horizontal track by means of an iron strap connected with a wheel kept in place by means of flanges and gravitation. After a beam had been moved, a coemployee neglected to move the hoist or change the air pressure and in starting the piston struck some object thereby throwing the wheel off the track and in falling it struck and injured plaintiff. He had been employed in the foundry for five weeks and was familiar with and had used the hoist. A similar hoist had fallen a short time before, which fact was known to the assistant foreman but not to plaintiff. Held that he assumed the risk of injury from such obvious danger and from the negligence of the coemployee.—Bauer v. American Car & Foundry Co., 132 Mich. 537.

¶ 926. Where employer and employee have equal knowledge of the incompetency of a fellow-servant who is retained in the service, each party assumes the risk, unless the employer undertakes to give special directions.—Jackson v. Schillinger Bros. Co., 182 Mich. 504, 7 N. C. C. A. 576.

¶ 927. The risk of injury from the failure of miners to properly examine, trim down or sound a drift to determine its safety, is assumed by a trammer removing rock and débris preparatory to timbering the drift.—Koskell v. Newport Min. Co., 182 Mich. 586.

¶ 928. Plaintiff, operating a hand feeding rip-saw machine for defendant, thoroughly understood the machine and knew that "fly-backs" might occur; that in such event the safe thing to do was to turn off the power; that the power lever was not accessible to him; and that the tailer, being a foreigner, would not understand his orders. He nevertheless continued his work and was injured by a "fly-back" which threw his hand upon the saw. Held, he could not recover, having assumed the risk of the tailer's ignorance and that incident to the location of the control lever.—Burton v. Brunswick-Balke-Collender Co., 166 Mich. 45.

¶ 929. The mere fact that a master, by supplying clubs to be slipped through the rings of a hatch-cover for use in removing said cover from the deck of a ship would have made the process of removal less hazardous to his servants, is not sufficient to entitle a plaintiff employee to recover for personal injuries on the ground of negligence, where said hatch-cover might have been safely removed without the use of such clubs.—Cribb v. Great Lakes Engineering Works, 167 Mich. 328.

¶ 930. A servant assumes the risk of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence.—Quincy Mining Co. v. Kitts, 42 Mich. 34.

¶ 931. A servant assumes the risk of a fellow-servant's negligence, even though the latter is in a position of greater responsibility or a different line of employment, so long as both are in the same general business, so that the negligence of one may contribute to the danger of the other.—Quincy Mining Co. v. Kitts, 42 Mich. 34.

¶ 932. It would seem that at common law a brakeman assumes the risk of injury where

he continues in the service after knowledge of the incompetency of the conductor because of habitual intemperance.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

§ 56m. ——Of incompetent fellow-servants.

Statutory provisions regulating employment of servants, see ante §§ 35, 36.

Infants employed in violation of statute as fellow-servants, see ante § 55e.

¶ 933. A railroad employee having knowledge of the unfitness of another employee of the same company, or one whose position or duties are such that he ought to be acquainted with such unfitness when it had become notorious, and who does not give information to the company of the unfitness thus actually or constructively known to him, takes upon himself all the risks of injury from such unfitness while engaged in the ordinary performance of his duties, as much as if he had expressly contracted with reference to possible injuries from that cause.—Davis v. Detroit & M. R. Co., 20 Mich. 105.

¶ 934. Where the reasons which are relied upon to charge the officers of the company with knowledge apply with equal force to show the knowledge of the plaintiff, the negligence of the latter in not complaining is as great as that of the company in employing an incompetent person. And where employer and employee have equal knowledge, and the latter continues the service, each party takes the risk, unless the employer undertakes to give special directions.—Davis v. Detroit & M. R. Co., 20 Mich. 105.

¶ 935. The molder whom a boy was instructed to assist was perfectly familiar with his ability, had worked with him and beside him, and had seen him do work requiring as much strength as that in which he and the boy were about to engage. Held, that, by accepting the service of the boy without objection, the molder estopped himself from claiming that the common employer is liable for a weakness on the part of the boy unknown to the foreman.—Jungnitsch v. Michigan Malleable Iron Co., 105 Mich. 270.

¶ 936. Where a laborer was injured through being struck and run over by a work train while making repairs to a switch, the railroad company is not liable where the locomotive was in charge of an engineer and fireman, who with plaintiff and others employed were under the orders and required to obey the foreman of the construction gang, and the train which had remained stationary for a long time, was by order of the foreman and without warning moved, and no lookout was stationed upon the flat car; failure to give signals, if required, having been the fault of the engine men, who were clearly fellow-servants of plaintiff, all being engaged in the common enterprise of double-tracking defendant's road, and the foreman being ignorant of plaintiff's position and there being nothing in the record to support the theory that defendant owed to plaintiff the duty to maintain a lookout on the car.—Burrman v. Grand Trunk W. Ry., 143 Mich. 689.

¶ 937. In an action for personal injuries by one employed as a cager, whose duties were to place coal cars upon the elevator operated in the mine shaft in order to hoist them to the surface, and who was injured by being caught between a loaded car and the car he was moving, which had been started by another miner down an incline leading to the shaftroom, the risk of employment that an intermeddler or a miner would do what he had no right or authority to do was held to have been assumed by the cager.—Sommers v. Standard Min. Co., 146 Mich. 111.

¶ 938. Plaintiff, a section hand, was employed by defendant railroad in clearing up a wreck. He was directed to board defendant's engine and ride to town to his dinner, and to bring the dinners of other employees back with him. While so riding he was killed in a collision. Held, that riding on the engine was one of the ordinary incidents of his employment, and plaintiff assumed the risk of injury due to the negligence of the employees in charge of the engine.—Moyer v. Ann Arbor R. Co., 159 Mich. 645.

¶ 939. Act No. 104, Pub. Acts 1909, §§ 4110-4116, How. St., 2nd Ed., absolves railway employees from the assumption of risk of the negligence of fellow-servants.—Boesler v. Copper Range R. Co., 184 Mich. 430.

¶ 940. Act 104, P. A. 1909, sec. 1, How. 2nd Ed., § 4110, providing that any common carrier railroad shall be liable to its employees for damages resulting from its negligence or that of its officers, agents or employees eliminates the doctrine of the assumption of the risk of the negligence of fellow-servants and this construction is not discredited by section 2 providing that such employee does not assume the risk of his employment where a violation of a statute by the carrier enacted for the safety of employees contributed to the injury.—Quick v. Detroit & M. R. Co., 175 Mich. 676.

¶ 941. Act No. 104, P. A. 1909, providing that common carrier railroads are liable to employees for injuries caused by negligence of the company, its officers, agents or employees, and that contributory negligence does not bar recovery if of a lesser degree than that of the company and that contracts of employment do not release the company, is intended to change the fellow-servant doctrine.—Arends v. Grand Rapids Ry. Co., 172 Mich. 448.

§ 56n. Miners' risks.

Duty to provide safe mines and mining equipment, see ante § 50.

Mine employees as fellow-servants, see ante § 55p.

Contributory negligence of miners, see post § 59g.
Jury questions as to assumption of risks, see post § 67t.

¶ 942. A pumpman employed in a mine long enough to raise a presumption of acquaintance with the system under which it was worked will be deemed to have assumed the risk of having the duties of watchman performed by the shift boss.—Williams v. Verona Min. Co., 149 Mich. 45.

¶ 943. Where a plaintiff was engaged in shoveling clay into cars at the bottom of a high clay hill, from which other workmen were loosening the chunks of clay, and plaintiff was injured by the rolling down of a huge piece of clay not set in motion by any one, the defendant, employer of the plaintiff, was not liable, as plaintiff had assumed the obvious risks of the employment.—Ritzema v. Valley City Brick Co., 152 Mich. 75.

¶ 944. Plaintiff had formerly been employed as a timber man in the fifteenth level of defendant's mine. He left the mine for a time, and then returned to work in the same level. Meanwhile defendant had built a chute or raise directly under the iron rail track in the fifteenth level, and leading down to the sixteenth level. The raise was seven feet long and four feet wide, the whole extending out about one foot on each side of the track. The chute was covered by boards as to the space between the rails. Plaintiff worked for some time in the mine and passed the chute many times. A light was customarily put there as a warning. Plaintiff was never told of the chute and did not learn of it until the injury. Held, it was a question for the jury whether the plaintiff should be so charged with knowledge of the chute as to be held to have assumed the risk.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 945. Assuming that an employer is negligent in not providing a mine elevator with a reasonably safe appliance for and a method of signaling the engineer, thereby subjecting his employees to extraordinary dangers, there is no presumption that the employees assume the risk by the contract of hiring.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 946. Where an inexperienced employee in a mine ascends from a shaft by catching hold of a bucket, being the means shown him by an experienced employee from whom he was supposed to take directions, and the hoisting cable breaks resulting in his injury, the employer cannot contend that plaintiff should have walked up on the foot walk, and plaintiff did not assume the risk and was not guilty of contributing negligence.—Maki v. Mohawk Min. Co., 176 Mich. 497.

¶ 947. An experienced workman who had charge of the attaching of a guy rope to a pulley stand and had made same taut by means of a bar, held to have assumed the risk of injury due to the breaking of the rope at its point of contact with the bar, he having full knowledge of the extent of the strain and being in a better position than anyone else to determine its safety.—Cusick v. Tamarack Mining Co., 179 Mich. 91.

¶ 948. An employee does not assume the risk of injury from a defectively constructed raise or chute in a mine intended as a means of descent to loosen clogged ore in the adjoining compartment of the raise, and which his foreman directed him to use for that purpose, since the doctrine of safe place applies.—Ranta v. Newport Min. Co., 180 Mich. 459.

¶ 949. A timberman, whose duty it is to make a mine safe for others to work in, assumes the risk of injury from falling rock while so engaged.—Juntunen v. Quincy Min. Co., 184 Mich. 341.

¶ 950. A mine timberman, who is engaged in working in a mine shaft between levels in repairing and making safer for use by those using a ladderway intermediate platforms, or "sollers," which are used to stop anything from falling through the ladderway or to catch a man's body, assumes the risk of the falling of rock while engaged at such work.—Drajicevic v. Champion Copper Co., 194 Mich. 306.

¶ 951. Workmen engaged to inspect, repair and make safe a tool, piece of machinery, appliance, or place of work, which is defective, out of repair, or dangerous, assume the added risk incident to the existing conditions of the work or place.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

§ 56o. Employees in factories, shops and mills.

Duty of master to protect and guard dangerous machinery and places, see ante § 51.
Jury questions as to assumption of risk, see post § 67r.

¶ 952. A servant who continues without objection to use machinery which he has found to be unsafe assumes the risk, and cannot recover for injuries which he may receive in consequence of doing so.—Richards v. Rough, 53 Mich. 212.

¶ 953. The mere fact that one employed in manufacturing Paris green knows it is a poison will not defeat his action for injuries if he is not informed of the effect it may produce upon one working without due precaution.—Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

¶ 954. A machinist who has worked in a shop for four years must be held to have assumed the risks arising from defects in the machinery of which he had knowledge.—

Breig v. Chicago & W. M. R. Co., 98 Mich. 222.

¶ 955. In places like sawmills, appliances more or less crude may reasonably be expected, and employees who use them are ordinarily as good judges of their safety as the employer. If unsafe, and the employee still consents to use them, the risk is his; and the employer has a right to expect that the employee assumes it, where the nature of the appliance, and its dangers are obvious. —Lamotte v. Boyce, 105 Mich. 545.

¶ 956. There is no obligation upon the part of an employer to make his premises and machinery perfectly safe, or to have the most approved appliances. His duty to provide reasonably safe machinery is qualified by his right to contract for the use of machinery which falls short of the best and most approved; and when the defect is obvious, and cannot escape ordinarily careful observation, which is always due from the employee, the risks attendant upon such use are assumed by the employee.—Lamotte v. Boyce, 105 Mich. 545.

¶ 957. An employee who, in the line of his duty, has frequently oiled a revolving shaft at a point within four inches of a set screw, although required to enter a dark recess for that purpose, cannot recover for injuries received by reason of his clothing coming in contact with the screw while he was leaning over the shaft, without a light, to perform another service.—Sakol v. Rickel, 113 Mich. 476.

¶ 958. An experienced millhand familiar with the premises, and to whose attention a projecting set-screw on a shaft had been called, at which time he was informed of the danger therefrom, assumes the risk of working near the shaft and no recovery can be had for injuries causing his death, resulting from being caught in the set-screw.—Middaugh v. Mitchell, 120 Mich. 581.

¶ 959. A plaintiff in a personal injury case, 45 years old, acquainted by actual occupation with machinery, who is put to work upon a new planer of simple construction which he as much as his principal knows to be dangerous for use in planing short pieces of wood, and who continues at the work for eleven months, having in the meantime complained to the employer who assured him that it was not dangerous but did not give any promise of change in the machine or its condition, assumes the risk, and cannot recover.—Rohrabacher v. Woodard, 124 Mich. 125.

¶ 960. A wire screen over a hole in a partition built to protect a sawyer from flying sawdust if it can be said to obstruct the sawyer's vision is apparent to an assistant at the saw and he assumes the risk.—Kellogg v. Stephens Lumber Co., 125 Mich. 222.

¶ 961. A servant twenty years of age with four years' experience with machinery although not familiar with pulleys and belts assumes the risk of injury sustained while applying anti-slip compound to a pulley in accordance with instructions where the evidence shows it to be a simple process the dangers of which he must have known.—Cantwell v. John Brennan & Co., 125 Mich. 349.

¶ 962. An employee in a shingle mill assumes the risk of injury to his hand by contact with the saw caused by the accumulation of bark and sawdust underneath a pivoted table preventing it from clearing the saw. Such failure or defect should have been apparent to one shown to have had several years' experience in and around the mill work.—Willis v. Besser-Churchill Co., 126 Mich. 659.

¶ 963. An operator at a wabble saw does not assume the risk of injury where the defects are not apparent, no warning was given and he knew nothing of the danger.—Chilson v. Lansing Wagon Works, 128 Mich. 43.

¶ 964. A woman of mature years, of sufficient intelligence so that she is put at the head of a department where she operates machinery driven by a belt which she puts on and off as occasion requires for a long time, assumes the risk of injury therefrom though by the placing of a tank it became necessary to push the belt to the left in taking it off instead of to the right as she had done before, since any danger in so doing was as apparent to her as to anyone. —Price v. United States Baking Co., 130 Mich. 500.

¶ 965. An employee planing hoops on a planer constructed for the purpose, injured by a hoop thrown back because of a roller coming out of place, must be held to have assumed the risk where the roller had become displaced occasionally for two months before the accident, and been replaced by the millwright in a certain way which would hold it in place for a time when it would again become loose and have to be replaced, the same thing having occurred on the morning of the accident, so that the employee knew it was likely to occur, and there was nothing concealed about the danger, the whole machinery being open to his observation.—Fischer v. Goldie, 132 Mich. 574.

¶ 966. An experienced workman employed in constructing a hoisting apparatus for unloading coal from vessels, with which work he was familiar, assumes the risk of working upon a platform which he had helped to construct, the danger being as apparent to him as to anyone.—Cronin v. Russel Wheel & Foundry Co., 132 Mich. 500.

¶ 967. Plaintiff was injured while operating a hoisting apparatus consisting of a

wheel turned by an endless rope kept in place by means of blocks nailed along the edge, some of which had split off. The injury was caused by the rope getting out of line and running off the wheel. Held, that the defect was apparent and that he was as well able to judge of the necessity of keeping the rope in line as was the employer, and that, being an adult and familiar with the appliance, he must be held to have assumed the risk.—Bays v. Warren Featherbone Co., 131 Mich. 205.

¶ 968. An employee assumes the risk of injury from an emery wheel bursting on account of high speed, where he is shown to be thoroughly familiar with the machines, to have put wheels upon them, to have seen the wheel in question put upon the machine and to have known that it was not ordinarily so used.—Randa v. Detroit Screw Works, 134 Mich. 343.

¶ 969. An employee who sustained injury through the breaking of an emery belt in an establishment in which he had for two years used such belts and knew that they frequently broke, assumed the risk of his employment, where the employer had furnished a sound belt and a competent inspector and repairer, and where the condition of the belt in question was as apparent to such employee as to any one, and where no complaint had been made by him that the belt in question was unfit for use.—Taylor v. Withington & Cooley Mfg. Co., 136 Mich. 652.

¶ 970. Any risk incident to the fact that the servant was short of stature and could not easily reach a lever on a machine which he had previously operated and knew is as much known to him as to the master and is assumed.—Dutchowski v. Handy Things Co., 141 Mich. 11.

¶ 971. A mason working inside of an oven and hearing a foreman say that he would turn on a blower to cool the oven is charged with knowledge that the resulting air current will stir up dust and ashes, even though he does not know where the blower enters the oven; and hence he assumes the risk by remaining inside and failing to warn the other, his superior, not to turn it on.—Page v. Battle Creek Pure Food Co., 142 Mich. 17.

¶ 972. In a personal injury case where the plaintiff, 27 years old, was injured through using a machine used for cutting steel plates, had operated the machine for one year, and perfectly understood its operation, he assumes the risk of injury where he continued to work the machine after knowing a defect therein and that it was not remedied although he had informed the master of the defect.—Goga v. American Car & Foundry Co., 142 Mich. 340.

¶ 973. Plaintiff in an action for personal injuries, who testified that he was an "oiler, sweeper, and grinder into the wet end" of a cement factory, and who was expected to do anything he was directed to do, and who so understood his employment, was acting within the scope of his employment and was not called upon to do work with which he was unfamiliar and whose ordinary dangers he did not understand when he was ordered to open a cock in an air pipe with a wrench, having performed such an act before.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in result.

¶ 974. Where it appears that plaintiff had worked in defendant's sawmill for five or six years, and knew that the place to work provided by defendant was unsafe, if it was in fact unsafe, or would have known it if he had exercised reasonable care, he cannot recover for an injury resulting from working in such unsafe place.—Younggren v. I. Stephenson Co., 150 Mich. 488.

¶ 975. A servant employed in placing steel sheets between the upper and lower plates of a steel press assumed the risk of injury in putting his hand between the plates to put a sheet of steel in position, which he knew was dangerous.—Richards v. Michigan Pressed Steel Co., 155 Mich. 668.

¶ 976. A manufacturer is not required to discard expensive machinery because not up to date; but may use it if he can find persons willing to operate it, and such persons, if they know the danger of such operation, assume the risk thereof.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 977. An employee attempting to put a belt on a moving pulley assumes the risk of being caught, where the device is simple and the danger obvious.—Neifert v. Metler, 165 Mich. 354.

¶ 978. Plaintiff was employed to clean out the vat used in a paper factory for washing pulp. Inside the vat were paddles operated by an upright and counter-lying shaft, the paddles being put into motion by the shifting of a belt from a loose to a tight pulley. Assistants of the defendant owner's millwright were sent to repair this belt. After their arrival and while they were employed in repairing the belt, plaintiff went into the vat. The millwrights shifted the belt, thereby starting the machinery and injuring plaintiff. Held, the case was not one of assumption of the ordinary risks incident to plaintiff's employment, and to establish a defense based on "assumed risk" it must be shown that under the facts plaintiff, having been warned and given notice of danger in case he went into the tank, in this special instance assumed the risk.—Courtois v. King Paper Co., 172 Mich. 305.

§ 56p. Linemen.

¶ 979. An experienced electric lineman who is employed to repair generally a line

which is old and to change the form of construction, and is thoroughly familiar with the condition of the wires and poles, assumes the risk of injury from a shock due to a defective condition of the line.—Baxter v. City of Lansing, 190 Mich. 542.

¶ 980. The telephone lineman assumes the risk of dangers arising from the contact of other highly charged wires with telephone wires which he is engaged in erecting, and of the grounding of telephone wires.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 981. A lineman engaged in the erection of trolley wires for an electric railway company, who continues in its employment with knowledge that no inspection of poles is being made by the company, assumes the risk.—Lynch v. Saginaw Valley Traction Co., 153 Mich. 174.

¶ 982. No recovery can be had for injury to an experienced lineman caused by the breaking of a wooden pole which he was climbing, it having become decayed at the point where it joined an iron pole of which it was an extension, where it was part of the lineman's duty to inspect the poles and repair or report if defective, there being no evidence that the pole in question had been reported defective, nor of any more practical system of inspection, nor anything to show that the company had any reason to suppose that the pole was defective.—Krimmel v. Edison Illuminating Co., 130 Mich. 613.

¶ 983. A lineman does not assume the risk of injury from the breaking and falling of poles caused by the negligence of other linemen who set the poles two years before, with whom he did not sustain the relation of coemployee, and whose acts were unknown and unknowable to him; but he assumed only such risks as were incident to the use of proper poles for the length of time since they were first set.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

§ 56q. Workers about sewers, ditches and excavations.

¶ 984. An experienced boiler-man, 52 years old, who for 10 months before his death had full charge of defendant's boiler room, and whose death was caused by the bursting of a pipe connecting with a sewer, assumed the risk attendant upon the use of the pipe, where it had been taken down and put up at his own direction by a laborer, and where he failed to supervise it after having been informed of its defective condition, although it was his duty to keep the pipe in working order.—Mackey v. Newberry Furnace Co., 119 Mich. 552.

¶ 985. A servant of mature years who has been employed for some years in laying gas pipe in ditches over which, according to defendant, he had some supervision, and concerning which he never made any complaint, assumes the risk of injury from a caving in of the sides of the ditch while working on the pipe therein, without express directions, where no danger is apparent on examination made by him and shoring was available for use when needed.—Foley v. Grand Rapids Gaslight Co., 127 Mich. 671.

¶ 986. An experienced digger of sewer trenches in which such sewer digger was at work, who, when spoken to by the contractor as to the curbing of the trench, did not think it was necessary, assumed the risk of the ground caving in because of the lack of curbing.—Lenderink v. Village of Rockford, 135 Mich. 581.

¶ 987. Where a member of a gang employed in excavating a ship canal knows the shovels are operated without signals, and continues to work with this knowledge, he assumes the risk of such manner of operation.—Dunn v. Great Lakes Dredge & Dock Co., 161 Mich. 551.

¶ 988. Among the several gangs of laborers employed in excavating a ship canal was the pipe gang, whose duty it was to extend the air and water pipes used for the air drills and shovels. Plaintiff was a member of this gang. Two parallel lines of track were laid for the cars used to carry off the rock. Plaintiff was ordered by the foreman of his gang to adjust a valve on a pipe lying between the two lines of track, upon which cars were standing ready to be filled. While he was so engaged, the shovel gang caused a shovelful of rock to be lifted into one of the cars, and a rock fell off and injured plaintiff. Plaintiff knew that rocks often fell off the shovel and that the shovel was at that moment being operated. Held, he assumed the risk of the injury.—Dunn v. Great Lakes Dredge & Dock Co., 161 Mich. 551.

¶ 989. The rule requiring the master to provide a safe place to work has no application to a case where a servant was injured while wheeling sand to the factory by a frozen crust of a sand pile breaking off after it had been undermined by him, there being no danger in doing the work except such as arose during the progress of the work as a necessary incident to the work itself.—Livingstone v. Saginaw Plate Glass Co., 146 Mich. 236.

§ 57. Railroad employees' risks.

Statutory provisions as to employment of railroad workers, see ante § 36.

Duty to provide safe tracks and other railroad equipment, see ante § 49.

Methods of operating or unloading trains, see ante § 52a.

Fellow-servant rule as applied to railroad employees, see ante § 55j.

Under Federal Employers' Liability Act, see post § 58.

Contributory negligence of railroad employees, see post §§ 59f, 591.
Jury questions as to assumption of risks, see post § 67s.

¶ 990. Railroad employees are presumed to be aware and take the risk of dangers from such conditions and defects in the construction of a side track as would be open to observation; and they are also expected to use reasonable care in examining their surroundings.—Batterson v. Chicago & G. T. Ry. Co., 53 Mich. 125.

¶ 991. A railway employee cannot recover for an injury arising from the improper construction of a side track if he had equal means of knowledge with the defendant of the defect and did not protest against it.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 992. If a railroad employee, knowing, or having ample means of knowing, from long-continued employment, the way and manner in which the side tracks are used, continues in the employment without complaint, and is thereby subjected to risks of accident, he is presumed to assume such risks, and, if injured thereby, cannot recover.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 992a. The doctrine of assumption of risk affords a railroad company no relief from its duty of protecting its employees from unnecessary and dangerous pitfalls and unusual conditions in respect to matters with which their employment brings them into contact.—Ragan v. Toledo, A. A. & N. M. R. Co., 91 Mich. 379.

¶ 993. A trackman who, knowing the rule that notice is not given of the passage of extra trains, remains in the company's employ, assumes the risk.—Jolly v. Detroit, L. & N. R. Co., 93 Mich. 370.

¶ 994. The general rule imposing upon a railroad company the duty of furnishing its employees a safe place in which to work is subject to the qualifications that, when a new road is being built, the employee cannot complain of its imperfect condition, but must take the risks naturally incident to such employment, such as trees close to the track, and that he assumes greater risks upon such a road than upon a completed one, where he might expect that the track was clear and all obstructions removed.—Manning v. Chicago & W. M. R. Co., 105 Mich. 260.

¶ 995. The risk of injury from coupling cars supplied with double deadwoods is assumed by one of some previous experience who has been in the company's employ several weeks during which time such cars have been in constant use.—Fenlon v. Duluth, S. S. & A. R. Co., 108 Mich. 284.

¶ 996. A railroad employee was injured while coupling a car that was lower than the rest; he had fully understood the danger, yet had not protested to his employers against the use of the car, nor received any assurance that its use would be discontinued. Held, that the company was not liable.—Fort Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133; Botsford v. Michigan Cent. R. Co., 33 Mich. 256.

¶ 997. A railroad employee who, while walking beside and pushing a car by the hand rail along a track-siding in the railroad yard in the night time, struck his shoulder against a coal bin close to the track, was chargeable with knowledge that he was liable to encounter such obstruction and assumed the risk of meeting it.—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 998. A provision in a contract of employment between a railroad and an employee wherein the latter before exposing himself in working with cars, engines, machinery or tools agrees to ascertain their condition and soundness merely obligates the employee to use care, and will not prevent a recovery for injuries received because of the defective condition of a pilot of which he was ignorant, never having seen it before, and did not discover.—Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226.

¶ 999. Although a section man engaged in unloading rails from a moving train assumed the risk of the dangers incident to the business so far as they were understood or apparent, he did not assume the risk of the negligent acts of the roadmaster in charge of the train, in giving no warning and in unduly hastening the unloading.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 1000. A section hand has a right to assume that the railroad company has furnished a proper car and had it loaded in a proper manner and hence does not assume the risk of injury caused by the derailment of a handcar on which he was riding and which was thrown from the track by striking a piece of hardwood which had fallen from an open rack car loaded with refuse from a planing mill, though he had seen the car as it passed by and thought it was dangerous to load cars in that manner.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 1001. Where a section hand is instructed by the foreman to ride on an engine instead of in the usual way, the increase of danger is obvious, and is assumed by the former.—Moyer v. Ann Arbor R. Co., 159 Mich. 645.

¶ 1002. Defendant railroad had a spur branch some ten miles long, leading off into some timberland through a sparsely settled district, said branch being solely for the purpose of serving said timberland. No regular stations or stopping places existed, cars be-

ing loaded at any point along the tracks. Plaintiff's intestate was employed in defendant's crew engaged in extending said branch. He knew that it was customary to leave freight cars loaded at any point along said line. On a work train returning after dark, the intestate was placed on the front car with a lantern to look out for loaded cars and to signal the engineer, the engine being at the intestate's suggestion placed at the rear of the train. A collision with the loaded car occurred, resulting in the death of plaintiff's intestate. Held, the intestate assumed the risk and plaintiff could not recover.—Ingersoll v. Detroit & M. Ry. Co., 168 Mich. 380.

¶ 1003. Where defendant's car was placed upon a repair track for repair of a certain defect noted by defendant's inspector for repair, and plaintiff, who was a car repairer for defendant, upon going under the car to repair such defect was injured by a drawbar suddenly falling upon him by reason of broken carrying irons which had not been discovered and reported by the inspectors, and was not known to defendant, held that plaintiff assumed the risk.—Sims v. Minneapolis, St. P. & S. S. M. Ry. Co., 196 Mich. 114.

§ 57a. ——Brakemen and switchmen.

¶ 1004. The risk arising from the use of worn rails for side tracks in a railroad yard is one of the ordinary risks of a switchman's employment.—Michigan Cent. R. Co. v. Austin, 40 Mich. 247.

¶ 1005. An experienced brakeman was ordered by the conductor to attach a car loaded with lumber which projected forward and compelled him to stoop in making the coupling. In doing so he delayed a little, and his fingers were caught in the coupling-link, and hurt. Held, that he could not maintain an action against the railway company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way.—Day v. Toledo, C. S. & D. R. Co., 42 Mich. 523.

¶ 1006. A switchman had his hand crushed while coupling a freight car furnished with double deadwoods, and received from another road where such a contrivance was generally used. He had not been expressly notified that he would be required to handle such cars, but in the course of commerce, and as a matter of business necessity as well as of statutory obligation, they were being constantly received and forwarded like all other cars adapted to the gauge of the road, and having occasion to run thereon. Held, that the switchman could not maintain a suit against the company as for negligent injury in receiving the cars or in omitting to notify him thereof.—Michigan Cent. R. Co. v. Smithson, 45 Mich. 212.

¶ 1007. The omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double deadwoods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances.—Hathaway v. Michigan Cent. R. Co., 51 Mich. 253.

¶ 1008. A youth of ordinary intelligence was killed while coupling freight cars. He was fully aware of the danger of such work, and not entirely inexperienced, and his death was not caused by any negligence or carelessness of those in charge of the train. Held, that the railroad company was not answerable for his death.—Viets v. Toledo, A. A. & G. T. R. Co., 55 Mich. 120.

¶ 1009. Where a switchman, who is acquainted with all of the surroundings, attempts to descend a car ladder for the purpose of uncoupling the car, knowing that unless the train is stopped he must strike a post less than twenty feet distant, and without knowing that his signal to stop the train has been received and acted upon, and in order to give which he was obliged to look towards the engine, and must have seen the steam emitted therefrom, which is alleged in the declaration to have prevented the engineer from seeing the signal, he must be held to have assumed the risk and danger in descending the ladder.—Pennington v. Detroit, G. H. & M. R. Co., 90 Mich. 505.

¶ 1010. Where a brakeman while attempting the third time to couple cars on a side track slipped upon a snow-bank, of which he had no knowledge, and which had been formed by shoveling the snow from the siding, no space being cleared along the rail and the other side being dangerous by reason of coal docks, it was held that the accident was caused by defendant's negligent operation of its road, and plaintiff did not assume the risk.—Cregg v. Chicago & W. M. R. Co., 91 Mich. 624.

¶ 1011. Where an ordinarily intelligent person of mature age voluntarily attempts, though cautioned, to perform, without previous experience, the duties of a brakeman, he must be regarded as assuming the ordinary risks of his employment, and cannot recover for an injury caused by a danger that is apparent.—Dysinger v. Cincinnati, S. & M. R. Co., 93 Mich. 646.

¶ 1012. A railroad company that furnishes safe cars and a competent inspector thereof is not liable to a brakeman injured while seeking to couple, to another car, a properly constructed car which has been accepted by the inspector from another company for transportation, but over the end of which part of the lumber wherewith it is laden projects so as to injure such brakeman.—Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329.

¶ 1013. A brakeman will be held to have assumed the risk of injury from an imperfect kind of drawbar in use on the road on which he is employed, where he has daily used such drawbars, and is therefore familiar with the dangers attending their use.—Secord v. Chicago & M. L. S. R. Co., 107 Mich. 540.

¶ 1014. A brakeman assumes the risk of coupling and uncoupling cars at a cattle guard, such as exist at intervals over the entire road.—Fuller v. Lake Shore & M. S. R. Co., 108 Mich. 690.

¶ 1015. A railroad brakeman will be held to have assumed the risks incident to the use in lanterns of an inferior quality of oil furnished by the company employing him, where it appears that the oil had made him trouble for several weeks, and that he continued to use it without complaint.—Huffman v. Michigan Cent. R. Co., 109 Mich. 251.

¶ 1016. A brakeman does not assume the risk of an unsafe place to work arising out of the faulty construction or lack of repair of a brick yard shed in which the railroad company maintains a siding.—Doyle v. Toledo, S. & M. R. Co., 127 Mich. 94.

¶ 1017. A brakeman and switchman who has assisted for eight days in making "flying switches," will be held to have assumed the risk of injury therefrom.—Carr v. St. Clair Tunnel Co., 131 Mich. 592.

¶ 1018. A railroad brakeman assumes the risk of injuries resulting from being caught by a hook placed on the end of a locomotive, used for switching, for the purpose of hanging the end of the air hose, notwithstanding protests on his part and frequent removal by him where the hook is shown to have been in general use by the company and to have been replaced whenever found missing.—Crawford v. Detroit, G. R. & W. R. Co., 127 Mich. 312.

¶ 1019. An experienced brakeman, who while running backwards with a car, fixing the coupling, fell into an open ditch covered with snow, by the side of the road-bed and was run over by such car and killed, assumed the risk; where it appeared that the ditch was an outlet for a drain underneath the switches, and had existed for many years and that the deceased must have known of the ditch as he had passed over it every day for a year without objection.—Miller v. Detroit, G. H. & M. Ry. Co., 133 Mich. 564.

¶ 1020. A switchman cannot be said to assume the risk of all injuries sustained by riding on the side of a freight car.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 1021. A competent brakeman who had been in the employ of defendant company for over a year, and who sustained injury by the slipping of the platform of a car while he was engaged in coupling, did not assume the risk growing out of the construction of the car and platform in question.—Hewitt v. East Jordan Lumber Co., 136 Mich. 110.

¶ 1022. A railroad brakeman, who was crushed to death between a cattle chute and a passing car, assumed the risk of being injured, where he was familiar with the location of the cattle chute, and where, if he exercised ordinary care in the performance of his duties, he must have known that there was not sufficient space for him to pass between the chute and an ordinary freight car; even though he may not have known the precise distance by measurement.—Wilson v. Lake Shore & M. S. Ry. Co., 145 Mich. 509.

¶ 1023. In a suit by a switchman for personal injuries received in a fall over a pile of gravel which had been allowed to remain in defendant railway company's yard, defendant cannot make a good defense on the ground that plaintiff assumed the risk of falling over such obstruction.—Gillespie v. Grand Trunk Ry. Co. of Canada, 150 Mich. 303.

¶ 1024. Where plaintiff, a brakeman, is injured by striking a cattle chute placed three feet, eleven inches from the side track of the railroad, and is ignorant of the location of the cattle chute, he cannot recover from the defendant railroad for the injury if, in the exercise of reasonable diligence, he should have known of the chute, so as to be held to have assumed the risk.—Carr v. Grand Trunk Ry. Co. of Canada, 152 Mich. 138.

¶ 1025. A railroad brakeman who has through long experience become thoroughly acquainted with the fact that many side tracks in a particular locality are built upon "made ground," must be held to have assumed the risk, if any, arising from such construction.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 1026. Defendant railway's contract with its switchmen provided that the cutting off of passenger cars should be done by the car men, and prohibited the switchmen from performing such duty. Plaintiff's decedent, a switchman, was injured while cutting off a coach at the direction of the yard conductor. The accident occurred through the negligence of a fellow-switchman in making another coupling so as to force the cars together between which the decedent was working. Held, plaintiff was not precluded from recovery because of the fellow-servant rule.—Baker v. Michigan Cent. R. Co., 169 Mich. 609.

§ 57b. ——Engineers and firemen.

¶ 1027. Whether an accident occasioned by a misplaced switch, by which a train is run on a side track and against cars standing

there, is not within the risks assumed by an engineer in entering into the employment of the company to run its engines, quære.—Lyon v. Detroit, L. & L. M. R. Co., 31 Mich. 429.

¶ 1028. The defendant corporation was not liable for the death by accident of plaintiff's intestate, where the evidence showed that while engaged for defendant in the work of building a slip in a river, deceased in pushing off a scow on which the crew was working, from a pile driver, pushed his spike pole into some timbers, the pole slipped, and deceased, losing his balance, fell into the river and was drowned; since the risks of his employment were not concealed, but open and visible.—Fisher v. Chicago & Grand Trunk Ry. Co., 77 Mich. 546.

¶ 1029. A railroad engineer who has been over a particular crossing 161 times during the preceding year must be held to have assumed the risk of faulty signals at such crossing.—Mellish v. Pere Marquette R. Co., 167 Mich. 86.

¶ 1030. An experienced engineer who was killed by the derailment of his train, assumed the risk of defective castings in the engine, where it appeared that the engine had been properly constructed and that the defendant had performed its full duty as to inspection; that it was the decedent's duty to inspect the engine and that he made such inspection but reported nothing wrong, and where the defect, if any, was easily discernible.—Peppett v. Michigan Cent. R. Co., 119 Mich. 640.

¶ 1031. An engineer of a passenger train who was injured in a wreck did not assume the risk of an unsafe track, as it was the duty of the master to be diligent in maintaining the track.—Hamilton v. Michigan Cent. R. Co., 135 Mich. 95.

¶ 1032. A locomotive fireman who has been employed on the same engine for several months, and is required, in the course of his duties, to go out several times on a running board on each trip so that he comes into frequent contact with the guard rail above the running board, assumes the risk of the turning of the hand rail as he catches hold of it upon his way back from the head of the engine where he has shut the door of the headlight.—Gillette v. Grand Trunk Western Ry. Co., 192 Mich. 113.

¶ 1033. A locomotive fireman who has worked daily on the same locomotive engine for several months and is required, in the course of his duties, to pass daily over the running boards of the engine, assumes the risk in passing a rope used to fasten the bail of a classification lamp to the upper rail along the running board, which is hanging so as to form a loop, where the rope had been in use for some time, was in plain view, and he was hurt in broad daylight while on his return from the head of the engine where he had shut the door of the headlight.—Gillette v. Grand Trunk Western Ry. Co., 192 Mich. 113.

§ 57c. ——Employees of street railways.

¶ 1034. A motorman who had had proper instruction, had been employed by a street car company for six months, who knew the purposes for which sand was used and was familiar with sand boxes, and the effect of sand upon a slippery track must be assumed to have assumed the risk occasioned when he failed to use sand and a shovel provided on the car, and the car ran away because of the slippery condition of the track.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 1035. A motorman on an electric street railway who was injured through a collision of his car with another car which was backing up, and who as an employee knew that cars had been backed on the piece of road in question and that it was likely to happen again; that the cars did not carry red lanterns upon the rear as was customary with steam railroads, and what if any means there were of determining whether a car was approaching or going away from him; assumed the risk of the methods adopted by the employer in relation to the backing of such cars.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 1036. Where a motorman for an electric railway was familiar with the system of transmitting power and knew that a high tension wire was near enough so that it might be reached by a trolley pole from the top of a car and that contact with such wire was dangerous, no recovery can be had for his death resulting from contact with the wire by a defective trolley pole which was being removed from the car, since he assumed the risk though no specific instructions had been given him as to the danger from such contact if the trolley pole was removed from the car in a certain manner.—Harrison v. Detroit, Y., A. A. & J. Ry. Co., 137 Mich. 78.

¶ 1037. A suburban street railway employee engaged in construction work, who sustained injury as the result of a car of his company on which he was being transported running into an open unguarded switch which had no light, target or lock, did not assume the risk of such appliances, as his work was performed at a distance from the switch in question and no notice of the defects would have come to him through his work and his duties had no relation to the track.—Noe v. Rapid Ry. Co., 133 Mich. 152.

¶ 1038. A plaintiff conductor did not assume the risk of an injury received through a fall while descending from the top of an electric car, because a step provided for the purpose of aiding in ascending and descend-

ing from the top of the car was not in place, since the risks assumed in such a case are those usually incident to the employment.—Leary v. Houghton County Traction Co., 171 Mich. 365.

§ 58. Under Federal Employers' Liability Act.

Liability of employer under Federal Employers' Liability Act, see also ante § 37.
Sufficiency of proofs, see post § 66.

¶ 1039. The doctrine of assumption of risk, except such as arise from a carrier's violation of a statute enacted for the safety of its employees, is available to the defendant in an action under the Federal Employers' Liability Act.—Miller v. Michigan Cent. R. Co., 185 Mich. 432.

¶ 1040. The Federal Employers' Liability Act, 35 U. S. Stat. 65, takes away the defense of fellow-servant's negligence, and under it contributory negligence does not bar, the action being available only in mitigation of damages in proportion to the employee's negligence.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

¶ 1041. The defense of the assumption of risk of injury from being caught between the side of a car and the track doors leading into a freight shed, held open to the defendant in an action under the Federal Employers' Liability Act, for injury sustained from such cause by an employee.—Miller v. Michigan Cent. R. Co., 185 Mich. 432.

¶ 1042. In order to make the negligence of a fellow-servant one of the assumed risks under the Federal Employers' Liability Act, the injured employee must actually know of the fact of the negligence of his fellow-servant, or such negligence must be so customary that he would be chargeable with knowledge thereof.—Chapman v. United States Exp. Co., 192 Mich. 654.

¶ 1043. Under the Federal Employers' Liability Act an employee assumes the usual and ordinary risk incident to his employment.—Chapman v. Ann Arbor R. Co., 196 Mich. 671.

¶ 1044. The defense of assumption of risk is available in actions brought under the Federal Employers' Liability Act, 35 U. S. Stat. 65, except in cases where defendant has violated a statute enacted for the safety of employees, and where such violation contributed to the injury.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

¶ 1045. Under the Federal Employers' Liability Act the defense of assumed risk remains as at common law.—Simms v. Minneapolis, St. P. & S. S. M. Ry. Co., 196 Mich. 114.

Risks assumed under the Federal Employers' Liability Act, see note, 8 N. C. C. A. 834-871.

G. CONTRIBUTORY NEGLIGENCE.

§ 59. In general.

Burden of proof as to contributory negligence, see post § 62b.
Evidence as to contributory negligence, see post §§ 64h, 65 l.
Jury questions as to contributory negligence, see post § 68.
Instructions as to contributory negligence, see post § 71g.
General law of contributory negligence, see Negligence, IV.
Under Workmen's Compensation Act, see Workmen's Compensation Act.
Contributory negligence of workman as passenger, see Carriers, IV, E, 7.

¶ 1046. In determining the question of the contributory negligence of an operator whose duty lies in the line of danger, all of the circumstances must be considered, and particularly those exigencies which render the prompt performance of his duty necessary.—Irvine v. Flint & P. M. R. Co., 89 Mich. 416.

¶ 1047. In determining whether a deceased employee was guilty of contributory negligence, the jury is bound to consider all the facts and circumstances bearing upon that question, and cannot select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

¶ 1048. The age and intelligence of a laborer injured by machinery, and his experience in the use of such machinery, may be considered by the jury in an action by him for the injury.—Huizega v. Cutler & Savidge Lumber Co., 51 Mich. 272.

§ 59a. Statutory provisions.

¶ 1049. Act No. 104, § 2, Pub. Acts, 1909, providing that contributory negligence of an employee of a common carrier railroad does not bar recovery if of a lesser degree than that of the carrier, its officers, agents or employees, does not declare the common law relating to gross negligence and ordinary negligence, but means that the employee may recover if his negligence is less than that of the company.—Bruce v. Michigan Cent. R. Co., 172 Mich. 441.

¶ 1050. Under Act No. 104, § 2, Pub. Acts, 1909, providing that contributory negligence of an employee of a common carrier railroad does not bar recovery if of a lesser degree than that of the carrier and that no injured employee can be held guilty of contributory negligence or to have assumed the risk of his employment where the violation by the carrier of a statute for the safety of employees contributes to the injury, the defenses of assumed risk and contributory negligence are not available where a violation of such a statute contributes to the

injury or if the negligence of the employee is less than that of the company, its agents, officers or employees.—Bruce v. Michigan Cent. R. Co., 172 Mich. 441.

¶ 1051. Act No. 104, § 2, Pub. Acts, 1909, providing that contributory negligence of employees of common carrier railroads does not bar recovery if the negligence of the employee is of lesser degree than that of the carrier, nor where the violation by the carrier of a statute for the safety of employees contributes to the injury, must be construed to give effect to the legislative intention which is found in the act itself and the conditions which the legislature thereby sought to remedy.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 1052. The language in Act No. 104, Pub. Acts, 1909, providing that common carrier railroads are liable for injuries caused by the negligence of the carrier, its officers, agents or employees, and contributory negligence does not bar recovery if the negligence is of a lesser degree than that of the carrier and that contracts of employment, etc., are no defense to actions for injuries, is not ambiguous and the classification is not clearly arbitrary.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 1053. Under Act No. 104, § 2, Pub. Acts, 1909, providing that where employees of common carrier railroads are injured negligence contributing to the injury does not bar recovery if such negligence is of a lesser degree than that of the company, the courts still have the power to determine whether there is actionable negligence attributable to the company and whether there is testimony tending to show mutual fault in proximate relation to the injury, but the terms, slight, ordinary and gross negligence afford no proper basis for reaching the determination, and the question in all cases of mutual fault will be "whether the fault of the defendant was the greater."—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 1054. Act No. 104, Pub. Acts, 1909, relating to the liability of common carrier railroads for injuries caused by negligence of the company, its officers, agents or employees, or by contributory negligence, and providing that contracts of employment, etc., are no defense to actions for injuries, is not amendatory of any other statute, but it alters the common law as to the single class of employees and employers mentioned.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

§ 59b. Omission of statutory duty by master.

Statutory provisions and regulations, see ante §§ 35, 36.

Provisions as to protecting and safeguarding machinery and places, see ante § 51.

Duty to inspect and repair, see ante § 53.

Duty to warn and instruct, see ante § 54.

¶ 1055. The rule depriving an employer of the defense of assumption of risk where he has omitted a statutory duty in safeguarding dangerous places to work does not extend to the defense of contributory negligence because the assumption of risk may be a defense in cases where there is no contributory negligence.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 1056. An omission of a statutory duty to safeguard machines does not deprive an employer of the defense of contributory negligence.—Schulte v. Pfaudler Co., 150 Mich. 427.

¶ 1057. Where a defendant fails to provide a loose pulley upon which to shift the belt of a machine, in violation of a statute requiring such pulley, plaintiff is nevertheless prevented by contributory negligence from recovery for an injury suffered in an attempt to tie up the loose belt from the shafting.—Trombley v. McAfee, 152 Mich. 494.

¶ 1058. Elimination from the case of the doctrine of the assumption of risk, because the risk arose through omission to guard belting as required by statute, does not carry with it the defense of contributory negligence in failing to be careful about coming in contact with such belt so exposed.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 1059. A brakeman is not guilty of negligence contributing to his injury where his own acts are not negligently performed though he continues in the service after knowledge of the incompetency of a conductor because of habitual intemperance, where a statute (Comp. L., § 6284) provides that no person who uses intoxicating drinks as a beverage shall be employed in any operating department of a railroad.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

§ 59c. Reliance on due performance of duty by master.

Care and diligence required of master, see ante § 33.

Duty to protect and safeguard machinery and places, see ante § 51.

Assumption of risk from nonperformance of duty by master, see ante § 56f.

Omission of statutory duty by master as bearing on contributory negligence, see ante § 59b.

¶ 1060. A servant has a right to trust the prudence and caution of his employer, and to rely upon his not putting him in charge of implements which, from improper construction or other cause, are so dangerous that a prudent man would not make use of them.—Fort Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133.

¶ 1061. An employee is not bound, before beginning work, to familiarize himself with the condition of all the machinery he may come in contact with. It is enough if he knows his own work and the risks directly connected with it.—Swoboda v. Ward, 40 Mich. 420.

¶ 1062. An employee has a right to assume that it is safe to do what he is hired to do unless his knowledge warns him it is not.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 1063. A servant is not negligent in presuming that his master has performed his duty.—Irvine v. Flint & P. M. R. Co., 89 Mich. 416.

¶ 1064. The servant has a right to presume that his safety has been reasonably provided for, and in a general way use a walk or appliance without first particularly inspecting it.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 1065. An employee going on a skip of a mining shaft has the right to assume that all needed help was being employed in the engine house, so that he may with perfect safety go onto the skip, or, in lieu of such help, that all proper rules and regulations for the safe conduct of the work had been made and promulgated.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1066. An employee in a mine has the right to assume that the defendant employer has done all things, including the making and promulgation of adequate rules, necessary to secure his safety in going onto the skip to assist in loading heavy machinery thereon.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1067. A brakeman's duty to test brakes to see that they work properly does not require him to look for defects in the brake-chain which are not apparent except upon a careful examination, link by link, and his failure to discover such defects is not contributory negligence.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 1068. A person when employed and instructed to commence work at a particular place is under no obligation in order to protect himself from the charge of contributory negligence, to first go over the building or plant and make himself familiar with each piece of machinery, and the danger he may incur in case he comes in contact with it in its then condition.—Boman v. Mashek Chemical & Iron Co., 147 Mich. 178.

¶ 1069. A brakeman who was killed while going between cars to set brakes is not guilty of contributory negligence in having failed to examine the cars to see if his way was clear and safe before it became necessary to brake the cars, where it was shown that the cars were improperly loaded and he did not have time to examine whether they were properly loaded.—Irvine v. Flint & P. M. R. Co., 89 Mich. 416.

¶ 1070. With respect to the employer's duty to supply a safe place to work, the servant will not be bound to familiarize himself with all the machinery or appliances which he does not himself use.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

§ 59d. Reliance on assurances of safety or promise to repair.

Duty of master to inspect and repair, see ante § 58.

Reliance on assurance of safety or promise to repair as bearing on assumption of risk, see ante § 56h.

Questions of law and fact, see post § 68c.

¶ 1071. It is the duty of a section hand who knows that his work of cleaning switches during a snow storm is more or less hazardous, owing to the frequent operation of trains, to exercise reasonable care to protect himself from injury.—Barnhart v. Pere Marquette R. Co., 188 Mich. 587.

¶ 1072. It is not contributory negligence for an employee who is in doubt about the safety of the place where he has to work to defer to the opinions and assurances of those who are supposed to know, and from their position are bound to have special knowledge, as to whether it is safe or not.—Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

¶ 1073. Where a motorman suggested the use of sand to avoid the danger of his car slipping on a certain grade, and the superintendent assured him that the track was safe without it, the plaintiff is justified in relying upon such assurance.—Mayer v. Detroit, Y., A. A. & J. Ry., 152 Mich. 276.

¶ 1074. A statement or assurance of the safety of a place when given an employee will not be deemed to have been made in a representative capacity, unless given by a vice principal.—Lesh v. Tamarack Min. Co., 186 Mich. 399.

¶ 1075. One who is employed upon a farm to blast stumps, and is experienced in the use of dynamite and the effect of explosions in blasting stumps, and has equal knowledge with the general superintendent of the farm how the electrical appliances are used in firing the shots and the length of the electric wire used, and uses an unusually heavy charge in firing a shot, and fails to seek protection from flying pieces by retiring to a safe place, cannot recover on the bare assurances of the general superintendent that the wire was of sufficient length and reasonably safe if properly used.—Gatewood v. Consolidated Coal Co., 192 Mich. 247.

¶ 1076. A servant who calls attention to the fact that dangerous machinery has be-

come uncovered, and who continues work in obedience to orders and relying on assurances that the defect shall be remedied, is not guilty of contributory negligence.—Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519.

¶ 1077. An employee who continues for a reasonable time in the use of defective machinery, under the promise of repair, cannot be said, as a matter of law, to have been reckless.—Krohn v. Joseph N. Smith & Co., 151 Mich. 247.

§ 59e. Avoidance of or precautions against known or apparent dangers.

Duty to provide safe tools, appliances and places, see ante § 46 et seq.

Assumption of risks from known obvious or apparent dangers, see ante § 56b.

¶ 1078. For an injury received by a workman who catches his hand in the exposed cogs of an ordinary planing machine the master is not liable, where it appears that although such workman had run the machine only a day or two, he had worked within a few feet of it for two years or more, and among similar machinery for twenty-five years; since the danger of accident was perfectly apparent, and could have been easily avoided.—Schroeder v. Michigan Car Co., 56 Mich. 132.

¶ 1079. A fairly intelligent youth of sixteen had his hand mutilated by the jointer in a planing mill where for two weeks he had been at work. He had had no previous experience with such machinery, but the dangerous nature of the jointer was manifest to any one who looked at it, and he would not have been hurt if he had not laid his hand, without looking, upon the table in which the jointer operated. Held, that the injury was accidental, and he could not recover for it.—Palmer v. Harrison, 57 Mich. 182.

¶ 1080. An employee operating an elevator is guilty of contributory negligence if, knowing that unless the brake is properly set and locked a weight placed upon it will cause it to descend, he rolls heavy weights thereon without first seeing that it is properly set.—Robinson v. Charles Wright & Co., 94 Mich. 283.

¶ 1081. An employee injured by the sudden release of an elevator alleged to have been due to a defective spring, cannot recover therefor where he had used the elevator constantly for many months and was the last one to use it before the accident, the mechanism being simple and in plain view so that by the exercise of ordinary care he would have seen any defect which might exist.—Juchatz v. Michigan Alkali Co., 120 Mich. 654.

¶ 1082. Plaintiff's intestate was employed as a fireman on a derrick located on a dock. He went below the deck of the derrick for the apparent purpose of loosening bolts in a steam engine, to let the water out for the night. The machinery below was unprotected by guards and the intestate was caught therein and killed. The place was not one where the workmen usually worked, and was known to plaintiff as a place of peril. Held, he was contributorily negligent and no recovery could be had.—Gehl v. Pittsburg Coal Co., 163 Mich. 285.

¶ 1083. An oiler was guilty of contributory negligence, who had been engaged in oiling machinery in defendant's factory daily for about seven months and knew or was chargeable with notice that the band saw in question against which he put his hand was there, and where the saw was not dangerously near the place where such oiler was called to do the oiling, but was more than three feet away, and the least care would have prevented his putting his hand near the saw.—Perlick v. Detroit Wooden-Ware Co., 119 Mich. 331.

¶ 1084. Plaintiff was a mature and intelligent man set to work to unload a car of frozen sawdust into a hopper in a platform from which ran a conveyor. There was behind him an uncovered elevator casing which plaintiff claims he did not see but of which the foreman warned him, and while he was attempting to dodge and step back from a piece of frozen sawdust which was about to fall on him he fell into the conveyor and was severely injured. Held, that the defendant could not escape liability on the theory of contributory negligence in that the plaintiff having developed the situation from or out of which the accident happened he was bound to see that there was a safe way to escape from the position of danger created by himself and to escape by any other way at his peril.—Roman v. Mashek Chemical Co., 147 Mich. 178.

¶ 1085. Although a plaintiff suing for personal injuries had been employed in violation of Pub. Acts 1901, Act No. 113, § 3, which recognizes the immaturity of judgment of children under 16, he cannot recover for an injury received through thrusting his hand into a planer head on the mistaken supposition that it was not running, where he knew at the time everything that the most experienced person could have told him of the danger of doing so.—Beghold v. Auto Body Co., 149 Mich. 14.

§ 59f. ——Working on or about tracks or trains.

Proximate cause of accident to railroad employees, see ante § 43.

Safety and sufficiency of tracks and other railroad equipment, see ante § 49.

Methods of operating and unloading trains, see ante § 52a.

Fellow-servant rule as applied to railroad employees, see ante § 55j.

Assumption of risk by railroad employees, see ante § 57.
Dangerous methods of work, see post § 59i.
Disregard of rules, warnings and instructions, see post § 59m.
Jury questions as to contributory negligence, see post § 68f.

¶ 1086. A brakeman, whose business it also was to couple cars, had his arm crushed in trying to couple to another car a caboose the drawbar of which was some six inches below that of the other car and of cars generally. The caboose had been in that condition for a month, as the brakeman himself knew, and it had been reported for repairs; but the fact that the drawbars were not on the same level must have been apparent to any one attempting to couple the cars, if he used his eyes. Held, that he could not recover against the railroad company.—Brewer v. Flint & P. M. R. Co., 56 Mich. 620.

¶ 1087. A railroad employee was injured by a defective draw-head which he used for the first time without looking at it, acting on the supposition that it was all right. He had worked about the engine nearly a week without examining the draw-head, which he was liable to use at any moment. Held, that his negligence would prevent a recovery for the injury.—Goulin v. Canada South. Bridge Co., 64 Mich. 190.

¶ 1088. Where the immediate cause of a switchman's being thrown from an engine was a violent jerk resulting from the sudden reversal of the engine without warning, it was held that his knowledge of the want of a hand-rail to assist him in keeping his place on the step at the end of the tender of the engine did not render him guilty of contributory negligence.—Lyttle v. Chicago & W. M. R. Co., 84 Mich. 289.

¶ 1089. An employee who, knowing the fractious disposition of a horse, drives him within five feet of a backing engine from which steam is escaping, is guilty of such contributory negligence as will preclude a recovery for injuries sustained by reason of the unmanageableness of the horse, though he expressly objected to driving it.—Mahan v. Clee, 87 Mich. 161.

¶ 1090. A brakeman who, while trying in the daytime to uncouple from an engine a moving freight car, is injured by stepping into an unfilled space between the ties of a side track, cannot recover where the condition of the track was or should have been known to him, he having frequently passed it in the discharge of his duties, and where, relying upon his supposition that the road was smooth, he stepped upon it without looking at the obvious defect.—Ragon v. Toledo, A. A. & N. M. R. Co., 97 Mich. 265.

¶ 1091. A brakeman cannot recover for injuries sustained by reason of a defective drawbar while attempting to make a coupling, where he discovered the danger when the cars were several rods apart, walked along trying to block it up, though he might, by stopping the train and adjusting the bar, or by raising it in another way than that attempted, have avoided the injury.—Secord v. Chicago & M. L. S. R. Co., 107 Mich. 540.

¶ 1092. A section hand injured by an engine backing over a street crossing which he was cleaning, is guilty of contributory negligence which precludes recovery where, after seeing the engine and knowing that it might come that way, he resumed work with his back toward it without looking though an occasional glance would have informed him of its approach.—Carlson v. Cincinnati S. & M. R. Co., 120 Mich. 481.

¶ 1093. A railroad employee who while walking beside and pushing a car by a hand rail along a track-siding in the railroad yard on a moonlight night, walks up to and strikes against a coal shed near the track when he should have seen it, is guilty of contributory negligence.—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 1094. A brakeman who while in charge of a car in defendant's yard in the daytime, without looking to see if the way was clear, climbed upon a ladder at the side of his car which was moving toward a pile of lumber a few feet away, from which boards projected, is guilty of contributory negligence and cannot recover for an injury sustained by his being struck by the boards.—Ramsay v. C. K. Eddy & Sons, 123 Mich. 158.

¶ 1095. A brakeman who was injured while changing a lever so as to shift a semaphore signal and turn a switch, was not entitled to recover where the accident could have been avoided had he put his foot, his knee, or his hand upon the top of the lever before withdrawing the pin; as such action would have prevented the lever flying up and striking him and the appliance was reasonably safe.—Chapman v. Pere Marquette R. Co., 133 Mich. 311.

¶ 1096. Where a side track in a freight yard was constructed with a very sharp curve, so that there was great danger that in coupling cars the draw-bars would slip and pass each other, which danger, however, existed only on the inside of the curve, it was held to be contributory negligence for an experienced brakeman, who must have been aware of the danger, to remain on the inside while engaged in coupling.—Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166.

¶ 1097. A compliance with the statutory duty of stopping and giving signals before passing a crossing of two railroads does not relieve an engineer from the duty of keeping his train under control when he knows that there are no semaphores, flag-men or

gates at the crossing; and where both engineers of colliding trains are negligent in this respect, neither, if injured, can recover from the other's employer.—Kelly v. Duluth, S. S. & A. R. Co., 92 Mich. 19.

¶ 1098. A foreman of a railroad section gang who, while inspecting his section, runs a considerable distance along the track on a tricycle without looking back, although he knows that extra trains may come at any time, is guilty of contributory negligence.—Jolly v. Detroit, L. & N. R. Co., 93 Mich. 370.

¶ 1099. A railroad company employing a flagman is not responsible for his death through being run over by one train while he was flagging another, when he could have seen such train by simply turning his head and the trainmen did not see him. The company owes no duty to protect the flagman by notifying him of the approach of trains. It is his duty to watch for passing trains.—Zulke v. Michigan Cent. R. Co., 147 Mich. 192.

¶ 1100. A section hand who knows the company's custom of shunting cars along the tracks in its yard in making up trains, and who also knows that cars have just been run unattended upon the side track where he is at work, is guilty of such contributory negligence as bars recovery, if, failing to look out for moving cars, he is injured.—Schaible v. Lake Shore & M. S. R. Co., 97 Mich. 318.

¶ 1101. The danger of riding on the side of the tender of an engine through a roundhouse door, with a clearance of from eleven to sixteen inches only, is an obvious one.—Hollingshead v. Detroit, G. H. & M. Ry. Co., 181 Mich. 547.

¶ 1102. A repairer of tracks employed in a railroad company's yard, which as he well knew was used for the purpose of making up trains, was held guilty of contributory negligence for placing himself with his face away from the direction from which cars were to be expected, and for continuing his work without looking back, in consequence of which he was struck and injured by a slowly-moving switch-engine.—Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 885.

¶ 1103. The engineer of a switch-engine in a railroad yard used for the purpose of moving cars has a right to act on the belief that employees in the yard, familiar with the continuously recurring movement of the cars, will take reasonable precaution against their approach, especially where the cars are moving so slowly that ordinary attention on an employee's part would enable him to avoid them.—Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 885.

¶ 1104. A brakeman of a railroad owes a duty to the company to familiarize himself with the location of buildings along the track, so as to avoid injury.—Carr v. Grand Trunk Ry. Co. of Canada, 152 Mich. 138.

¶ 1105. It is the duty of an engineer to know the duties of a station agent along the line of the railroad so far as they relate to the proper discharge of the engineer's duty and failure to inform himself of such matters may constitute negligence on his part.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 1106. A plaintiff brakeman riding on the top of defendant's freight car in the discharge of his duties, owes only a duty of reasonable observation of his surroundings in the light of experience, and is not required to anticipate that wires would be strung over the track at a height in violation of law.—Meyers v. Detroit & C. R. Co., 166 Mich. 408.

§ 59g. ——Mining.

Proximate cause of accident to miner, see ante § 43.

Safety of miner and mining equipment, see ante § 50.

Mine employees as fellow-servants, see ante § 55p.

Assumption of risk by mine employees, see ante § 56n.

Jury questions as to contributory negligence of mine employees, see post § 68e.

¶ 1107. Whether a plaintiff employee in a mine should be held to be charged with knowledge of a chute into which he fell and was injured, depends on whether such chute would or would not escape ordinarily careful observation.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 1108. Where a plaintiff miner proceeds to timber the roof of a raise some hours after blasting, and knows the increased danger of such delay, or if as a reasonable person he should have known of it, he cannot recover of defendant employer for an injury to him from the falling of ore from said roof.—Hoaking v. Cleveland Iron Mining Co., 163 Mich. 538.

¶ 1109. Where a miner experienced in the use of dynamite prepares a number of blasts, lights them, goes away to a place of safety, counts the explosions, assumes that all of his charges have exploded, returns and is injured by an explosion of a remaining charge, he is guilty of such negligence as bars his recovery.—Snarski v. Montreal Mining Co., 176 Mich. 698.

¶ 1110. For a miner on being suddenly confronted by a moving car in a narrow passage of a mine, to step in his excitement to the side where he came into contact with an exposed electric wire instead of choosing the opposite side where he could have stood in safety, is not contributory negligence as

a matter of law.—Hazzard v. Consolidated Coal Co., 133 Mich. 368.

§ 59h. Improper use of appliances and dangerous methods of work.

Methods of work, see ante § 52.
Assumption of risk from dangerous methods of work, see ante § 56k.
Avoidance of known or apparent dangers, see ante § 59e.

¶ 1111. Where an instrumentality furnished by the master is safe when properly handled the servant cannot handle it improperly and then recover damages for injuries received by him as the result.—Alford v. Metcalf Brothers & Co., 74 Mich. 369.

¶ 1112. An operator is guilty of contributory negligence if, where it is dangerous to remove, while a saw is in motion, the refuse accumulating around a lath machine, he fails to stop the saw though able to do so, and goes on with such removal.—Torongo v. Salliotte, 99 Mich. 41.

¶ 1113. Where the servant may perform his work in two ways, one safe, the other dangerous, the master is not responsible for injuries to him where he voluntarily assumes the dangerous way.—Kopf v. Monroe Stone Co., 133 Mich. 286.

¶ 1114. Where two methods are open for the performance of a duty, one dangerous and the other safe for the operator, one who chooses the dangerous method rather than the safe will be precluded from recovery.—Lukovski v. Michigan Cent. R. Co., 164 Mich. 361.

¶ 1115. It is contributory negligence to reach over a revolving circular saw to take a piece of lumber in such a way that a slip or the cessation of pressure would throw one's arm against the saw.—Lindstrand v. Delta Lumber Co., 65 Mich. 254.

¶ 1116. A laborer in a saw-mill who undertakes to saw a piece of scantling by leaning over the saw with one arm stretched across it, so that, if he slips, the destruction of his arm is inevitable, is guilty of contributory negligence.—Lindstrand v. Delta Lumber Co., 65 Mich. 254; Lindstrand v. Delta Lumber Co., 68 Mich. 261.

¶ 1117. It is contributory negligence for the operator of a circular saw to reach over and place his body in a line of danger where the machine was likely to throw boards, and did throw the one which hurt him, where the object of so reaching was to grasp a lever used for freeing the machine when it clogged and he was familiar with it and might have adapted the location of the lever to his short stature by means of a rope as was customarily done before or might have walked around the machine and stopped it by means of a lever on the other side, but instead of doing either was hasty and forgetful of the danger.—Dutchowski v. Handy Things Co., 141 Mich. 11.

¶ 1118. It is contributory negligence for a servant to attempt to clean out the space between a guide and a saw by pushing with a lath which breaks and throws his hands against the saw.—Deering v. Canfield & Wheeler Co., 126 Mich. 373.

¶ 1119. Where an employee for the purpose of permitting a door to be raised higher, climbed upon the roof of a building to remove a plank, placed to protect the building and those working within from the falling of heavy weights placed above the building and used in raising and lowering a door, he was found guilty of contributory negligence, and his administratrix cannot recover where he was killed by the breaking of a cable and the falling of one of the weights; the employer is under no obligation to inspect where there is no reason to believe that his employees will interfere with the apparatus so as to make it dangerous.—Schwandt v. William Wright Co., 126 Mich. 609.

¶ 1120. Where defendant has provided two safe ways by which its employees may reach certain machinery which they are accustomed to use in their work, and plaintiff, one of such employees, chooses a third way, by means of a ladder, and on account of a defect in such ladder falls and is injured, plaintiff is not entitled to recover.—Perry v. Michigan Alkali Co., 150 Mich. 587.

¶ 1121. Where an employee sues his employer for personal injuries sustained by having his arm caught in the cogs of a machine which he was cleaning, he cannot recover if it appears that the work he was doing at the time of the accident did not require him to put any part of his person in dangerous proximity to the cogwheel, and that the accident would not have happened if plaintiff had conducted himself as an ordinarily prudent man should have done.—Schulte v. Pfaudler Co., 150 Mich. 427.

¶ 1122. An experienced workman, familiar with ropes and their use, who selects a rope from a pile of ropes at hand, knowing for what purpose it is to be used, cannot recover for injury resulting from the breaking of the rope.—Cronin v. Russel Wheel & Foundry Co., 132 Mich. 500.

¶ 1123. Plaintiff was employed by the defendant in the manufacture of paper boxes at a machine called a "stayer machine," used to fasten a gummed tape upon the corners of boxes. The gummed tape was automatically fed by the machine towards the front thereof, and towards the operator. A hammer operated by a foot lever came down upon an anvil so as to press the moistened tape upon the corner of the box. Pincers were supplied with the machine to be used

when necessary in pulling out the tape. Plaintiff while using said pincers stuck her other hand into the machine and under said hammer and a knife used to cut off said tape, said knife being operated by said foot lever. While so engaged her finger was injured by the hammer and knife which had been released by her by putting her foot on said foot lever. Plaintiff understood thoroughly the operation and the dangers of the machine. Held, she was precluded from recovering, by contributory negligence.—Woods v. Kalamazoo Paper Box Co., 167 Mich. 514.

¶ 1124. Where appliances are suitable and in proper condition for the purpose for which they are intended, the master is not liable in damages to an employee who is injured while unnecessarily using them for some other purpose. So held where a miner, while ascending from the mine in a cage constructed for that purpose, was injured by using as a hand-hold part of the apparatus provided for hoisting the cage from the mine.—Jayne v. Sebewaing Coal Co., 108 Mich. 242.

§ 59i. ——Boarding or working about trains or tracks.

Proximate cause of accident to railroad employee, see ante § 43.
Methods of operating and unloading trains, see ante § 52a.
Assumption of risk by railroad employees, see ante § 57.
Avoidance of known or apparent dangers, see ante § 59f.
Jury questions as to contributory negligence, see post § 68f et seq.

¶ 1125. A call "All aboard!" when work cars are about leaving is no more than notice of that fact, and does not justify a servant in boarding or leaving cars in motion.—Novock v. Michigan Cent. R. Co., 63 Mich. 121.

¶ 1126. An employee of a car-building company crawled under some new cars which had been removed from the company's yards as completed, and placed upon defendant railroad company's track for transportation. The conductor of a train had already looked over the cars to see if any one was under them at work. The cars were then coupled to the train and were started up, and the employee was killed while completing some omitted part of construction pursuant to directions. Held, that he was guilty of contributory negligence.—Coops v. Lake Shore & M. S. R. Co., 66 Mich. 448.

¶ 1127. On a signal for brakes, a brakeman, standing on a flat-car in a freight train, caught hold of a ladder on the side of a box-car, and, swinging his body around to ascend, came in contact with a bridge, was thrown down and killed. Held, that he was guilty of contributory negligence.—Illick v. Flint & Pere Marquette R. Co., 67 Mich. 632.

¶ 1128. An experienced head-brakeman, whose hand was injured while he was coupling cars, was held to have been grossly careless, where, by his own testimony, it appeared that he was doing the switching of the train and was told to hitch on to a car at a station, and that while the train was moving backward, as required by his signal, he put the coupling pin in place, and noticing that the draw bar was defective, he attempted to raise the drawbar with his knee, but that it did not come up high enough and slipped and hurt his fingers; and that if he had looked around before the cars came together he could have stepped out from between the cars.—Karrer v. Detroit, G. H. & M. R. Co., 76 Mich. 400.

¶ 1129. It is contributory negligence on the part of a switchman to ride in a sitting position upon the beam of the pilot of a road-engine, with his feet hanging down over the cowcatcher, and his personal representative is therefore precluded from recovery in a case where he was killed through the locomotive, on which he was riding, running into a truck owned by defendant and driven by this teamster.—Glover v. Scotten, 82 Mich. 369.

¶ 1130. One who undertakes to uncouple cars as they are passing over a "split switch," which he knows cannot be blocked, is guilty of negligence which precludes recovery for injury, whether the railroad company is or is not in fault for using such switch.—Grand v. Michigan Cent. R. Co., 83 Mich. 564.

¶ 1131. A brakeman who rides in a standing position on the brakebeam of the tender of an ordinary road engine while backing across a river upon a trestle, at a rate of speed of from five to eight miles per hour, he having no place to hold to except the drawbar, against which he leans, and being in a position where he cannot see the engineer or fireman or be seen by either of them, is guilty of such negligence as will bar a recovery for injuries received by his being struck by the end of a gate which had become unfastened, and swung partly across the track, so as to come in contact with the rear end of the tender, and slide along, and crush the brakeman against the drawbar.—Benage v. Lake Shore & M. S. R. Co., 102 Mich. 72, aff'd on rehearing 102 Mich. 79.

¶ 1132. The contention made in an action to recover for injuries sustained by a brakeman being struck by a gate swung partly across the track, that the swinging in of the gate was not one of the dangers to be expected, and that the brakeman had the right to assume that the railroad company would discharge its duty, and not permit the gate to be unfastened or across the track at the time of the accident, as it was closed only at night and opened each morning, cannot be sustained, the brakeman being in a position where he could not escape injury if

the tender backed into any other obstruction upon the track, and likely to be thrown off by any sudden starting of the engine; nor will it do to say, under these circumstances, that, because it was the custom of others to ride in the same exposed place, therefore the brakeman was in the exercise of due care.—Benage v. Lake Shore & M. S. R. Co., 102 Mich. 72, aff'd on rehearing 102 Mich. 79.

¶ 1133. The negligence of a brakeman, if any, in riding upon the pilot of an engine to the place where a coupling was to be made, cannot be said to have contributed to injuries sustained by him in consequence of the breaking of the pushbar while he was standing upon the crossbar of the pilot attempting to make the coupling, it appearing that it would have been necessary for him, in any event, to get upon the crossbar in order to perform such service.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 1134. Two cars coupled together had each a coupling lever. In uncoupling on one side the lever of one car was used, while in uncoupling on the other side, the lever of the other car must be used. Plaintiff, a brakeman, tried to operate one of the levers and could not, owing to its defective condition. Instead of trying the other lever, which was in good condition, he went between the cars to uncouple by hand and was injured. Held, he was barred from recovering by contributory negligence.—Wight v. Michigan Cent. R. Co., 161 Mich. 216 (Moore, J. dissenting).

¶ 1135. It seems that a conductor who stands on the top of a car to hold the trolley on the wire while taking the car to the barn is guilty of contributory negligence.—Whitcomb v. Detroit Electric Ry., 125 Mich. 572.

¶ 1136. A foreman of a railroad section gang who, while inspecting his section, uses a tricycle instead of the hand-car which the company has provided for his safety, and who, in consequence of his going alone thereupon (which he was not required to do), is overtaken by a train and injured, cannot recover.—Jolly v. Detroit, L. & N. R. Co., 93 Mich. 370.

¶ 1137. Plaintiff was a foreman in charge of defendant railway's coal dock. His duty was to oversee and assist in the coaling of the engines by means of large buckets, which were hoisted full of coal from the dock and dumped upon the tenders. While plaintiff was steadying with his hand one of the ascending buckets, the door at the bottom of the bucket jarred open and struck plaintiff's hand. A rope was attached to the bucket by which plaintiff might have guided and steadied it. Held, he could not recover, since he chose a dangerous method when a safe one was open to him.—Lukovski v. Michigan Cent. R. Co., 164 Mich. 361.

¶ 1138. Plaintiff was employed in making up trains operated by defendant company, and for some three months had assisted in uncoupling air hose and engines, coupling safety chains, and similar work. He was injured by stepping between a coach and engine to close the jaw of a coupler so that it would be out of position to couple. From his own evidence it was shown that he was negligent in so doing. Held, that he was guilty of contributory negligence.—McCauley v. Michigan Cent. R. Co., 167 Mich. 230.

¶ 1139. Where a car repairer goes between two freight cars in a switching yard, without any one else present to caution and protect him and without displaying warning signals or flags, according to the rules of the company, he assumes the risk and is guilty of contributory negligence.—Garlinghouse v. Michigan Cent. R. Co., 174 Mich. 73.

¶ 1140. It is contributory negligence for an experienced employee of a coal company engaged in loading a car of not unusual width, to stand with knowledge of the danger, in a narrow space between the timbers of a coal tipple and the side of the car while removing a block from beneath its wheels in order to permit it to run down an incline.—Lewis v. Wolverine Coal Co., 186 Mich. 564.

§ 59j. Dangers not known or understood.

Assumption of risks from latent or unknown dangers, see ante § 56c.

¶ 1141. An employee who was injured by the fall of a rack suspended from the ceiling of the room in which he worked, was not guilty of contributory negligence in working near the rack, as it was not part of his duty to examine or use the rack, nor was it obviously dangerous to one working near it.—Corbett v. American Screen Door Co., 133 Mich. 669.

¶ 1142. A switchman is not guilty of contributory negligence in failing to get off the side of a car, to avoid a collision with a coal chute, where he testifies that he knew of the chute and was in the act of removing to the rear of the car when his foot was crushed by a pile of lumber some distance from the chute.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 1143. One who has no knowledge of the special dangers attending the handling of dynamite and fulminating caps, and who is not informed thereof by his employer, cannot be charged with contributory negligence that will prevent his recovering for injuries received.—Mather v. Rillson, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

¶ 1144. A brakeman who sustained injury by the shifting of a car platform while he was attempting to couple cars while on the inside of a curve, was not guilty of contribu-

tory negligence in getting on such inside of the curve, where no harm would have come to him had the platform not shifted.—Hewitt v. East Jordan Lumber Co., 136 Mich. 110.

¶ 1145. An employee who drank of the contents of a water cooler manufactured by defendant and furnished for the use of its employees, and was poisoned by an irritant poison which had been placed in such cooler for cleaning purposes, without notice to such employee, was not guilty of contributory negligence.—Geller v. Briscoe Mfg. Co., 136 Mich. 330.

§ 59k. Using defective tools, machinery or appliances.

Safety and sufficiency of tools and appliances, see ante § 46.
Duty of master to inspect and repair, see ante § 53.
Assumption of risk from master's negligence or nonperformance of duty, see ante § 56f.

¶ 1146. An employee who voluntarily remains in service in spite of defects in the machinery used and in the means employed to guard against accident, and without any promise by the employer to correct them, is guilty of contributory negligence, and cannot recover for any injury he may suffer in consequence.—Swoboda v. Ward, 40 Mich. 420.

¶ 1147. An employee informed of and understanding the dangerous character of machinery assumes the risk, and in remaining is guilty of such negligence as, notwithstanding the employer's negligence, will prevent his recovering for an injury.—King v. Ford River Lumber Co., 98 Mich. 172.

§ 59l. Disregard of rules, warnings or instructions.

Rules and orders, see ante § 52.
Warnings and instructions, see ante § 54.
Assumption of risks from violation of rules, orders and instructions, see ante § 56j.
Assumption of risk by railroad employees, see ante § 57.
Questions of law and fact, see post § 68f.

¶ 1148. There can be no recovery on account of a death which was caused by the decedent's own negligence in working, contrary to orders, a pump in a mine at the time men at the windlass are raising or lowering buckets.—Lendberg v. Brotherton Iron Min. Co., 97 Mich. 443.

¶ 1149. No recovery can be had against an employer for the death of a fourteen-year-old employee resulting from his coming in contact with an uncovered revolving shaft, where the deceased had no duties to perform with or about the shaft, and had been warned to keep away from it.—Monforton v. Detroit Pressed Brick Co., 113 Mich. 89.

¶ 1150. It is contributory negligence for a servant to go in the dark without a lantern on a narrow footway passing on the top of vats, some of them full of boiling liquid into which he fell, where condensing steam made the walk slippery, and where he had been told that he must be careful because of working over boiling hot liquids and had been instructed, though in broken English not perfectly understood, and had been working in the place for a week observing conditions.—Shippey v. Grand Rapids Leather Co., 124 Mich. 583.

¶ 1151. The mere presence of an employee in a doorway engaged in removing the door and obstructing it so that he had to be pushed aside, is not such warning to a fellow employee that a platform and stairway inside the door had been removed as to make him negligent as a matter of law in not heeding the warning.—Preuschoff v. B. Stroh Brewing Co., 132 Mich. 107.

¶ 1152. A driller in a stone quarry who sustained injury by an explosion resulting from his forcing dynamite into too small a hole in the rock in a stone quarry, and who in so doing acted at the request of the loader who was a coservant and outside the line of his duties, was, even on the assumption that he was engaged in loading holes, given sufficient notice of danger by being instructed by such loader how to do the work safely, and the employer would not have been bound to anticipate that the driller would attempt to force the dynamite into a hole too small.—Kopf v. Monroe Stone Co., 133 Mich. 286.

§ 59m. ——Operation of trains.

Avoidance of known or apparent dangers, see ante § 59f.
Dangerous methods of work, see ante § 59l.
Jury questions as to contributory negligence, see post § 68f et seq.

¶ 1153. If the conductor of a freight train is killed as the result of his failing to act upon a rule of the company, familiar to him, warning the operators of such trains to keep the latter under full control within station limits, in the expectancy to find the main track occupied, no recovery can be had in an action for damages for the death.—Enright v. Toledo, A. A. & N. M. R. Co., 93 Mich. 409.

¶ 1154. A violation of rules of a railroad company, such as going between moving cars to uncouple them, is contributory negligence preventing recovery for injuries sustained unless the company has sanctioned the custom of its employees in acting in violation of the rules, so that they are abrogated.—Fluhrer v. Lake Shore & M. S. Ry. Co., 121 Mich. 212.

¶ 1155. An experienced brakeman got off of a train at a station, there being no necessity in the discharge of duty that he should do so, did not attempt to get on the train until it was in motion, passed several cars with

side-ladders on without attempting to get aboard, and, while attempting to climb upon a car not belonging to his employer, pulled the hand-hold out of the wood, which had become rotten, so that he was dragged under the train. The master's rules forbade use of foreign cars without examining the ladders on them. Held, that he was guilty of contributory negligence.—Wilson v. Michigan Cent. R. Co., 94 Mich. 20.

¶ 1156. An experienced brakeman, who, disregarding the company's rules and his contract of employment, unguardedly steps, for the purpose of reversing a crooked link so as to make a coupling, upon the track in front of a tender and engine that are approaching him "as fast as a fast walk," but the engineer and fireman of which are subject to his orders, and who, while walking sideways upon the track, trying to reverse the link, stumbles against a pile of ashes recently dumped upon the track from a passing engine and not observed by him, falls, and is injured, is guilty of such contributory negligence as precludes recovery.—Loranger v. Lake Shore & M. S. R. Co., 104 Mich. 80.

¶ 1157. A locomotive fireman who, having been notified that a track over which he is about to run is new, and that he should be prepared to take care of himself in case of accident, voluntarily, and against the warnings of the engineer, assumes a position in front of the cab, upon the side next to an artificial embankment supporting one rail of the track, is guilty of contributory negligence, precluding a recovery for injuries sustained by the overturning of the engine upon the giving way of the embankment.—Niles v. Minneapolis, St. P. & S. Ste. M. R. Co., 107 Mich. 288.

¶ 1158. In the case of injury from a rear end collision with a train standing at a station, the railroad company's failure to notify the engineer that the advance train stood on the track at the station would not render it liable to him for the injury, in view of a rule of the company requiring him driving a special to act on the supposition that another train would be met, or that the main track would be occupied at the station.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 1159. Violation of the master's rule against going between moving cars to couple them is not a defense against liability for resultant injury, where such violations by the servants are so customary, universal and notorious that the master may be deemed to have sanctioned an abrogation of the rule.—Fluhrer v. Lake Shore & M. S. R. Co., 124 Mich. 482.

¶ 1160. Recovery by a railroad employee injured while in a cinder pit, when it is alleged an engine was moved without ringing the bell, is not barred by failure to comply with a notice requiring car repairers and others of that department who work about cars to protect such cars with signals when performing work whereby a movement of the cars might result in injury, since such employee is not employed in the car department and is not a foreman.—Bruce v. Michigan Cent. R. Co., 172 Mich. 441.

¶ 1161. Where the rules of a railroad company required car repairers to protect cars between which they were working with blue flags and lights, and there is no evidence that the company's officers knew of the violation of such rule, it is error to instruct the jury that if the rule had not been enforced, failure on the part of plaintiff to observe it would not affect his right of recovery.—Garlinghouse v. Michigan Cent. R. Co., 174 Mich. 73.

¶ 1162. Where a brakeman has been cautioned against the danger of coupling cars loaded with logs, and where he has read a rule of the company forbidding coupling by hand, and calling attention to the fact that logs often project over the ends of cars, there can be no recovery if he is injured while coupling in that manner cars loaded with logs so projecting.—Brennan v. Michigan Cent. R. Co., 98 Mich. 156.

¶ 1163. A switchman who had been strictly cautioned against having anything to do with coupling cars tried to uncouple some while the train was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman and the railroad company had no notice of it. Held, that he could not recover for the injury resulting to him.—Gardner v. Michigan Cent. R. Co., 58 Mich. 584.

¶ 1164. An engineer who in running a railroad train is injured while disregarding the instructions which the company has issued for his guidance, and is therein guilty of gross negligence contributory to the injury, cannot recover damages of the company.—Lyon v. Detroit, L. & L. M. R. Co., 31 Mich. 429.

¶ 1165. Plaintiff's intestate, eighteen years old, was a member of defendant's extra section gang, and as such went from place to place with the construction train, and assisted in unloading material. A train of twenty flat cars had been unloaded, and was returning at the rate of from fifteen to twenty-five miles an hour. The men were riding upon the pilot of the engine, which was running backward, pulling the train. When about a mile distant from the place where the men were to alight, the conductor ordered them to go to the rear of the train, so as to be ready to drop off when the train should slack up for that purpose. The deceased started upon a run to obey the order, fell between the cars, and was killed. He

had been in defendant's employ for about three months, and had been repeatedly cautioned by the foreman of the gang against running backward and forward over the cars while they were in motion. Held, that he was guilty of such negligence as to preclude a recovery for his death.—Saner v. Lake Shore & M. S. R. Co., 108 Mich. 31.

¶ 1166. An electric railway company is not liable for the death of an employee killed by coming in contact with a fuse block on a switchboard while his hand rested on an iron beam, where the testimony showed that he had been warned of the danger and the fuse block and wire pointed out to him.—Cron v. Toledo & Monroe Ry., 132 Mich. 497.

§ 59n. Compliance with orders or requests.

Assumption of risk from compliance with orders or commands, see ante § 561.

¶ 1167. A master cannot escape liability by insisting that his servant is in the wrong in not refusing to obey an unwarranted order within the scope of a supervisor's employment.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 1168. Where a servant in obeying his master's orders incurs the risk of machinery which it is reasonably probable may be safely used by extraordinary caution and skill, he is not guilty of concurring negligence.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 1169. An employee in an iron foundry was injured in consequence of the slipping of a fellow-workman on an icy path, over which they were carrying, under orders to do so, a ladle full of molten iron. Held, that the workmen should have been warned of the dangerous character of the service arising from the contact of water and ice with melted iron, and that without such warning they could not be charged with contributory negligence in not declining the service, or in not removing the ice before going upon it.—Smith v. Peninsular Car Works, 60 Mich. 501.

¶ 1170. A direction to a workman employed in loading slabs on a defective dump-car to fix it up as well as he can does not direct him to incure danger in using a circular saw to which he is not accustomed, nor, if it did, would it justify him in so doing, or in being careless in his use of the saw.—Lindstrand v. Delta Lumber Co., 65 Mich. 254; Lindstrand v. Delta Lumber Co., 68 Mich. 261.

¶ 1171. Where a caving-in of defendant's mine whereby plaintiff's intestate was killed was incident to the work of mining, and where decedent had been ordered to continue at work after complaint made of the unsafe condition of the premises, the defense that decedent was contributorily negligent in knowingly remaining in the vicinity of danger was held inadmissible.—Schlacker v. Ashland Iron Min. Co., 89 Mich. 253.

¶ 1172. Where a carpenter is employed by the owner in constructing a scaffold to do work on a cupola on a new building, the steel framework of which had been constructed by an independent contractor, and is injured as the result of the falling of the scaffold due to the absence of a bolt in a steel beam on which the platform rested, while the doctrine of safe place does not apply, yet the fact that he was directed to begin his work on top of a steel structure finished by an independent contractor is material as bearing upon his contributory negligence and the negligence of his employer.—Porth v. Cadillac Motor Car Co., 198 Mich. 501.

§ 59o. Comparative negligence of master and servant.

¶ 1173. Where a servant, whose duty it was jointly with two others to remove to the ground an ice chute used in conveying ice from railroad cars to an ice house when a car had been emptied, stood between the ice chute and the ice house platform facing a train bringing full cars of ice, and the train struck the chute and forced deceased between it and the platform, held that the negligence of the deceased was not lesser than that of defendant so as to preclude a recovery under Pub. Acts 1909, No. 104, § 2, How. St., 2nd Ed., § 4111, making contributory negligence no defense where negligence of employee less than of employer.—English v. Michigan Cent. R. Co., 188 Mich. 286.

H. ACTIONS FOR INJURIES.

§ 60. Remedy and pleading.

Variance between pleading and proof, see post § 61.

General law of pleading, see Pleading.

Survivability of cause of action for injury to servant, see Abatement § 16; Death by Wrongful Act.

Verdict and findings, see also Verdict.

Judgments as bar or estoppel in later actions, see Former Adjudication.

¶ 1174. Where the declaration in an action for personal injury sustained while working in plaintiff's factory shows substantially that at the time plaintiff was directed to adjust a belt on a shaft the machinery was in motion, it is unnecessary to allege that the regular way to adjust the shaft was when the machinery was not in motion.—Burk v. Burrell, 88 Mich. 289.

¶ 1175. Where the employment of a child under certain age is forbidden by statute (Pub. Acts 1901, No. 113, as amended by Pub. Acts 1905, No. 171) and the violation of such statute is relied upon as negligence in a personal injury suit facts from which

an employment is prohibited by statute must be stated in the declaration.—Van Wyck v. Dickinson, 148 Mich. 418.

¶ 1176. In an action by a servant for personal injuries a declaration disclosing the facts relied upon as to plaintiff's ignorance and want of skill, the kind of labor to which he was accustomed, the danger of the described tool in the hands of an inexperienced workman, the duty of the master to properly instruct the plaintiff in the uses of the tool and its dangerous character, and how to hold it to prevent pieces of iron when cut loose from flying into the eyes, "and to have instructed plaintiff fully in the premises, yet plaintiff says that defendant, well knowing its duty as aforesaid and plaintiff's ignorance in that respect, neglected its duty in the premises, and on said day set plaintiff to work using said machine or tool, and did not then and there have the same in good proper working condition and good repair and order as was its duty, but the same was out of repair in that, etc. (describing wherein it was out of repair)," sufficiently avers neglect of duty on the part of the master to caution and instruct the plaintiff.—Brockmiller v. Industrial Works, 148 Mich. 642.

¶ 1177. A declaration alleged that the defendant ordered the plaintiff to go outside his usual employment of operating and managing the retorts for the manufacturing of wood alcohol, and directed him to help replace a derailed tram car on the track; that defendant did not acquaint the plaintiff with the dangers of the new employment; and that while so engaged plaintiff was injured. Held that the negligence of defendant was sufficiently set out.—Johnson v. Desmond Chemical Co., 152 Mich. 84.

¶ 1178. Where plaintiff alleged that defendant ordered him, outside his usual employment, to help replace a derailed tram car, and that defendant employed an improper method in replacing the car, whereby plaintiff was injured, held that it was not incumbent on the plaintiff to point out in his declaration the proper way for doing the work.—Johnson v. Desmond Chemical Co., 152 Mich. 84.

¶ 1179. In a suit for personal injuries by a servant, it is not always necessary to allege the general use or employment of a device, where the necessity for the same is obvious.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1180. A declaration for negligent injury to a servant is not demurrable for failure to state that the injured person did not know of the danger, if it does aver that he was without fault.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1181. In a suit against an employer for the negligent death of an employee, plaintiff's intestate, plaintiff is not called upon to negative in his declaration every fact which would tend to establish defendant's freedom from negligence.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1182. Declaration construed to aver the operation of a defective machine independent of a guard or want of guard, and also to aver a defective guard and not to aver that the machine was not guarded.—Scherer v. Otis Elevator Co., 167 Mich. 1.

¶ 1183. A declaration held sufficient in an action for injuries caused by the explosion of a boiler as the result of an employer's failure to inspect it.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 1184. Plaintiff alleged that he was employed by defendant corporation as a night watchman in a manufacturing establishment; that there was a second story connected with the first story of the building by a narrow stairway not having any handrail on either side; that under his instructions it became his duty to pass up and down said stairway, and while so doing, in the performance of his duties in the line of his employment, he was hurt, owing to the absence of such protection and while exercising due care and caution. Plaintiff in said declaration called the building in one part a two-story building and in another part a one-story, and designated said stairway sometimes as a stairway and at other times as a ladder. Held, said declaration was sufficient upon demurrer to state a cause of action, under Act No. 285, Pub. Acts of 1909, § 14, requiring stairways to be provided with substantial handrails.—Davis v. Buss Mach. Works, 169 Mich. 498.

¶ 1185. A declaration alleging the injury of an employee by the explosion of a boiler as the result of an employer's breach of his nondelegable duty of inspection, is not demurrable, on the ground that those charged with the duty of inspection were the fellow-servants of the plaintiff.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 1186. A declaration in an action for injuries received by a servant as the result of the explosion of a boiler due to the failure of the master to inspect it, which alleges that the plaintiff was unaware of the defective condition of the boiler, and that he was exercising due care at the time of his injury, is not demurrable on the ground that the defect, if one existed, was as apparent to the plaintiff as to the defendant.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 1187. In an action by a servant against his employer for personal injuries a declaration stating the duties of the defendant under eight heads and averring that none of these duties was performed, causing injuries to plaintiff, reasonably informs the defendant of the nature of the case it is called upon to defend and is sufficient under the

Judicature Act.—Douglas v. Temple Mfg. Co., 197 Mich. 138.

Right to sue in local state courts on cause of action under Federal Employers' Liability Act arising in other state, see note, 16 N. C. C. A. 191-197.

§ 60a. ——Railroad accidents.

Proximate cause of accident, see ante § 43.
Sufficiency and safety of tracks, bridges and other railroad equipment, see ante § 49.
Methods of operating and unloading trains, see ante § 52a.
Fellow-servant rule as applied to railroad employees, see ante § 55j.
Risks assumed by railroad employees, see ante §§ 57, 58.
Contributory negligence of railroad employees, see ante §§ 59f, 59i, 59m.
Issues and variance in actions by railroad employees, see post § 61a.

¶ 1188. In an action against a railroad company for personal injuries, a declaration alleging that plaintiff, while acting under the foreman, was ordered by him to pull the coupling-pin and jump across to the other car, and that then without any notice to plaintiff the foreman let off the brake, which suddenly accelerated the speed of the car and widened the distance which plaintiff was to jump, that plaintiff had no knowledge or information that the brake was to be let off, and that by that means plaintiff was injured without fault or negligence on his part, was held sufficient.—Erickson v. Milwaukee, L. S. & W. R. Co., 88 Mich. 281.

¶ 1189. A declaration, in an action against a railroad showing that the engineer ran his engine against plaintiff when moving it on orders received from the roadmaster, is defective where it contains no allegation of fact indicating that the order was negligent or improper, and does not state that the customary signals were omitted by the engineer.—Hammond v. Michigan Cent. R. Co., 162 Mich. 431.

¶ 1190. A declaration the gist of which is that defendant's roadmaster directed an engineer in charge of defendant's engine to move the same when plaintiff was in a place of danger, that is, a few feet in front of the engine on the track and with his back towards the engine, does not on its face disclose negligence.—Hammond v. Michigan Cent. R. Co., 162 Mich. 431.

¶ 1191. In an action against a railroad to recover for the death of a sectionman at a crossing, it was held that the declaration stated a cause of action independent of statute, counting upon a common-law duty to furnish a locomotive with a suitable whistle as a reasonable instrumentality in its efficient operation, and a breach thereof.—Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 1192. In an action against a railroad to recover for the death of a sectionman at a crossing, it was held that the declaration set forth a statutory duty and also a duty independent of statute to place, equip, and maintain a steam whistle upon the locomotive in a reasonable repair.—Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 1193. In determining the sufficiency of a declaration to recover for a death caused by a boiler explosion, the defendant owner of the engine, having the care and control of same, is presumed to have as good, if not better, means of information as to its construction and condition as has the plaintiff.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 1194. In a suit for the death of plaintiff's intestate from a boiler explosion, the declaration alleged in one count the duty and neglect of defendant to provide a boiler of sufficient strength; to employ inspectors and repairmen; and to cause said inspectors and repairmen to act at proper times in looking after the boiler, water glass, valves, water spaces, fire box, etc. Held, the declaration was not bad on special demurrer as being multifarious and uncertain in alleging different acts of negligence in one count.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 1195. On action against a railroad company for injuries received because of an alleged breach of duty, a statute imposing such duty need not be pleaded by the plaintiff to enable him to avail himself of it when the defendant sets up assumption of risk.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

¶ 1196. An allegation in a declaration in an action by the administrator of the estate of a railroad fireman against an interstate railroad for the negligent death of decedent that defendant owned, at the time of the injury, and was operating a railway system extending through the states of Michigan and Indiana, and that decedent was employed by it in the construction, repairing, and maintenance of the roadbed of such railroad, amounts to an allegation that defendant was engaged in interstate commerce and that decedent was employed by it in such commerce.—Jorgensen v. Grand Rapids & I. Ry. Co., 189 Mich. 537.

General rules applicable to actions under Federal Employers' Liability Act, see note, 6 N. C. C. A. 74-106.
State rules of practice as applicable in actions under Federal Employers' Liability Act, see note, 9 N. C. C. A. 265-277.
Election in actions under Federal Employers' Liability Act, see note, 9 N. C. C. A. 961-702.
Amendment of petition or complaint from common law to statutory action for in-

jury or death or vice versa or from proceeding under State Employers' Liability Acts to Federal acts, see note, 6 N. C. C. A. 225-238.

§ 60b. ——Mining accidents.

¶ 1197. In a suit against an employer for the negligent death of an employee, due to the falling of a skip in a mining shaft, the declaration alleged: (1) That to keep the skip from falling while being loaded the drum must be put in gear with the steam cylinders of the hoist; (2) that the only way to do this is for the engineer to stand by the hoist with his hand on the friction lever; (3) that the engineer's other duties make it at times impossible for him to do this; (4) and therefore it was defendant's duty to publish a rule for notifying the engineer that the skip was being loaded. Held, these allegations sufficiently established the duty in question, of the defendant.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1198. In a suit for personal injuries to a servant from the falling of a mining skip, the declaration sufficiently alleges the duty of the master, and his breach thereof, which states that it was his duty to see that the skip be kept firmly secured while the servant was standing on it, engaged in loading, and that he failed to provide a safe place for the servant to stand while so engaged.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1199. In a suit against an employer for the negligent death of an employee, due to the falling of a skip in a mining shaft, the declaration alleged: (1) That to securely hold the skip while being loaded, the friction bar must be kept in place by the hand of the engineer; (2) that the employee was negligently sent upon the skip; (3) that on account of the lack of a rule directing the engineer to stand by and hold the friction bar, the drum became ungeared, and the skip fell and injured the employee. Held, these allegations are sufficient to show that defendant's failure to make necessary rules was the proximate cause of the accident.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1200. In a suit for personal injuries to a servant from the falling of a mining skip, the declaration sufficiently alleges the negligence of the defendant in not providing a necessary attachment to be the proximate cause of the accident, by stating that "because of the negligence aforesaid, the skip fell," etc.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1201. In a suit against an employer for the negligent death of an employee, due to the falling of a skip in a mining shaft, the declaration alleged: (1) That to make the skip safe, the engineer must remain at the hoist and keep the friction lever in place; (2) that the defendant well knew that the engineer was by other duties called away from the hoist at times; (3) that the defendant negligently required the engineer to be away from the hoist, on other duties, when it was being loaded, whereby the skip fell and the employee was injured. Held, the declaration sufficiently alleged a breach of duty by defendant to employ sufficient men.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1202. In a suit for personal injuries to a servant due to the falling of a skip into a mine shaft, the declaration alleged that: (1) Unless the friction lever is kept in place by hand, it will work loose and let the skip fall; and (2) that the engineer was required by other duties to leave the hoist, and as a consequence the friction lever did work loose and the skip did fall. Held, the declaration sufficiently alleged what caused the skip to get loose, and descend.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1203. In a suit against an employer for the negligent death of an employee, due to the falling of a skip in a mining shaft, the declaration alleged: (1) That to securely hold the skip while being loaded the friction bar must be held in place by the hand of the engineer; (2) that the employee was negligently sent upon the skip; (3) that on account of the lack of a rule directing the engineer to stand by and hold the friction bar, the drum became ungeared, the skip fell to the bottom of the shaft, and the employee was injured. Held, these allegations were sufficient to show how the drum became loose and the skip descended.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1204. In a suit for personal injuries to a servant from the falling of a mining skip, the declaration sufficiently alleges the defendant's negligence as the cause of the injury, which states that, by reason of his failure to have the skip securely kept in place at the collar of the shaft, the skip fell, etc.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1205. Plaintiff sued defendant employer for personal injury of plaintiff's intestate, due to the falling of a skip in a mining shaft. The issuable facts were: (1) Whether the defendant was guilty of negligence in failing to make and promulgate a rule for notifying the engineer when loading was being done, and requiring him to remain at the hoist to set the foot brake and keep in place the friction lever; and (2) whether, if so, such negligence was the proximate cause of the death of plaintiff's decedent. These facts were alleged in the declaration. Held, the declaration was not demurrable because it failed to allege that the foot brake was or was not set.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1206. A declaration setting forth facts to show that defendant failed to employ suf-

ficient men in the work of managing and loading a mining skip sufficiently alleges this negligence as the cause of the accident when it states that by reason of the negligence aforesaid the skip fell, etc.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1207. Where a count in a suit for personal injuries to a servant from the falling of a mining skip alleges a breach of duty by the master for failure to provide an attachment to hold the friction lever in place, it is not necessary to allege whether the engineer in charge of the hoist did or did not know that the servant was engaged in loading the skip.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1208. Where a count alleges as the cause of the falling of a mining skip, the failure of the master to provide a certain attachment to keep the friction lever in place, the allegation is sufficient which states that the hoist was not so fitted with the device, and that while the engineer was absent and not attending to the friction lever, the skip fell.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1209. Where, in a suit for personal injuries, the facts set forth in a declaration show that a certain appliance was necessary and practicable to pervent a mining skip from falling and injuring the plaintiff, the allegations of duty on the part of the defendant to supply the same are sufficiently definite if, from the facts alleged, the duty may be implied.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1210. A declaration alleged that the injury of an employee by the falling of a mining skip was caused by the negligence of the employer in failing to provide a certain attachment. Held, that negligent absence of the engineer from the hoist was only a concurring cause of the accident, and failure to allege this fact did not render the declaration insufficient.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1211. A declaration attempted to place a liability on the defendant employer for an injury to an employee, caused by the falling of a mining skip while it was being loaded. The negligence alleged was the failure of the defendant to publish a rule that the engineer should remain at the hoist while the loading was going on. Held, that the declaration was not demurrable on the ground that the servant assumed the risk, since it contained no intimation that he knew there was no such rule.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1212. In a suit for personal injuries to plaintiff miner, due to an explosion in defendant's mine, the declaration alleged that various shifts of men were employed in working the different levels of the mine; that in order to protect plaintiff from injury it was necessary that one shift should know what the other shifts were doing with regard to the placing of explosives; that it was necessary that there should be adequate appliances for hoisting the shifts of men up the shaft to the surface, to escape injury; that it was necessary that there should be an adequate signal system in said shaft to secure the quick operation of said hoisting apparatus; that defendant failed to supply such adequate signal system and appliances, and upon signal being given failed to use reasonable diligence in operating said hoisting apparatus so as to enable plaintiff to get out of said mine and out of the way of dangerous explosives placed in one of the levels of the mine by other shifts of men, and that as a result plaintiff was injured by explosives in said mine. Held, the declaration was sufficient upon demurrer.—Panela v. Castile Min. Co., 165 Mich. 329.

§ 61. Issues, proof and variance.

Burden of proof, see post § 62.

General law as to issues, proof and variance, see Pleading, IX, X.

¶ 1213. In an action for negligent injury the inquiry should be confined to what is pertinent. Where the accident arose entirely from plaintiff's use of a trimmer saw, inquiry as to the general management of the mill or the particular management of slab-cars should be excluded, whatever negligence there may have been in furnishing a poor slab-car or in requiring plaintiff to use it.—Lindstrand v. Delta Lumber Co., 65 Mich. 254.

¶ 1214. The servant, in an action for damages against the master for personal injuries received, in the course of his employment, as the result of the defendant's negligence, must bring by his proof the cause of the accident within the allegations of his declaration.—Wheeler v. Berry, 95 Mich. 250.

¶ 1215. Employers may use such machinery as they choose, provided it is sound, well made and kept in repair: and in an action for injuries caused by its use the question whether a different kind of machinery would not have been safer cannot be considered.—Richards v. Rough, 53 Mich. 212.

¶ 1216. In an action for an injury caused by defendant's negligence in setting plaintiff, a boy thirteen years old, at work upon a dangerous machine without proper appliances, evidence that working at the machine made the boy dizzy is not admissible, no complaint being set forth in the declaration of negligence in respect of that, and it not being suggested that such effect upon plaintiff led in any way to the accident.—Steiler v. Hart, 65 Mich. 644.

¶ 1217. Evidence that a plank on which a servant stood while oiling a shaft was slippery with oil and water will not support a recovery under a declaration alleging im-

proper construction of the platform on which he stood.—Zimmerman v. Detroit Sulphite Fibre Co., 113 Mich. 1.

¶ 1218. The question as to whether plaintiff's employment as a common laborer included the duty of assisting in holding up and bolting to place an iron plate forming a part of the shaft in which the buckets in a beet sugar mill were conveyed was immaterial, in an action for injuries received while performing such work as directed by his master, by one corner of the plate being caught by a descending bucket; since the danger was so apparent as to call for no warning.—White v. Owosso Sugar Co., 149 Mich. 473.

¶ 1219. In an action by a servant against the master for personal injuries where the sole theory of the declaration is that boards upon which heavily loaded trucks were moved were uneven, unsound, rotten, unsafe and defective in consequence of which the place was unsafe, the plaintiff cannot recover upon the theory that sound boards were not sufficiently strong or that the end of the boards would be pressed into the soft ground. —Shanke v. United States Heater Co., 125 Mich. 346.

¶ 1220. There can be no recovery in an action for personal injuries to a servant, where the declaration alleged negligence on the part of defendant in employing plaintiff, a boy of immature years and without experience, to work on a dangerous machine requiring skill and extraordinary care to operate, and in failing to warn plaintiff of the dangerous character of such machine, and to properly instruct him how to operate it, and contained no allegation as to such machine being out of repair; but where the evidence showed that plaintiff was injured by the "self tripping" of the machine, due to the fact that it was out of order and not in safe condition to operate; such variance between the proof and the pleading being fatal.—Chall v. Detroit Stove Co., 140 Mich. 68.

¶ 1221. Under a declaration for negligence consisting in the misplacement of a controlling lever so that an operator to use it had to place his body in a line of danger, where it appears that the machine was not originally faulty but that the change in location of the lever was due to wear allowing it to swing away from its original position, the liability, if any, must be based on negligence in not repairing after knowledge or notice or in not inspecting and discovering it.—Dutchowski v. Handy Things Co., 141 Mich. 11.

¶ 1222. Variance between a declaration alleging defective guard and proof that there was no guard on a machine, held fatal.—Scherer v. Otis Elevator Co., 167 Mich. 1.

¶ 1223. In a suit for personal injuries a declaration alleged that while attempting to uncouple cars plaintiff was injured on account of a defective drawhead on the car in question. His proof showed that the drawhead was all right, but that the bolts holding same were defective and caused the accident. Held, the trial court properly refused to direct a verdict for defendant on the ground of variance between the proof and the allegations of the declaration.—Van Leuvan v. Ann Arbor R. Co., 167 Mich. 355.

¶ 1224. Plaintiff was injured by a log while employed in loading logs on the carriage of the saw in a sawmill. He alleged in his declaration that the injury was due to defects in the kickers used to kick the logs over on the carriage. Under this declaration he was permitted to prove that the steam engine operating the kickers was out of repair. Held, although the declaration was not broad enough to admit this evidence, still the decision should not be reversed, since plaintiff would, upon request, have been permitted to amend, and defendant did not complain of being taken by surprise.—Edwards v. Engadine Lumber Co., 158 Mich. 428.

¶ 1225. Where, in a suit for injuries to an employee at a drug store from the explosion of a soda fountain tank, the negligence charged is the failure to furnish sound and safe tanks, it is immaterial whether defendant's negligence arises from a failure to inspect and repair or a failure to substitute new tanks for old ones.—McDonnell v. Central Drug Co., 170 Mich. 291.

¶ 1226. Where a plaintiff miner alleges negligence by the defendant for failure to supply adequate appliances for hoisting the miners out of a mine and an adequate signal system to use in times of danger from explosives, he cannot under such a general allegation be permitted to show that some other signal system and arrangement would have been better than the one in use at the particular time, if that in use was in a reasonably proper condition to do what it was expected and required to do when signals were given for hoisting.—Panela v. Castile Min. Co., 165 Mich. 329.

¶ 1227. A declaration of a miner, injured by a fall of rock, alleged that defendant was negligent in mining out all the ore between two levels without leaving pillars or obstructions to prevent rock from above the upper level from falling into an opening between the levels and into the lower level, and in failing to inspect above the upper level. It was claimed that recovery was had on a different theory; that rock fell from the back to the floor of the upper level; that it then broke and a part of it rolled into the opening; that defendant should have anticipated such a happening; and that inspection should have been made and continued from the place where the rock fell. The testimony was conflicting upon every phase of the case, which was tried upon the merits. Held, plaintiff recovered upon the case made

by his declaration.—Moilanen v. Washington Iron Co., 176 Mich. 505.

¶ 1228. Where a woodworker injured by a sliver flying from a machine bases his right to recover on a violation of a promise to place a hood over the side knives, evidence of a custom of other factories using similar machines to place a hood over the knives is inadmissible.—Gorrey v. W. F. Hurd Co., 177 Mich. 116.

¶ 1229. There is a variance between a declaration averring that a quarry employee carried his dinner to his working place and was injured at his working place during the noon hour, and proof that he was on a public highway where he had gone to avoid the blasting at his working place.—Moronen v. McDonnell, 177 Mich. 691.

¶ 1230. In an action to recover for injuries sustained by a child of twelve years while employed at a dangerous machine in violation of Act No. 285, Pub. Acts 1909, as amended by Act No. 220, Pub. Acts 1911, §§ 4009-4063, How. St., 2nd Ed., held that there was not a variance between the allegations of the declaration and the proof.—Schuetz v. Van Orman, 184 Mich. 478.

¶ 1231. The testimony of an employee who was in a position to know, that the signaling apparatus for the movement of a skip in a mine shaft, was never inspected except when it failed completely to work, is admissible under an allegation of the failure of an employer to maintain, inspect and repair a proper signaling apparatus.—Paskvan v. Allouez Min. Co., 187 Mich. 101.

§ 61a. ——Actions by railroad employees.

Proximate cause of accident to mine employees, see ante § 48.
Safety of mines and mining equipment, see ante § 50.
Application of fellow-servant rule to mine employees, see ante §§ 55p, 55q.
Risks assumed by mine employees, see ante § 56n.
Contributory negligence of mine employees, see ante § 59g.

¶ 1232. A declaration for negligent injury to a brakeman while uncoupling cars set forth that it was occasioned by a deep hole between the rails. The evidence was that it was between the rails of a side track. Held, that the declaration would naturally be construed to refer to the main track, and that the variance was material, especially when taken in connection with other variances as to the nature of the hole and the extent of the injury.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 1233. Where the declaration, in an action for negligent injury, alleged that plaintiff was employed as a switchman, and was discharging his duty as such when injured, while the proofs showed that he was foreman of a switch crew and had control of the engine, held, that the variance was immaterial.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567.

¶ 1234. Proof that plaintiff, a common laborer, was sent to pull a coupling pin in a train and that in jumping from one car to another as the train parted he was injured by the foreman's act of releasing brakes without plaintiff's knowledge, thereby accelerating the parting, is not equivalent to showing that his capacity of brakeman for the occasion had been discharged and that of laborer resumed, and therefore is not variant from a declaration alleging that, as a common laborer, plaintiff was sent to perform the duties of brakeman and was injured while so employed.—Erickson v. Milwaukee, L. S. & W. R. Co., 93 Mich. 414.

¶ 1235. A complaint in a negligence case, framed on the theory that a freight car, which the deceased mounted for the purpose of uncoupling, was moving backward uncontrolled, and proof that the train was moving forward under its conductor's order, presents a fatal variance.—Pennington v. Detroit, G. H. & M. R. Co., 90 Mich. 505.

¶ 1236. A declaration alleging "a hole" in defendant's track and proof that there was a space at that point where there were unfilled intervals between the ties making holes into one of which plaintiff stepped are not variant in that the very hole was not specifically pleaded.—Ragon v. Toledo, A. A. & N. M. R. Co., 97 Mich. 265.

¶ 1237. Averment of injury caused by having to walk on an unballasted track while coupling cars and dropping down into the space between ties is variant from proof that the injury was due to resting plaintiff's arm against a car standing there, while waiting for the approach of the car to be coupled, and having his arm caught between the deadwoods of the cars when they came together.—Mueller v. Lake Shore & M. S. R. Co., 105 Mich. 487.

¶ 1238. Under an allegation in a declaration that it was necessary for plaintiff, a brakeman, to ride back and forth on the side of cars and that such was the usual manner of performing and going to and from his work, testimony indicating that plaintiff might lawfully so ride while ascending to the top of the car, did not constitute such a variance as to surprise the defendant.—Potter v. Detroit, G. H. & M. R. Co., 122 Mich. 179.

¶ 1239. A fatal variance between a declaration and the proof of a contract is not shown by an allegation that the plaintiff had previously been employed as a passenger brakeman and proof that he was formerly employed as a freight brakeman.—Sax v. Detroit, G. H. & M. R. Co., 125 Mich. 252.

¶ 1240. A defendant in a personal injury action cannot be heard to object to a variance between a declaration and the proofs where the controversy on the trial was clear, no objection on the evidence was made, the case was tried on the theory supported by the proof and no element of surprise is shown.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 1241. In an action by a brakeman who, while engaged in coupling in front of a moving car, was run over after falling into a ditch covered with snow, which had been constructed during his temporary absence, it was competent for him to testify for what purpose he got down from the ladder and started to pass through in front of the moving car which ran over his leg; as the declaration alleged that he was in the performance of his duty as a brakeman, and was using due care and prudence.—DeCair v. Manistee & G. R. R. Co., 133 Mich. 578.

¶ 1242. In an action for personal injuries sustained in a collision between two trains each containing cars billed to points outside the state, which fact plaintiff could not have discovered, he was held entitled to recover under the Federal Employers' Liability Act though he failed to plead it, an amendment being permissible.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 1243. In an action for personal injuries by a street railway conductor against the street railway company, the failure to properly inspect the car in the barns cannot be relied on for recovery where it is not alleged in the declaration.—Whitcomb v. Detroit Electric Ry., 125 Mich. 572.

¶ 1244. In an action by a motorman for personal injuries where the alleged duty of the defendant street-railroad company was to "equip and supply its said car with sand boxes and sand" the question as to whether there was a pail of sand or a shovel provided with which he could throw sand on the track in case of emergency is wholly immaterial, there being no such ground of negligence alleged in the declaration.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

§ 62. Burden of proof.

Burden of proof in actions for wrongful discharge or wages, see ante §§ 20, 27.
Presumptions, see post § 63.
Weight and sufficiency of evidence, see post § 65.
Instructions as to burden of proof, see post § 71h.
General law as to burden of proof, see Evidence, II.

¶ 1245. The orders of a master are so far presumptively lawful that the servant has the burden of showing a lawful reason for disobeying them.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 1246. A brakeman who enters into a contract with a railway company by which he acknowledges the receipt of a copy of rules of the company, and agrees to abide by them, has the burden of proving that the company sanctioned a departure from one of its rules by a custom so universal and notorious that the company was presumed to have had knowledge of it and to have ratified it.—Fluhrer v. Lake Shore & M. S. Ry. Co., 121 Mich. 212.

¶ 1247. While the law does not hold persons using machinery to any absolute duty of insuring its safety, it requires some care in introducing untried novelties; and where the result of any defect must be an immediate danger to human life, it devolves on those who expose such life to the danger of a new experiment that turns out badly to show that they have followed such a course as the understood rules of service or mechanics applicable to such matters rendered safe according to ordinary probabilities.—Marshall v. Widdicomb Furniture Co., 67 Mich. 167.

¶ 1248. The burden of showing that an employee's injury is within a contract exempting an employer from liability for negligence rests on the latter.—Cottrell v. Michigan United Traction Co., 184 Mich. 221.

¶ 1249. The burden was upon the iron mill company, employer, to show that the servant knew and understood the increased danger, where, in an action for injuries to an infant employee, it appears that he was injured in consequence of a risk not ordinarily incident to the employment, growing out of the master's negligence.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 1250. If a servant shows that he has been injured in consequence of an unusual risk due to his master's negligence the master has the burden of showing that the servant knew of the increased danger.—Swoboda v. Ward, 40 Mich. 420.

¶ 1251. Where a servant shows that he was injured in consequence of an unusual risk due to his master's negligence, the master has the burden of showing that the servant knew of the unusual danger.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 1252. Where, in an action for personal injuries, it is sought to charge one as master, the plaintiff must show that at the time of the alleged injury the relation of master and servant existed between the parties.—Smedley v. Mashek Chemical & Iron Co., 189 Mich. 64.

§ 62a. ——Negligence of master.

Care and diligence required of master, see ante § 33.
Presumptions of negligence, see post § 63a.

¶ 1253. A servant cannot recover from his master for a negligent injury received in

his service without showing some fault on the part of the master.—Quincy Mining Co. v. Kitts, 42 Mich. 34.

¶ 1254. General reputation of unfitness would be admissible as evidence, and might be sufficient to charge the company with knowledge, notwithstanding they may have been actually ignorant of it. The ignorance will be negligence in a case in which any proper inquiry would have obtained the information, and where the duty to inquire was plainly imperative. But the burden of proof to establish the unfitness alleged as the ground of the plaintiff's action and the defendant's knowledge of it is upon the plaintiff.—Davis v. Detroit & M. R. Co., 20 Mich. 105.

¶ 1255. In an action for wrongful death caused by the alleged incompetence of the yardmaster of the railway company, the plaintiff must show that the company was guilty of negligence in first employing such yardmaster because unfitted for the position, or in afterwards retaining him. This may be done by showing specific acts of incompetency, and bringing them home to the knowledge of the company, or by showing them to be of such a nature and character, and frequency, that the company in the exercise of due care on its part must have brought them to its notice.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 1256. A railroad company cannot be held liable as for the consequences of negligently retaining incompetent servants if, in exercising due care and diligence to see that its employees are competent, careful and sober, it fails to discover that they are not. But the degree of diligence which they must exercise must correspond to the servant's responsibility, and it is for a jury to say what reasonable diligence may be. The presumption is that the company has done its duty, and the burden of proving the contrary is on the party complaining of its negligence.—Hilts v. Chicago & G. T. Ry., 55 Mich. 437.

¶ 1257. In an action for wrongful death the burden of proof is upon the plaintiff to show that the defendant sawmill company did not use due care in the selection of a competent sawyer as a fellow-servant.—Kellogg v. Stephens Lumber Co., 125 Mich. 222.

¶ 1258. Before a master can be held liable on the ground that he has in his employ an incompetent servant, it must appear that he has been negligent either in employing or retaining him, and the burden is upon the plaintiff to show negligence in that regard, the presumption being that the master was not negligent in either respect.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 1259. A servant whose employer has not elected to come under the Workmen's Compensation Act cannot recover for injuries in the absence of evidence of some negligence on the latter's part.—Lydman v. DeHaas, 185 Mich. 128, 8 N. C. C. A. 649.

§ 62b. ——Contributory negligence under Federal Employers' Liability Act.

Contributory negligence of servant, see ante § 59.
Presumptions as to contributory negligence, see post § 63b.
Evidence as to contributory negligence, see post §§ 64h, 65 l.
Sufficiency of proofs under Federal Employers' Liability Act, see post § 66.
Jury questions as to contributory negligence, see post § 68.

¶ 1260. In an action under the Federal Employers' Liability Act the burden of proving contributory negligence is upon the defendant.—Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605. (Brooke, C. J., and Ostrander, J., dissenting.)

¶ 1261. In an action under the Federal Employers' Liability Act the rule of the federal courts as to the burden of proving contributory negligence governs.—Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605. (Brooke, C. J., and Ostrander, J., dissenting.)

¶ 1262. The rule of the federal courts in an action under the Federal Employers' Liability Act that the burden of proving contributory negligence is upon the defendant does not prevent the defendant from securing the benefit of the establishment of contributory negligence of the plaintiff by the latter's own testimony, as the burden of proof as to the defendant begins with the condition of the case as it stands upon undisputed facts upon plaintiff's own testimony.—Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605. (Brooke, C. J., and Ostrander, J., dissenting.)

Employee's negligence as sole cause of injury and relation of same to contributory negligence in actions under Federal Employers' Liability Act, see note, 10 N. C. C. A. 926-938.

§ 63. Presumptions.

Presumptions in actions for wrongful discharge or wages, see ante §§ 20, 27.
Burden of proof, see ante § 62.
General law of presumptions, see Evidence, II.

¶ 1263. In a suit brought by a railroad employee against the company for damages caused by the alleged unskilfulness or negligence of another employee of the same company, the defendants are entitled to the benefit of a presumption that they exercised due care in the employment of their servants, and that they had no knowledge of the

defects of character or incapacity imputed.—Davis v. Detroit & M. R. Co., 20 Mich. 105.

¶ 1264. When a master has exercised due care in the employment of a servant, he may rely upon the presumption of competency until he has notice or knowledge to the contrary.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1265. The law raises no presumption that a boy seventeen years of age is too young to manage properly a brake by which is controlled the hoisting and lowering of passenger cages in a mine.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1266. An employee may frequently use machinery in a negligent manner, but if such negligent use leaves no trace behind it, which it is the duty of the master upon inspection to see, no presumption of knowledge on the part of the master arises.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1267. A master is bound to exercise the care only that an ordinarily prudent person situated like himself would exercise, and is bound to know only what such an ordinarily prudent person would know; so one who uses purchased varnishes in his business cannot be presumed to know that a can of "bronzine" contained any dangerous explosive. To know this he must possess more knowledge than is possessed by the ordinarily informed buyer and user of varnishes, and to hold an employer liable for injuries resulting to his employee upon the assumption that he had such knowledge would require him to exercise extraordinary care.—Siegel v. United Elect. Heating Co., 143 Mich. 484.

¶ 1268. A master using paints and varnishes in his business, exercising the care of an ordinarily prudent person in like circumstances, cannot be held liable for an injury to an employee because he had failed to warn him of the danger, where it appeared that although he had knowledge of the danger of bringing paints and varnishes in contact with fire, he could not be assumed to have knowledge that they would emit vapors which would take fire from a stove several feet distant.—Siegel v. United Elect. Heating Co., 143 Mich. 484.

¶ 1269. In an action against a railway company for negligent injury to an employee from a defect in a roadway which has just come under its control from another company, there can be no presumption that defendant had had sufficient time to remedy the defect.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 1270. A court cannot presume that a common laborer in a foundry or machine shop is possessed of the scientific knowledge necessary to enable him to comprehend and avoid the danger liable to ensue upon the contact of molten iron with an icy roadway.—Smith v. Peninsular Car Works, 60 Mich. 501.

¶ 1271. One engaged in railroading may be presumed to understand the nature of the work he is entering upon, and if he is not acquainted with the particular dangers of the line upon which he is to work, it is his duty to give attention to them, and he must be on the lookout for buildings near tracks and to know what persons usually know of the use of side tracks and such dangers as naturally follow.—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 1272. A brakeman is not chargeable with knowledge of the abutting of a fish chute upon a part of the main track outside the yards, where he was not familiar with the surroundings and had no opportunity to make himself familiar with them, and he has the right to expect that such obstacles will not be placed in such close proximity to the track as to make them dangerous to a brakeman using the side ladder of a car; but the rule is very different as to an obstruction abutting on a side track.—Phelps v. Chicago & West Mich. R. Co., 122 Mich. 171.

¶ 1273. A brakeman is chargeable with knowledge of the existence of conveniences for the handling of freight, such as fish chutes, near switch tracks, and must therefore be on the lookout for them.—Phelps v. Chicago & West Mich. R. Co., 122 Mich. 171.

¶ 1274. A switchman operating on a switch for the first time is not bound to know of lumber piled so close to the track as to prevent his riding past it on the side of a car, although he is bound to know of all permanent structures so placed.—Bradburn v. Wabash R. Co., 134 Mich. 575.

§ 63a. ——Of negligence.

¶ 1275. Mere occurrence of an accident with injury raises no presumption of negligence against a master sued by his injured servant.—Fuller v. Ann Arbor R. Co., 141 Mich. 66.

¶ 1276. The mere fact that an accident has occurred resulting in the injury of an employee raises no presumption of negligence on the part of the master.—Siegel v. Detroit, G. H. & M. Ry. Co., 160 Mich. 270.

¶ 1277. The negligence of a master cannot be presumed in an action by a servant for injuries received in the discharge of his duties.—Maki v. Isle Royale Copper Co., 180 Mich. 624.

¶ 1278. While plaintiff employed in defendant's boiler-shop was riveting pieces of a boiler-front placed in position before him, they fell upon him and injured him. Held, that he could not recover without evidence of negligence on defendant's part, the mere fact of the accident not being enough to impose

liability.—Toomey v. Eureka Iron & Steel Works, 89 Mich. 249.

¶ 1279. An engineer who was killed by the derailment of his train in rounding a curve, assumed the risk of the accident happening from a cause for which there was no reasonable explanation.—Peppett v. Michigan Cent. R. Co., 119 Mich. 640.

¶ 1280. In the absence of any evidence of inadequacy of inspection in the barns of a street railway company, a conductor cannot recover for personal injuries by showing that the trolley pole was found badly bent on his first trip out after several miles had been covered without apparent defect and after the trolley had left the wire at one place.—Whitcomb v. Detroit Electric Ry., 125 Mich. 572.

¶ 1281. In the absence of direct testimony it is not within either the province of the court or the jury to speculate as to how an accident happened, wherein a servant fell from the place where he was working.—Sheon v. Kerr-Murray Mfg. Co., 146 Mich. 99.

¶ 1281a. Negligence in failing to provide a safe place to work cannot be predicated on the bare fact that a torpedo was lying on a car which plaintiff, a car-repairer, was repairing, and that when he threw a wrench upon the car it struck and exploded the torpedo, injuring him, and where he saw and recognized it as one of defendant's torpedies; but with nothing to show how or by whom it came there or that defendant was responsible for its being there.—Fuller v. Ann Arbor R. Co., 141 Mich. 66.

¶ 1282. The rule that an accident is not in itself evidence of negligence has no application where a railroad company permitted a planing mill to load refuse in an open barrel car and a piece of the refuse fell off and derailed a handcar upon which plaintiff was riding, there being no other probable theory of the cause of the accident.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 1283. An employer is not liable for injuries to his employee from the explosion of a barrel of paint, which had taken fire without the employer's fault, occurring while the employee and others, at the request of the employer, were endeavoring to extinguish the flames, where the peril was such as to justify the request given.—Burke v. Parker, etc., Co., 107 Mich. 88.

¶ 1284. Where an employee, observing the usual precaution, is injured while engaged in switching and handling cars in the usual and customary manner, negligence on the part of the employer will not be presumed unless it is shown that the method adopted was in itself improper.—Miller v. Michigan Cent. R. Co., 185 Mich. 482.

Doctrine of res ipsa loquitur as applicable in actions under Federal Employers' Liability Act, see note, 10 N. C. C. A. 853-860; 15 N. C. C. A. 591-617.

§ 63b. ——Contributory negligence.

Jury questions as to contributory negligence, see post § 68.

¶ 1285. Plaintiff's decedent was killed while operating a ripsaw, by being struck by a piece of timber thrown back by the saw. No one saw the accident. Held, that it was error to direct a verdict for the failure of the plaintiff to prove that the deceased was exercising due care, since, in the absence of eye witnesses, a presumption of law exists that he was free from contributory negligence.—Van Doorn v. Heap, 160 Mich. 199.

§ 64. Admissibility of evidence.

Evidence in actions for wrongful discharge or wages, see ante §§ 21, 22, 28, 29.

Burden of proof and presumptions, see ante §§ 62, 63.

Weight and sufficiency of evidence, see post § 65.

Evidence in actions for injury to third persons, see post § 79.

General law of evidence, see Evidence.

Proper scope of direct and cross-examination, see Examination of Witnesses.

Acts and declarations by agents and servants as res gestæ, see Evidence §§ 478-484.

Admissions and declarations by servants and agents as evidence against principal, see Evidence, VII, C, 3, D.

Exaction of executory waiver after accident from other servants as admission of liability, see Evidence ¶ 2117.

Judicial notice of mechanical facts and working experiences, see Evidence § 16.

¶ 1286. Where one who has been employed in a manufacturing establishment sues his employer for an injury to his health arising from a process of manufacture, a certificate of plaintiff's admission to the poor-house as a public charge, after such injury, is irrelevant, and is prejudicial to defendant.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 1287. It was error to refuse to permit plaintiff in an action for personal injuries to show how many of the section-men employed had had no experience with that kind of work, the severity of the work, whether any of the men gave out before the accident to plaintiff, whether plaintiff could see the rail before it hit him, and whether loading the rails upon moving cars was more dangerous than upon stationary cars.—Palmer v. Michigan Cent. R. Co., 87 Mich. 281.

¶ 1288. Evidence of the physical facts surrounding an accident are relevant and material in an action under Act No. 104, Pub. Acts 1909, §§ 4110-4116, How. St., 2nd Ed.,

to recover for injuries sustained by a motorman as the result of a collision between interurban cars.—Darling v. Grand Rapids, G. H. & M. Ry. Co., 184 Mich. 607.

¶ 1289. An annual report of the Michigan Bureau of Labor is not admissible to show that a factory inspector ordered the knives of a planer to be covered.—Koehler v. Abey, 168 Mich. 118.

¶ 1290. In an action against a railroad company by one of its engineers for a negligent injury, it was error to permit the introduction by plaintiff of defendant's time-card, which related exclusively to the duty of station agents; the evidence showing that there was no agent at the station where the injury occurred.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 1291. In an action for the wrongful death of an engineer of a railroad resulting from a collision caused by the alleged negligence of the company's yardmaster in sending a switch-engine and a train of cars upon the main track when another train was past due, evidence as to the number of engines ordinarily employed in switching, the number of freight trains there on an average, and the number of tracts is properly admitted as tending to show the character and importance of the yardmaster's work, and the dangers incident thereto.—Michigan Central R. Co. v. Gilbert, 46 Mich. 176.

§ 64a. ——As to existence of relation and scope of employment.

Jury questions as to existence of relation and scope of employment, see post § 67a.

¶ 1292. In an action by a brakeman for injuries received while assigned to more dangerous work, a train baggageman's opinion that the work to which he also was assigned was outside the line of his duty is immaterial.—Jones v. Lake Shore & M. S. R. Co., 49 Mich. 573.

§ 64b. ——As to safety of tools, appliances and places.

Weight and sufficiency of evidence, see post § 65d.

Expert and opinion testimony as to mechanics, construction, tools, and appliances, see Evidence §§ 226, 265.

¶ 1293. In a suit to recover for the death of a motorman alleged to have been caused by the failure of defendant railway to provide a brake as required by statute, it is not reversible error to permit an experienced motorman to testify as to the dangers attendant upon the kind of brake in use upon the car at the time of the accident.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 1294. Evidence as to the customary manner of inclosing elevator shafts is admissible in an action for injuries sustained by an employee, when the character of the inclosure has a causal bearing on the injury.—Fifelski v. Grand Rapids Gas Light Co., 181 Mich. 508.

¶ 1295. Error in the admission of expert evidence as to whether a freight elevator was a place of danger to life and limb, is harmless in a case in which the court will take judicial notice as to the dangerous character of the elevator.—Braasch v. Michigan Stove Co., 153 Mich. 652.

§ 64c. ——Prior or subsequent conditions or mishaps.

Evidence as to conditions and facts at times other than pleaded, see also Evidence § 94.

¶ 1296. In an action for negligence against an employer where, three months before the accident, defendant's elevator was repaired so that there was no difficulty in running it, testimony of a former employee of defendant as to the elevator's condition six months before the accident is immaterial.—Robinson v. Charles Wright & Co., 94 Mich. 288.

¶ 1297. In a suit for negligence against an employer it is not admissible in corroboration of testimony as to the condition of a blower in a planing mill at the time of an accident to show what its condition was a week afterward.—Kinney v. Folkerts, 84 Mich. 616.

¶ 1298. Evidence of a witness as to the condition of a clutch upon a machine may be introduced by plaintiff, although the witness did not examine the machine until two months after the accident, where there was no evidence of any repairs having been made, and the machine was operated in court upon the theory that its condition then was the same as at the time of the accident, and the evidence of defendant's expert indicated that the parts of the mechanism were hard, and not likely to wear seriously in two or three months.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 1299. In an action by a motorman against a street railway company for personal injuries caused by losing control of his car because of the slippery condition of the track, evidence of another runaway under the same circumstances is competent because it would be notice to defendant that it should have made all reasonable efforts to avoid such dangers.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 1300. In an action by a motorman against a street railroad company for personal injuries caused by losing control of his car because of the slippery condition of the track the exclusion of a question to

the depot master, one of plaintiff's witnesses, as to how many cars he had known to run away down the hill on which this car ran, furnishes no basis for an argument that plaintiff was prevented from showing other similar runaways for similar cases upon the same portion of the road, where no attempt was made to show that the witness knew anything about the cause or circumstance of other runaways.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 1301. Testimony tending to show the presence of oil in the pipes through which ammonia in a refrigerating plant was pumped, and the impossibility of entirely avoiding it, was admissible in an action for injuries sustained from the blowing out of a pipe joint, where it appeared that oil had a softening effect on the gaskets of such joints.—Kaess v. Tivoli Brewing Co., 149 Mich. 371.

¶ 1302. In an action for personal injuries where the accident happened through the falling of an elevator there is no responsibility therefor where the evidence wholly fails to show the reason why the elevator had acted as it did, but evidence of other accidents is receivable to show why.—Casterton v. American Blower Co., 142 Mich. 407.

¶ 1303. On the question whether the absence of a guard and a spreader from a ripsaw was the proximate cause of a timber flying back and injuring plaintiff's deceased, it is admissible to prove previous similar "fly backs" from the same machine.—Van Doorn v. Heap, 160 Mich. 199.

¶ 1304. In a suit to recover for the death of a motorman alleged to have been caused by the failure of defendant railway to provide a brake as required by statute, it is not error to admit evidence to show the condition of the brake in use on the car two weeks before the accident and during the week preceding the accident, and to show the manner of operating the brake and the danger attending the slipping off of the chain from the handle, where the purpose of such evidence is to show why the brake was at certain times inefficient.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 1305. Plaintiff, an expert electric lineman employed by defendant received a shock and was injured while taking hold of a guy wire in making certain alterations on defendant's pole. The guy wire had become charged by reason of the fact that a live wire had become released from its pin in such a way as to permit said wire to be drawn against the brace supporting one of the arms. The wire rubbing against the brace destroyed the insulation, and the brace in turn carried the current to the guy wire. The pole in question was at a corner and the strain had a tendency to break the pins carrying the live wires. The guy wire in question had become charged upon two occasions previous, one of them about two weeks before the day of the injury. Defendant had been notified and sent a man to remedy the defect. No warning was given to plaintiff. Held, the court properly admitted evidence that the guy wire had become previously charged; that the repairs made before the accident were not made properly; and that the lines at the place of the accident were not originally properly constructed.—Huber v. Twin City General Electric Co., 168 Mich. 531.

¶ 1306. In an action at common law for the negligent death of a railway pump operator alleged to be due to the failure of defendant to furnish deceased with a place and machinery reasonably safe in which and with which to work, held that there was sufficient proof to show that there was no change in the condition of the machine from the time of the accident until the subsequent time referred to by witness so as to render the testimony of such witness as to the condition of the machine in the afternoon after the accident, in that a portion of deceased's clothing was found in the clutch, not erroneous.—Snowden v. Detroit & M. Ry. Co., 194 Mich. 87.

§ 64d. ——Master's knowledge of defects and inspection and repair.

Weight and sufficiency of evidence, see post § 65f.

¶ 1307. In a suit for personal injuries, it is proper upon the point of plaintiff's ignorance of the dangers of the machine in question, and defendant foreman's knowledge of the same, to introduce evidence looking to the impeachment of said foreman, who testified as a witness for defendant.—Molyneaux v. Bradley, Miller & Co., 167 Mich. 278.

¶ 1308. In an action for death of a servant through the bursting of a defective pulley, defendant's superintendent denied that he had said to a member of the coroner's jury that he knew of the defective condition of the pulley. A member of the jury then testified as to what the superintendent had said. Held, admission of such testimony as substantive proof of defendant's knowledge of the defect was reversible error.—Clark v. Goldie, 177 Mich. 653.

¶ 1309. Where a railroad company when sued for injuries caused by the defective condition of the handle-bar on a hand-car introduced testimony that the car was examined every morning and found to be safe, it was not error to admit in rebuttal contradicting testimony.—Greenfield v. Lake Shore & M. S. R. Co., 117 Mich. 307.

¶ 1310. Evidence that certain gaskets had been removed on account of deterioration

was admissible in an action for personal injuries received from the escape of ammonia gas blown out of a pipe joint claimed to have been packed with an improper gasket, where it appeared that the gasket in question was of the same material, had been installed at the same time, and was subject to the same influences as the gaskets removed; as such evidence was material to the question of defendant's duty to inspect such gaskets from time to time to ascertain their condition.—Kaess v. Tivoli Brewing Co., 149 Mich. 371.

¶ 1311. In an action by a lineman to recover for injuries sustained by him through the breaking of a pole while he was engaged in erecting trolley wires, evidence tending to show that it was the universal custom of electric railroad companies to omit other inspection than that made by the repair crew, is admissible.—Lynch v. Saginaw Valley Traction Co., 153 Mich. 174.

¶ 1312. In a suit by plaintiff operator of a hotel elevator it is reversible error for the trial court to refuse to permit a duly qualified expert to state whether the defects in the elevator appliances in question could be discovered upon inspection; what his experience was as to inspection of braking and safety devices on the make of the elevator in question; as to the frequency of inspection necessary to make elevators safe and reliable; and as to the proper manner and method of such inspection.—Ammer v. Postal, 168 Mich. 405.

¶ 1313. In an action for wrongful death of an employee, through the falling of a heavy gate, it is not prejudicial error to permit witnesses to testify that the duty of keeping the gate in repair rested upon another employee where they have testified that it was no part of the deceased's duty, and the question upon whom the duty rested is immaterial.—Storrie v. Grand Trunk Elevator Co., 134 Mich. 297.

§ 64e. ——As to methods of work, rules and orders.

Weight and sufficiency of evidence as to methods of work, see post § 65g.
Weight and sufficiency of evidence as to rules and orders, see post § 65h.
Expert and opinion evidence as to modes and methods of work, see Evidence, VI.

¶ 1314. In an action for an injury to an employee while uncoupling moving cars it is competent to show what is usually and habitually done in running trains, because, if a railroad company permits a certain course of conduct it should not be allowed to hold its employees to the letter of its rules in order to shield itself from liability for what it has tacitly permitted.—Hunn v. Michigan Cent. R. Co., 78 Mich. 513; Eastman v. Lake Shore & M. S. R. Co., 101 Mich. 597.

¶ 1315. A train dispatcher ordered a car, without knowledge of any defects in its condition, to follow another car which was in an unsafe condition. Had the second car been in good condition, and had the train crew of the front car obeyed the rule of the company as to torpedoing the track, the collision would not have occurred. Held, in an action by the conductor of the second car for personal injuries, that it was reversible error to permit experts to testify that the dispatcher's order was improper.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 1316. In a suit by a conductor against a suburban railway for injuries sustained in a collision alleged to be due to the negligence of defendant's train dispatcher, there was evidence that the method of giving dispatches was for the dispatcher to call the conductor on the telephone and have the conductor in the hearing of the motorman repeat out loud the orders back to the dispatcher. Held, it was competent for a third person, who overheard the plaintiff conductor repeat the dispatch in question, to testify as to its contents.—Meade v. Detroit, J. & C. Ry., 165 Mich. 489.

¶ 1317. Where it is customary for train dispatchers to find out whether their orders have been delivered to conductors and engineers, it is proper, in a suit to recover for failure to inform said trainmen of a washout, to exclude evidence of experts that it was good railroading to send such an order by message and without inquiring into the fact of its delivery.—Graham v. Detroit, G. H. & M. Ry. Co., 168 Mich. 41.

¶ 1318. In a suit for personal injuries suffered by a conductor while uncoupling cars, it is proper to permit plaintiff, an expert railroad man of long experience and familiar with the customary mode of doing the work he was engaged in at the time of the accident, to testify that the business of the road could not be transacted if the conductor stopped to make a particular examination of each car, and that he did the switching in the customary way.—Van Leuvan v. Ann Arbor R. Co., 167 Mich. 355.

¶ 1319. Plaintiff's decedent, a brakeman, was dragged one hundred feet by a car, and was found lying by the track. He was picked up and carried four hundred feet to the depot, where, knowing that he was dying, he stated that the accident occurred by reason of his stepping in a hole in the scales on the track of defendant's railroad. Held, that evidence of these statements was admissible as a part of the res gestæ in a suit for the negligent killing of the decedent.—Gilbert v. Ann Arbor R. Co., 161 Mich. 73.

¶ 1320. In an action by an employee of a railway construction company for damages for personal injuries due to being brushed

off a flat car, on which he was riding, by a push car which was on a siding and too near the main track, where it had been moved by small boys, the admission of evidence that leaving the car on the siding was not good railroading was not error, as, with several construction trains and trains carrying employees in operation, it was as important for defendant to exercise reasonable care to protect its employees from injury as though it had been a common carrier.—Adamski v. Michigan Ry. Engineering Co., 197 Mich. 561.

¶ 1321. In an action by a fireman on a locomotive for personal injuries sustained in a collision with another train evidence that after the collision the defendant company changed its rules in such a manner as to prevent a recurrence of such an accident, and discharged the operator at the station at which the accident occurred, and adopted a different method in stopping a train at that station than that by which it was attempted to stop the train of plaintiff on the night of collision, is inadmissible.—Moon v. Pere Marquette R. Co., 143 Mich. 125.

§ 64f. ——As to warnings and instructions.

Weight and sufficiency of evidence, see post § 65i.

Jury questions as to warnings and instructions, see post § 67l.

Negative evidence that warning was not heard, see Evidence § 80.

¶ 1322. In an action by an employee, evidence that the defendant employer notified other employees of the dangerous character of the common employment is inadmissible to rebut plaintiff's testimony that he was not so informed.—Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

¶ 1323. Plaintiff employee of defendant company was directed to leave his regular work, and help put a tram car which had jumped the track, back on the rails. He had no experience at this and received no instructions. He employed a crowbar and a ratchet lifting jack. In attempting to pry the car over with the crowbar, the car slipped and plaintiff was injured. Held, testimony that an inexperienced man would do the same as plaintiff was admissible to show the duty of defendant to give instructions.—Johnson v. Desmond Chemical Co., 156 Mich. 669.

¶ 1324. The plaintiff having been injured by a board flying from a buzz planer, it being alleged that the cause was the improper alignment of the knives, of which the defendants had notice, it is not error for the court to admit testimony of witnesses who had operated the same machine, as to similar injuries they had received, as tending to show the negligence of the defendants in not warning the plaintiff of the defects of the machine of which they had knowledge.—Wiers v. Shaw-Walker Co., 171 Mich. 324.

§ 64g. ——As to competency or negligence of fellow servants.

Weight and sufficiency of evidence, see post § 65j.

Directing verdict on ground of fellow servant's negligence, see post § 70c.

Jury questions as to negligence of fellow servants, see post § 67o.

¶ 1325. The opinion of a witness that if he had obeyed the orders of the yardman and taken a train out on the main track on an occasion when another train was overdue there he would have gotten into trouble was inadmissible, being a matter of opinion and purely speculative; such evidence would not prove that the railroad was negligent in employing a yardmaster, unless the fact be shown to have been brought to the knowledge of the officers of the road.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 1326. In an employee's action against his employer for injuries sustained by being caught in a machine, when the injury complained of is claimed to have resulted from obedience to a foreman's directions, evidence that the foreman was a man of intemperate habits, accustomed to get too drunk to do his work, and that he had been discharged for getting drunk but had been reinstated, is competent.—Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

¶ 1327. In an action for wrongful death caused by a collision of a hand car with a passenger train evidence that the foreman of a gang of section men running a hand-car was intemperate to an extent which unfitted him for his position is irrelevant where it is not claimed that he had been drunk or was under the influence of liquor on the day of the accident.—Hammond v. Chicago & G. T. R. Co., 83 Mich. 334.

¶ 1328. On an issue as to whether the operator of a cage or hoisting device in a coal mine was a competent and trustworthy engineer, as required by Pub. Acts 1905, No. 100, § 3, testimony of the habits of such operator as to the excessive use of intoxicants is admissible if such habits are shown to be within the knowledge of the mine owners, officers or agents, or are of so notorious a character that they should have known thereof.—Layzell v. J. H. Somers Coal Co., 156 Mich. 268.

¶ 1329. Evidence of talk among workman that the person in charge of the brake by which was controlled the hoisting and lowering of the cages in a mine was in the habit of lowering the cages at too great speed is not admissible upon the question of his incompetency in an action for injuries

caused by his turning the brake the wrong way while the cage was moving at "natural speed," and letting the cage fall.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1330. Evidence that the fellow-servants of an employee, in the retention of whom the master is alleged to have been negligent, had talked among themselves that he did his work improperly, is not admissible to prove general reputation for incompetency. —Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1331. On an issue as to whether the operator of a hoisting device in a coal mine is a competent and trustworthy engineer, within the meaning of Pub. Acts 1905, No. 100, § 3, statements of the mine boss made on the night after the accident, relative to the competency and trustworthiness of said operator, are inadmissible.—Layzell v. J. H. Somers Coal Co., 156 Mich. 268.

¶ 1332. Upon a question involving the incompetency of an engineer to run an engine and the consequent liability of the master for his incompetency it is proper to show specific instances of incompetency.—Salo v. Martin, 187 Mich. 617.

¶ 1333. The negligence of a servant in a particular instance cannot be shown by testimony of his incompetency or carelessness on specific other occasions; but if it is also shown that the master knew of the cases or that they were of such a character and so frequent that he must have known of them, he, the master, may be chargeable with negligence in retaining such servant.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 1334. Where the only allegation of negligence connecting a locomotive engineer with the injury to plaintiff is that which charges that it was negligence for him to allow a fireman to run his engine, previous negligence on his part is unimportant unless he was also shown to have been negligent at the time of such injury.—Thompson v. Lake Shore & M. S. R. Co., 84 Mich. 281.

¶ 1335. In an action for personal injuries sustained by an employee by the falling of a rack suspended from the ceiling of the room in which he was working, where the defendant claimed that the falling of the rack was due to its use by the foreman for a purpose for which it was not intended, the use for which the rack was intended was determined not by ascertaining what was in the mind of the defendant's manager or servant who made the rack, but by determining for what the employees to whom it was furnished had a right to use it.—Corbett v. American Screen Door Co., 133 Mich. 669.

§ 64h. ——As to contributory negligence.

Jury questions as to contributory negligence, see post § 68.

Contributory negligence as ground for directing verdict, see post § 70d.

¶ 1336. In an action by a brakeman who was run over after falling into a ditch, while engaged in coupling in front of a moving car, it was error to exclude testimony of a custom of employees of defendant, in coupling cars, to go in front of moving cars. —DeCair v. Manistee & G. R. R. Co., 133 Mich. 578.

¶ 1337. In a suit by a plaintiff employee for injuries suffered from placing his hand upon the rear bed plate of a molding machine in looking under the same, it is proper for the purpose of showing that plaintiff exercised ordinary care to admit evidence of an established usage or custom among experienced operators of molding machines of placing their hands in a similar position. —Molyneaux v. Bradley, Miller & Co., 167 Mich. 278.

¶ 1338. In an action for death of an employee, it is competent for the witnesses shown to be familiar with the premises and the work to express their opinions as to the necessity or expediency of the deceased's entering into the place where the accident occurred.—Storrie v. Grand Trunk Elevator Co., 134 Mich. 297.

¶ 1339. Plaintiff's intestate, a motorman on defendant's car, was killed by a collision at a railroad crossing while attempting to stop his car. The negligence alleged was the failure of defendant to provide a brake as required by statute. Held, it was not error to permit the conductor to give his opinion that it would usually be safe for a motorman to begin, as did the intestate, to apply his brake at a point 150 feet from the crossing, such evidence being proper on the question of contributory negligence.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 1340. Plaintiff's intestate, a motorman on defendant electric railway's car, was killed by the car of a railroad crossing defendant's track. Defendant's rules required the intestate to stop his car thirty feet from the crossing to enable the conductor to go ahead and look for trains, and a sidewalk had been built alongside defendant's track for the conductor to walk on. Plaintiff introduced evidence to show that the sidewalk was so short it was necessary for his intestate to stop at a point less than thirty feet from the crossing in order to enable the conductor to board the walk from the rear vestibule of the car. Held, such evidence was admissible to show the intestate was not contributorily negligent.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 1341. In an action by an employee to recover for personal injuries due to a fall down a silo chute because of the fact that the doors in the side of the silo had been placed upside down and the levers in two of the doors, which, with other levers formed the ladder up the side of the silo, turned down as plaintiff's weight was placed thereon, the testimony of plaintiff that he went up the ladder to help the person in the silo if he needed any help, otherwise to see how near done the work was, was not inadmissible as a self-serving statement of reasons.—Van Driel v. Stevens, 200 Mich. 291.

§ 64i. ——Servants' experience and knowledge of dangers.

Admissibility of negative evidence as to knowledge of danger by servants, see Evidence § 80.

¶ 1342. A youth employed in a saw-mill was injured by the machinery before he had been there long. He had once before been employed in the same mill. Held, that in an action for the injury he could show the changes made in the arrangements of the mill in the interval between his terms of employment, as bearing upon his want of familiarity with them when hurt.—Huizega v. Cutler & Savidge Lumber Co., 51 Mich. 272.

¶ 1343. That the brightness of the surface of the trunnion and tires of the mill where an employee was injured rendered it impossible to tell that another adjoining mill was in operation when looking at them from a point having their surfaces in perfect alignment, is not material where the plaintiff testifies that he did not look at all at the mill on which he was injured, and he gave no attention to the place where he was working, although his attention had been directed to the fact that all the mills but one were running, and he selected that one without difficulty.—Walters v. Wolverine Portland Cement Co., 148 Mich. 315.

¶ 1344. Plaintiff, a miner, was injured by a hanging rock falling from the roof of the drift. There was no question of safe place to work involved except as it concerned said hanging rock, and none in regard to plaintiff's experience or lack of experience except in respect to his duty to discover the danger from this hanging rock. Evidence was introduced by plaintiff to show that he was inexperienced, and that when he began work defendant, as a part of the contract of hiring, assured him that the place was safe. Held, such evidence, though inadmissible, was not prejudicial to defendant.—Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489.

§ 65. Weight and sufficiency of evidence.

Burden of proof and presumptions, see ante §§ 62, 63.
Admissibility of evidence, see ante § 64.
Questions of law and fact, see post § 67.
Directing verdict, see post § 70.
Judicial notice of mechanical facts and working experiences, see Evidence § 16.
Judicial notice of operating facts and experience on railroads, see Evidence § 14.

¶ 1345. Acting under the special instructions of the roadmaster of a division of defendant's road to cut a trolley wire which a street railway company had strung over defendant's track, the decedent climbed upon a box car, which had been run underneath the wire, and, while standing upon a stepladder which he had placed on top of the car, drew the wire down by placing one arm over it, and, with a pair of nippers, cut it until it parted. It was under tension and, by force of the recoil, threw him to the ground and caused his death. Verdict being for plaintiff, a reversal of the judgment and a new trial were ordered by the supreme court, the justices not agreeing in their reasons.—Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606.

¶ 1346. A verdict for the plaintiff in an action under Act No. 104, Pub. Acts 1909, §§ 4110-4116, How. St., 2nd Ed., to recover for injuries sustained by a motorman in a collision between interurban cars, held sustained by the evidence.—Darling v. Grand Rapids, G. H. & M. Ry. Co., 184 Mich. 607.

¶ 1347. In an action for personal injuries to a boy not quite 16 years old, evidence that the plaintiff's brother had stated that the plaintiff was 16 does not entitle the defendant to an instruction relieving it from liability based on an employment in violation of the statute, if the foreman who had employed him believed and had good reason to believe that he was 16, there being no evidence that plaintiff was asked his age, or that he knew of the representations said to have been made by his brother.—Beghold v. Auto Body Co., 149 Mich. 14.

§ 65a. ——As to existence of relation and scope of employment.

Admissibility of evidence as to existence of relation and scope of employment, see ante § 64a.
Jury questions as to existence of relation and scope of employment, see post § 67a.

¶ 1348. In an action by a mining employee against a mining corporation controlling the greater portion of the stock of and dictating the policies of another, the real employing corporation, which owned the mine, to recover compensation for injuries, evidence held insufficient to estop defendant from denying that it was employer operating the property.—Hannula v. Cleveland Cliffs Iron Co., 188 Mich. 543.

¶ 1349. In an action to recover for personal injuries received due to a defective

ladder which plaintiff was climbing to put out a fire in a car, where it appeared that plaintiff, while on his way home from work saw a fire burning along the tracks of defendant company and among charcoal cars and sawdust cars and assisted in putting out the fire, evidence held to show that plaintiff was a mere volunteer and was not hired as a servant by defendant's officers.—Smedley v. Mashek Chemical & Iron Co., 189 Mich. 64.

¶ 1350. The relation of master and servant does not exist between a construction company engaged in doing work in a building occupied by another company, and a servant of the construction company at the time of his injury, where such servant has fixed hours, fixed wages paid by the hour and is not required to perform any service until he has eaten his dinner and has returned to work, and who, at the dinner hour, ascends a ladder in the boiler room on the premises for the purpose of eating his dinner upon the top of the boiler, as was his custom and that of other employees, and is injured due to the turning of a rung of such ladder, which causes his fall, but he is a mere licensee at the time of his injury.—Boner v. Eastern Michigan Power Co., 193 Mich. 629.

¶ 1351. Where plaintiff's duty was to trim the lamps of an electric light tower under the directions of defendant's foreman, who ordered him to ascend the tower for that purpose, the fact that both he and the foreman were informed by another employee, before ascending, that the lamps had been trimmed, would not render his ascent a matter outside of the performance of his duties.—Weiden v. Brush Electric Light Co., 73 Mich. 268.

¶ 1352. In an action by a hostler's helper in a railroad roundhouse against the company to recover damages for personal injuries sustained as the result of plaintiff, who had, during working hours, ridden on an excursion train to a fair ground, and had returned in the cab of the engine of such train, jumping from the engine to the ground while it was in motion, evidence held not sufficient to show that plaintiff was injured in the course of his employment.—Stornelli v. Duluth, S. S. & A. Ry. Co., 193 Mich. 674.

¶ 1353. When a railroad section employee, at the command of his foreman, during working hours, accompanies the foreman and other laborers on a hand car for the purpose of obtaining an appliance, and, after obtaining it, remains with the hand car at the command of the foreman until the return of the party after quitting time, and then enters upon the return trip with the rest of the party in order to reach the car in which he is living, and, during the return trip is injured by one of the railroad's engines, the relation of master and servant exists at the time of such injury.—Salabrin v. Ann Arbor R. Co., 194 Mich. 458.

¶ 1354. Evidence held insufficient to show that plaintiff's employment was changed from a clerical one to the extra hazardous one of car checker.—Yost v. Grand Trunk Ry. Co., 166 Mich. 672.

§ 65b. ——As to cause of accident.

Proximate cause of accident, see also ante § 42.

Jury questions as to cause of injury, see post § 67b.

Directing verdict for failure to show cause of accident, see post § 70a.

¶ 1355. In an action for personal injuries alleged to have been caused by a defective brake on a hoisting derrick, plaintiff's testimony that the brake "gave way" is not destroyed by testimony on cross-examination that the engineer put his foot down and caused the brake to move and that is what caused the machinery to move, where it appears from other parts of the cross-examination that he did not mean to testify that after the brake had been set the engineer went and loosened it.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 1356. Plaintiff in a suit for personal injury alleged that while replacing a belt on a pulley, his sleeve was caught by the set-screw on the shaft, and he was drawn in, and injured. Held, although no witness testified that the catching of the sleeve in the set-screw caused the accident, the jury might infer such fact from the circumstantial evidence presented.—Little v. Bousfield & Co., 154 Mich. 369.

¶ 1357. Where a jury after visiting a mill decides that it was the force of the suction of a dust collector that drew the plaintiff's hand into the machinery and injured it, the court will not reverse this finding, though the apparent weight of the evidence be against this conclusion.—Lund v. Sargent Mfg. Co., 158 Mich. 3.

¶ 1358. The plaintiff in an action for damages for personal injuries sustained by coming into contact with an unknown set-screw in a revolving shaft of a sawmill which forced his hand upon the saw is not bound to exclude the possibility that the accident might have happened in some other way than that claimed by him, but is only required to satisfy the jury by a fair preponderance of the evidence that the injury occurred in the manner contended.—Tankovich v. Indiana Min. Co., 187 Mich. 186.

¶ 1359. A brakeman who had entire charge of defendant's logging train, and who was responsible for the loading thereof, allowed a log to be loaded so as to project several inches beyond the side of the car, and was killed by the falling of a dead tree which

stood so near the track that it was struck by the log. He had previously called the attention of defendant's foreman to the fact that the tree was standing too near the track, and his own attention was called to the projecting log. Held, that the improper loading was the proximate cause of the injury, and that defendant was not liable.—Powers v. Thayer Lumber Co., 92 Mich. 533.

¶ 1360. In a personal injury suit, the plaintiff cannot recover on the theory of the master's negligence in leaving certain holes in a dock open, where it appears that the injured person helped to cut the holes and there is no evidence that he was injured by reason of the presence of said holes.—Gehl v. Pittsburg Coal Co., 168 Mich. 285.

§ 65c. ——As to negligence of master or his representatives.

¶ 1361. In an action for wrongful death of a brakeman where the evidence showed that coal cars, boxed into the height of from two to two and a half feet, with a space of about fifteen inches in depth across the brake end of each car for the use of the brakemen, were loaded with lumber, which was piled to the height of from five to six feet from the car floor, and extended beyond the boxes, from eight inches at the top of the box to eighteen inches at the top of the lumber, and beyond the end of the car, projecting further as the height increased, until it left a space between the lumber of but fifteen inches on its surface, and the space reserved for the brakemen was thus partially covered, a jury was justified in finding that the cars had been improperly loaded.—Irvine v. Flint & P. M. R. Co., 89 Mich. 416.

¶ 1362. Testimony of an injury to an employee's hand in a stamping machine, and that the stamp came down without pushing the lever upon two previous occasions to the knowledge of the defendant, is not sufficient to sustain a verdict and judgment for the plaintiff; there must be a specific showing of negligence on the employer's part.—Sargee v. Clark Can Co., 126 Mich. 508.

¶ 1363. In a suit by a locomotive engineer against the railroad company for injuries received in a collision alleged to have been caused by the negligence of a train dispatcher, evidence examined, and held to show that the dispatcher was not guilty of such negligence.—Veit v. Ann Arbor R. Co., 150 Mich. 358.

¶ 1364. Where plaintiff's intestate was killed by the falling of the roof of a building which defendant, his employer, was raising, and where there was no evidence of intestate's negligence or of the cause of the falling of the roof, it was held that the falling of the roof was of itself some evidence to go to the jury that the work of raising it was not done with ordinary care and skill.—Barnowsky v. Helson, 89 Mich. 528.

¶ 1365. Liability for personal injury by a boiler explosion claimed to have been due to overpressure was not established where it appeared that the defendant had furnished a safe boiler, a competent engineer, inspectors, repairers and testers, and that after being informed by the repairer that it was safe to work under a certain pressure, the safety valve was set below the lowest limit of safety and that the explosion occurred at a pressure below such lowest limit, and where experts testified that the safe working pressure was considerably higher than that at which the explosion occurred.—Beunk v. Valley City Desk Co., 133 Mich. 440.

¶ 1366. A master cannot be held negligent in not providing sufficient help to handle a heavy article which caused injury to a servant, where at the time of such handling other servants of the employer stood by and could have aided had it been thought necessary.—White v. Owosso Sugar Co., 149 Mich. 473.

¶ 1367. The log carriage in defendant's sawmill was operated by a lever standing upright at the side of the carriage some twelve inches from the saw-frame and some twenty-four inches from the carriage track. Said lever was placed in a vertical position to stop the log carriage and a clip fastened to a verticle standard was fitted upon said lever to hold it in place when the carriage was stopped. The clip itself was held in place by a strip of leather fastened to the same and to the saw-frame. Plaintiff's decedent, after the carriage had been stopped, climbed in between the same and the saw for the purpose of removing the door or covering which covered the saw. While in this position with his back to the carriage, the carriage started, pushed him into the saw and killed him. Plaintiff's theory was that the decedent, while engaged in removing the casing, accidentally touched the spring attached to said clip, thus releasing the lever and causing the carriage to be set in motion. No evidence was offered to sustain this theory and the lever might have been moved in several other ways. Said clip and lever had been used for several years and had never been accidentally released in the manner claimed by plaintiff. Held, plaintiff's evidence of defendant's negligence was too indefinite to support a verdict in his favor.—Johnson v. Jackson, 168 Mich. 149.

¶ 1368. A jury is warranted in finding that a switching crew was negligent in removing cars from a train made up except for the testing of the air and returning them without notice to the train crew, where a brakeman who went between a car and

the tender to cut the air in order to repair a leak in the hose was injured by the shock, there being much evidence that the act was in the line of his duty, and that the switching screw had notice that the train crew was somewhere about the train since there was air in the hose on the standing cars, when the cars were restored to the train, and lights on the way car when it was disconnected.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 1369. Actionable negligence is not shown from the fact that the plaintiff was struck and injured by a falling roller, easily handled, which, while being carried down a stairway by two other employees, was allowed to slip and fall to the floor below, where the plaintiff was standing.—Seger v. Northwestern Cooperage & Lumber Co., 184 Mich. 48.

¶ 1370. That an employee was injured while removing a piece of broken material from a lath machine, as the result of his employer's negligence, held not established by the evidence.—Lydman v. De Haas, 185 Mich. 128, 8 N. C. C. A. 649.

¶ 1371. In an action by a factory employee for damages for personal injuries sustained as a result of his slipping against a swinging table used to carry poles against a saw which passed through a slit in the table and disengaging a worn notched lever fitting in the back of the table and holding it away from the saw when not in use, and falling on the saw, evidence held insufficient to show negligence upon part of the defendant.—Johnson v. Elm Cooperage Co., 188 Mich. 117.

¶ 1372. Evidence held insufficient to show actionable negligence on the part of defendant, in an action against a master to recover damages for personal injuries resulting in death sustained by plaintiff's intestate, an employee, while hauling dirt to a certain dumping ground due to the wagon tipping over at such grounds.—Grochulski v. Porath, 196 Mich. 270.

§ 65d. ——As to tools, appliances and places.

Duty to furnish safe tools, appliances and places, see ante § 46.
Admissibility of evidence, see ante § 64b.
Instructions as to safe tools and appliances, see post § 71a.
Instructions as to safe place to work, see post § 71b.

¶ 1373. The fact that a scaffold, remaining after it had been built and used for carpenters, was supported on brackets instead of being supported by posts resting on the ground and that it would have been stronger so made, does not show a neglect of duty towards painters who undertook to use the scaffold without invitation to do so, it having proved strong enough for the carpenters.—Hoar v. Merritt, 62 Mich. 386.

¶ 1374. An electric light company in so stringing its wires that those of one circuit cross those of another so that a slight sagging of one wire will bring the two in contact, and in maintaining one as a live circuit while employees are set at work handling with bare hands the wires of the dead one so crossing those of the live circuit, is clearly negligent.—Kraatz v. Brush Electric Light Co., 82 Mich. 457.

¶ 1375. In action by an employee negligence on the part of the employer who owns an elevator cannot be predicated upon the fact that just after an accident, when the elevator has fallen without check thirty feet, parts of the machinery are found loose and out of place; there being no evidence that they were in such condition before, and the strain from the fall necessarily tending to injure the machinery.—Robinson v. Charles Wright & Co., 94 Mich. 283.

¶ 1376. The mere fact that a machine shown to have performed its accustomed work properly both before and after an accident failed to work on that particular occasion is not sufficient to justify the conclusion of negligence.—Redmond v. Delta Lumber Co., 96 Mich. 545.

¶ 1377. Negligence of the master in permitting a saw frame to become dirty and clogged so that it would not recede by the action of a counterweight after being raised in operation is not shown, where the evidence is that it was the assigned duty of the employee to keep it clean and that it frequently did become clogged by bark and dust.—Johnson v. Hovey, 98 Mich. 343.

¶ 1378. Plaintiff's intestate, a fireman in the employ of defendant, was killed by the bursting of a joint in a steam pipe. While the cause of the explosion was entirely speculative, it was plaintiff's theory that it was occasioned by a defect in the joint itself, and he introduced evidence to show that the joint had been leaking for a long time prior to the accident, and that afterwards a crack was discovered therein of such a character that it must have existed for some time. There was no evidence that the joint was improperly constructed, that the leakage in itself was a signal of danger, or that an inspection would have revealed the defect. Held, that defendant was not liable.—Voight v. Michigan Peninsular Car Co., 112 Mich. 504.

¶ 1379. In an action for wrongful death of a laborer through the sinking of a vessel upon which he was employed, which vessel is alleged to have been unseaworthy, evidence that the vessel was built in 1862, that some months before the accident she leaked so badly that she was allowed to fill and sink, that subsequently less than $100 worth of work was done on her, that she sat light in the water exposed to wind and sun for

several months and that she sank without apparent cause on her first voyage only two-thirds loaded in smooth water and a light wind is sufficient to show that she sank because she was unseaworthy.—LaFernier v. Soo River Lighter & Wrecking Co., 129 Mich. 596.

¶ 1380. In an action for personal injury to an employee by the falling of a rack in the room in which he was working, by reason of the foreman's placing heavier and larger pieces of lumber on the rack than had ever been placed there before, the jury was warranted in finding that the foreman, who to get the pieces out of the way, ordered them placed in the rack, exercised a proper discretion and was using the rack for a purpose for which it was intended, and that the injury was due to a failure to furnish safe appliances and not to a misuse by a fellow servant of an appliance which was safe for the purpose for which it was intended.—Corbett v. American Screen Door Co., 133 Mich. 669.

¶ 1381. Failure to cover set-screws as required by Comp. L. 1897, § 5349, when required by the factory inspector, is evidence of negligence.—Sipes v. Michigan Starch Co., 137 Mich. 258.

¶ 1382. Testimony of one witness in an action for an injury sustained by an employee by coming in contact with a small saw on an equalizing machine, that he had seen hoods or other devices to cover saws on such machines in factories, but never saw them used in this state, made no case for the application of the rule that a manufacturer is required to adopt those inventions for the protection of his employees which are in ordinary use.—Journeaux v. E. H. Stafford Co., 122 Mich. 396.

¶ 1383. It was not negligence, for which a mill company could be held in damages, for such company to remove from the knives of its planer the hood and blowpipe, although an employee coming in contact with such knives, was injured; where it appeared that such hood and blowpipe were used merely for the purpose of removing the chips and dust, and there was no evidence that such was ever used for the protection of operators, or that planers are ever covered for such a purpose.—Erickson v. Cummer Mfg. Co., 140 Mich. 434.

¶ 1384. In the absence of proof that it was customary to protect by guards certain kinds of machinery there is no negligence in failing to employ guards for protection.—Walters v. Wolverine Portland Cement Co., 148 Mich. 315.

¶ 1385. The evidence proves that the sheeting in the construction of a sewer was put in according to the directions and under the supervision of plaintiff's intestate, in an action against a city for the negligent killing of plaintiff's intestate by the caving in of the sewer; where every witness who gave testimony on that subject, save one, testified that the sheeting was so put in, and the witness who did not so testify stated in his testimony that he supposed defendant's foreman had charge and supervision of putting in such curbing, but later testified that plaintiff's intestate was one of two men who built the curbing, and that he did not know whether he had charge of the work or not, and that he did not know whose plan it was.—Salzwedel v. City of Adrian, 145 Mich. 280.

¶ 1386. Where a plaintiff is injured while operating a tram car, and seeks to recover on the ground of the defective condition of the brake, but offers no evidence of any specific defects in the car, and only gives conjectural and vague surmises as to the nature of the defects complained of, the court properly directed a verdict for the defendant.—Micari v. Monroe Stone Co., 154 Mich. 362.

¶ 1387. In an action for injuries to a servant resulting from the use of a "softhead" claimed to have been improperly tempered, testimony of an expert that by accurate tests he had determined there was temper left in the "softhead" by the defendant's servant, who manufactured it, was sufficient proof of negligence.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 1388. Where plaintiff was injured while oiling a fan operated by a belt, and there was positive testimony that the injury was caused by a defective portion of the belt striking plaintiff's wrist and driving his hand into the fan, a verdict for plaintiff will not be disturbed as manifestly against the weight of evidence.—Cummins v. Boyne City Tanning Co., 177 Mich. 217.

¶ 1389. Where a servant was injured by the fall of an empty bucket, which was not being subjected to any unusual jar or strain, which was apparently due to it being defectively fastened to a hoisting apparatus, it is sufficient to support a reasonable inference that the accident was the result of the defendant's negligence in not properly securing the bucket.—Maki v. Isle Royale Copper Co., 180 Mich. 624.

¶ 1390. In an action by a mill employee for injuries sustained while oiling an overhead shaft, plaintiff's witnesses testified that the platform on which the oiler stood was about seven feet above the floor, and consisted of a single plank ten or twelve inches wide, supported on brackets placed at different heights and angles, so that it was inclined, and "wobbled" when in use. Defendant's witnesses testified that there were two boards, and that they were placed hori-

zontally. Held, that there was evidence upon which the jury might find that the employer was negligent in the construction of the platform.—Zimmerman v. Detroit Sulphite Fibre Co., 113 Mich. 1.

¶ 1391. An employer is not liable to an employee injured in an iron foundry by the explosion of a teaspoonful of molten iron falling onto the wet floor from a ladle which a fellow employee was carrying, where the evidence showed that the general condition of the floor was good except as to the alleged excessive dampness caused by using it too soon after sprinkling, though evidence was offered to show that in other foundries the floors were allowed to dry for a longer time before being used, an employer not being bound to adopt the latest and most approved methods.—Nowakowski v. Detroit Stove Works, 130 Mich. 308.

¶ 1392. In an action by an experienced laborer for damages for personal injuries sustained by the falling of an overhanging bank in a gravel pit, evidence held insufficient to show negligence upon the part of the employer in not providing a safe place to work by barring down the bank.—Robbins v. Trebilcock, 188 Mich. 163.

¶ 1393. Where premises are such that it is not negligent for a defendant employer to leave an alley unlighted, defendant's promise to provide a light for plaintiff night watchman at the latter's request, does not make it negligent for failure to furnish such light.—Moses v. Reo Motor Car Co., 165 Mich. 595.

¶ 1394. Plaintiff had worked for defendant as a night watchman for many years and was thoroughly familiar with its premises. The entrance on an alley to one of defendant's buildings was reached by three stair steps. Plaintiff approached the door from the inside of the building and could see it plainly. In attempting to put his foot on the first step to go down he reached too far and fell down the stairs. The alley was not lighted and the night was dark. Held, defendant was not guilty of negligence in failing to light the alley.—Moses v. Reo Motor Car Co., 165 Mich. 595.

¶ 1395. In occupations attended with great and unusual danger all readily attainable appliances known to science for the prevention of accidents must be used, and neglect to provide them is proof of culpable negligence.—Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

§ 65e. ——As to railroad tracks, cars and equipment.

Care and diligence required of master, see ante § 33.

Duty to furnish safe tracks, cars and equipment, see ante § 49.

¶ 1396. Plaintiff, an engineer in the employ of the defendant railroad, was injured in a collision caused by a flat-car (which had stood upon a siding) running down upon the main line. There being nothing to show that the side track was not in proper condition, or that there was reason to fear cars running out, or that the company had not used ordinary care in placing the car upon the siding. Held, that the omission to provide the flat-car with brakes, or the side track with stop-blocks, was not actionable negligence.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 1397. Evidence that draught rigging of a car was found to be defective after the accident in that it yielded too far on impact of coupling is insufficient to justify a finding that it was in the same condition when the car was put into the train, there being other evidence tending to show that the defect may have been caused by the force with which the cars came together on a first attempt to couple them at the time of the accident.—Perry v. Michigan Cent. R. Co., 108 Mich. 130.

¶ 1398. In an action by a brakeman whose leg was crushed by a car after he had fallen into a ditch while engaged in coupling, testimony that the ditch was constructed across the main track after a washout caused by a rainfall, and after four days was filled with snow up even with the ties, tended to show negligence on the part of the company. —DeCair v. Manistee & G. R. R. Co., 133 Mich. 578.

¶ 1399. A railroad cannot be charged with negligence for failing to make provision for the protection of persons near the track, from injury from caboose steps projecting fifteen inches, where it is shown that parts of the engines used projected more than fifteen inches though properly constructed. —Turner v. Detroit Southern R. Co., 137 Mich. 142.

¶ 1400. A railroad is not negligent in using a caboose with steps projecting fifteen inches from its side where such cabooses have been used for four years without accident and similar cabooses were in common use on other roads, and parts of the smallest engines in use on the road projected more than fifteen inches, and there is no evidence that it was so dangerous to use such cabooses that an ordinarily prudent employer would discard them.—Turner v. Detroit Southern R. Co., 137 Mich. 142.

¶ 1401. Negligence of a railroad company is sufficiently shown in an action for injury to a section hand caused by the derailment of a hand car, where it appeared that an open rack car had been loaded with mill refuse and that a short piece of hardwood flooring fell from the car and derailed the handcar which followed over the track a

short time after the loaded car had passed.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 1402. Where it appears that gravel, dropped from cars being moved in defendant railway company's yards, had formed in piles in and about the tracks, and had remained thus for a period of from two to four days, defendant is guilty of failure to maintain a safe place for its employees to work in, and is liable for such failure in a suit by a switchman who, while coupling a moving train, fell over one of said piles, and was injured.—Gillespie v. Grand Trunk Ry. Co. of Canada, 150 Mich. 303.

¶ 1403. Plaintiff, a brakeman, was injured by striking a cattle chute three feet, eleven inches from the side track. Plaintiff testified that many other buildings were examined by him along the same railroad and were by varying distances farther from the track than the chute in question. Held, that since plaintiff gave only selected instances of building locations, a custom could not be inferred from this evidence that in good railroading all buildings were located farther from the track than the one in question, so as to entitle plaintiff to rely on that custom.—Carr v. Grand Trunk Ry. Co. of Canada, 152 Mich. 138.

¶ 1404. Plaintiff's husband, a locomotive engineer employed by defendant, was killed while running his engine over an embankment across a ravine, said embankment having suddenly settled under the weight of the train, causing the derailment of the locomotive. There was evidence that there was a culvert running through the embankment ninety feet long and four feet in diameter; that for some years prior to the accident the wing walls of said culvert had disintegrated and a reservoir had been washed out at the outlet of the culvert; that the sand of the embankment had sifted through the disintegrated walls of the culvert and had been carried off by the water; that a large hopper-shaped hole had thus been formed in the embankment above the culvert, and that the roadbed had in this way been undermined. Held, a verdict for plaintiff under the death act was sustainable on the ground of defendant's failure to provide a safe roadbed and supply the proper inspection thereof.—Stolz v. Detroit, G. H. & M. Ry. Co., 167 Mich. 300.

¶ 1405. Evidence in an action for damages for injuries sustained by an employee while operating the machinery of a railroad pumping station held sufficient to establish an inference of negligence on the part of the company in failing to furnish such employee with a safe place to work.—Snowden v. Detroit & Mackinac Ry. Co., 187 Mich. 140.

§ 65f. ——As to inspection and knowledge or notice of defects.

Duty to inspect, see ante § 53.

Instructions as to tests and inspection, see post § 71c.

¶ 1406. Where the declaration in an action against a railroad company alleged it to be defendant company's duty to see that its cars, on which plaintiff was a brakeman, were properly loaded with lumber, so as not to imperil the lives of its employees, and the testimony tended to show that they were so loaded as to increase the hazard of braking them, and in addition that no provision was made by defendant for their inspection, the jury was justified in finding that there was no inspection.—Irvine v. Flint & P. M. R. Co., 89 Mich. 416.

¶ 1407. Defendant's locomotive inspector testified that, four days before the accident, he examined the left side of the fire-box, and that it was leaking badly; that he noted this fact in a book kept for that purpose, with an instruction that the fire-box be examined; and that it was the duty of one B. to examine it and see to its repair. B. testified that he made said examination, and stopped the water squirting from the mouthpiece on the left side, after which there was nothing to indicate that there was anything wrong; that he reported this repair, but did not, as was his duty, note on the book the fact of such examination. Held, that it was competent for the jury to infer that the inspector of engines was right in saying that there was a leak on the left side of the fire-box, and that a careful examination at that time would have disclosed a defective condition of the boiler, and prevented the accident.—Woods v. Chicago & G. T. R. Co., 108 Mich. 396.

¶ 1408. Comp. L. 1897, § 6313, requiring a railroad company to adjust, fill or block frogs so as to prevent employees getting their feet caught in them, imposes a duty to renew the blocking and to inspect the frogs frequently; the fact that they soon become dangerous again emphasizes this need and while a compliance with the usual custom tends to prove diligence, it is not necessarily the test of diligence.—Jones v. Flint & Pere Marquette R. Co., 127 Mich. 198.

¶ 1409. Negligence on the part of a railroad company in the matter of properly inspecting a wooden ladder leading to the top of a water tank, is not shown, in an action for damages from a fall occasioned by a slat of such ladder pulling loose; where it appears the ladder had been in use for upwards of 12 years, that it had been properly inspected six months prior to plaintiff's fall, and had been pronounced safe, and where the ladder broke under plaintiff because of a decayed portion hidden from ordinary inspection, and where there was no evidence as to the nature of the wood used, how long it might be expected to resist decay, or how fast decay, once started, would progress.—Nichols v. Pere Marquette R. Co., 145 Mich. 643.

¶ 1410. In an action for the death of plaintiff's intestate caused by the bursting of an idle pulley where it appeared that the pulley had been inspected and found to be in good condition less than three months before it burst, and there was nothing in the experience of mechanics which indicated the duty of a frequent inspection, it cannot be inferred that a person of ordinary prudence would have inspected the pulley oftener than once in three months unless there was testimony to show that more frequent inspections are customarily made by ordinarily prudent men in order that machinery may be safe for their employees.—Clark v. Goldie, 146 Mich. 303.

¶ 1411. Where the fireman of a repair train, sent out during a storm to repair washouts along the track, was killed as a result of the precipitation of the train into a washout alleged not to have been reported, circumstances which justify a finding that the washout had not been reported by the station agent to the train men, will not justify a finding that it had not been telegraphed to the station agent by the train dispatcher.—Graham v. Detroit, G. H. & M. Ry. Co., 151 Mich. 629.

¶ 1412. Plaintiff was a foreman in charge of defendant railway's coal dock. Defendant's engines were loaded with coal at the dock by means of large buckets, which were hoisted full of coal from the dock to the tenders of the engines by power supplied by the engines, and were there unloaded by opening a door in the bottom of the buckets. This door was held closed by a catch or lip, which lip was supported by a spring and a wedge. Plaintiff was steadying with his hand a bucket of coal as it was being hoisted upon the tender. As the bucket struck the tender on the side, the wedge came out and the door flew open and caught plaintiff's hand. Plaintiff proved that when the buckets got out of repair he customarily wrote a letter informing the proper official, and that some of the buckets had got out of order and he had, two weeks prior to the accident, sent such a letter. But there was no evidence that plaintiff supposed the bucket in question was out of order. Held, it was immaterial whether plaintiff proved a notice to repair buckets in general, since plaintiff did not know that the particular bucket in question was out of order, and therefore no recovery could be based on defendant's alleged promise to repair.—Lukovski v. Michigan Cent. R. Co., 164 Mich. 361.

¶ 1413. It cannot be assumed that an examination of the face of a quarry was made after a blast on a particular date, where defendant's foreman who customarily made such examination did not claim to have made it, but denied that any blast had been exploded on that date.—Druck v. Antrim Lime Co., 167 Mich. 154.

¶ 1414. Plaintiff, one of a gang of men employed by defendant to install a sprinkler system in the plant of a third person, was supplied with a stepladder to be used in the work. At the direction of his foreman he picked up a straight ladder belonging to said third person, and while using same was injured on account of its alleged defects. The alleged defects were such as could not be discovered by ordinary inspection. Plaintiff knew that his employer did not furnish the ladder and had not inspected it, or had opportunity to inspect it. He had no reason to think that the foreman had examined it otherwise than in the manner which plaintiff himself adopted. There was no evidence that the foreman was an inspector for the employer. Held, defendant was not liable for failure properly to inspect and supply safe tools.—Fellows v. Stevens, 170 Mich. 13. (Bird, J., dissenting.)

¶ 1415. Where it does not appear how oil came to be placed on a slide way in the defendant's factory, on which a night watchman fell and was injured, or that it was placed there with the former's knowledge, or had been there long enough to charge him with constructive notice, actionable negligence is not shown.—Meyer v. Grand Rapids Chair Co., 180 Mich. 604.

§ 65g. ——As to methods of work.

Methods of work in general, see ante § 52.
Admissibility of evidence as to methods of work, see ante § 64e.
Instructions as to methods of work, see post § 71d.

¶ 1416. In the absence of proof to the contrary, testimony that the general method of loading rails upon moving cars by gangs of men taken from section gangs, was the ordinary method of doing such work where the rails had been obtained from taking up old track, the adoption of such method was not shown to be negligence.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 1417. Testimony, which when given its greatest force, tended only to show that when a driller in a stone quarry had his last hole so nearly completed that it was suitable for loading with dynamite, the loader gave such driller a stick of the dynamite for loading, and that the unfinished holes were left until after the explosion blast, and that all others were loaded by the man specially employed and qualified for that purpose, and which also showed that neither the foreman nor any other officer of defendant was ever in sight when a driller loaded a hole, failed to show a practice so open and notorious that drillers loaded holes, as to charge defendant with knowledge of it, and consequent ratification.—Kopf v. Monroe Stone Co., 133 Mich. 286.

¶ 1418. In an action against a mine owner for the death of pumpman employed in the mine, held that there was no evidence to show a custom of defendant of leaving its

engine house and hoisting machinery without any one in charge during the hours between shifts while pumpmen were in the mine, nor was there any evidence to show that the employment of a particular brakeman was such as to leave him to infer the right to leave his post of duty at such times. —Williams v. Verona Min. Co., 149 Mich. 45.

¶ 1419. Plaintiff had been working as a regular miner in defendant's mine for about three weeks. A blast was exploded in the evening in the raise in which plaintiff was working. Next morning plaintiff's assistant did not appear to timber the roof of the place blasted. Plaintiff was directed to work in another part until noon, when he was directed with another to timber the blasted place. While so engaged, a quantity of ore fell in from the roof and injured him. Held, defendant could not be deemed negligent on the theory of a failure to adopt reasonably safe methods of work and to see that they were carried out.—Hosking v. Cleveland Iron Mining Co., 163 Mich. 588.

§ 65h. ——As to rules, orders and commands and compliance therewith.

Compliance with or disregard of rules, orders and commands as bearing on contributory negligence, see ante §§ 59 l, 59n.
Admissibility of evidence as to rules and orders, see ante § 64e.

¶ 1420. The production of a duplicate contract signed by a brakeman, in which he acknowledges the receipt of a copy of rules of the company, and agrees to abide by them, is prima facie proof that he had received and read such rules.—Fluhrer v. Lake Shore & M. S. Ry. Co., 121 Mich. 212.

¶ 1421. The production of authorities asserting that it was the duty of railroads to promulgate reasonable rules for the running of trains, was not sufficient to establish the fact that the defendant had been negligent in that respect.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 1422. Evidence showing that an employee in the operation of a traveling crane "was to use all the care possible, to keep his eyes peeled for anybody that might be in the way, and if they were in the way to call out and warn them," is sufficient to show a discharge by the master of his duty to establish rules to warn employees of the movements of the crane, if such duty exists. —Ferry v. American Suction Gas Producer Co., 153 Mich. 266.

¶ 1423. Written rules of railroads cannot be treated as abrogated on testimony tending to show nothing more substantial than insubordinate and unreported criminal disobedience on the part of some of the employees.—Jones v. Pere Marquette R. Co., 168 Mich. 1.

¶ 1424. A written rule of the company forbidding an engineer to run his northbound engine on the southbound main of a double track is not annulled by a telephone message from the despatcher to the yard master stating that a certain train due at the time in question will not run on said southbound track but will detour by another line.—Jones v. Pere Marquette R. Co., 168 Mich. 1.

¶ 1425. In a suit for personal injuries suffered in a collision by plaintiff engineer in running his train engine north on the southbound main of a double track in violation of the printed rules of the railroad, evidence that yard engines and dummies were used on both mains in both directions unde the direction of the yardmaster when not on the time of regular trains, and when they were properly protected, and conflicting evidence that passenger and freight engines had done the same, does not by reason of custom give plaintiff the right to run his engine north to the roundhouse on the southbound track, where bulletins are kept posted and the engineers are required to read them before every trip; where there is no evidence that defendant's managing officers know of said violations of the rule; where a man is employed whose duty it is to instruct new men as to rules and bulletins, and where the plaintiff has known of said infractions of the rules and has failed in his duty to report them.—Jones v. Pere Marquette R. Co., 168 Mich. 1. (Blair and Moore, JJ., dissenting.)

¶ 1426. Plaintiff engineer before switching his train into the yards was informed by a switchman that No. 8, a southbound train on defendant's line, would not run over the line that night but would detour by another line. Plaintiff knew No. 8 was due and had the right of way. After placing his train in the yard he ran his engine on the way to the roundhouse out north on the southbound main of the double track in violation of the printed rules of defendant, whereupon it collided with No. 8, resulting in plaintiff's injury. The train dispatcher had sent out word that No. 8 would detour and had later changed his plan and sent No. 8 out on her regular track without sending out a message informing the yardmen of such fact. Had the plaintiff followed the rules in taking his engine to the roundhouse the accident could not have occurred. Held, the dispatcher's conduct did not constitute negligence.—Jones v. Pere Marquette R. Co., 168 Mich. 1. (Blair and Moore, JJ., dissenting.)

¶ 1427. The foreman of a gang of laborers employed by a railroad company to dig and load gravel called out as the train was about to start, "All aboard!" and one of the men, in attempting to jump on while the train was moving, lost his hold and was injured. He swore that he heard no order to board the cars, and went because the others went; and he knew that there was to be another opportunity of getting on the train. Held, that there was no evidence of defendant's

negligence.—Novock v. Michigan Cent. R. Co., 63 Mich. 121.

¶ 1428. The inference that a servant of a railway construction company rode on the outside of a way car in the performance of a duty for the company and under its direction could be legitimately drawn; where, in an action for injuries to him in a collision while so riding, it appears that the company's roadmaster, who was on the train, told plaintiff he had "better go inside"; to which plaintiff replied he "got up here to watch the tools" to see that none fell off, and that he had a good seat, whereupon such roadmaster said "all right, then."—Milbourn v. Arnold Elec. Power Station Co., 140 Mich. 316.

¶ 1429. Where the general manager of a drug company testifies that one Larkins had charge of the soda department under one Tabor, and that one of Larkins' duties was to see that the fountains were charged, there is sufficient evidence for the finding that Larkins represented the defendant in issuing an order to an employee to fill a tank.—McDonnell v. Central Drug Co., 170 Mich. 291.

¶ 1430. In an action by a hostler's helper in a railroad roundhouse against the company to recover damages for personal injuries alleged to have been sustained while plaintiff was attempting to get off of an engine while it was in motion, evidence held insufficient to show that any invitation had ever been given by the engineer to the plaintiff to get on the engine to render help.—Stornelli v. Duluth, S. S. & A. Ry. Co., 193 Mich. 674.

¶ 1431. In an action by a hostler's helper in a railroad roundhouse against the company to recover damages for personal injuries sustained as the result of his jumping off the engine of an excursion train upon its return trip while such engine was in motion, and in which it was claimed by the plaintiff that he boarded the engine on its initial trip in response to what he thought was a request of the engineer, supposing there was something the engineer wanted him to do, that upon the return trip the engineer promised to let him off at the roundhouse, and, while slowing down, motioned him to get off, which he attempted to do while the train was moving at about ten miles an hour, evidence held insufficient to show any negligence on the part of the defendant.—Stornelli v. Duluth, S. S. & A. Ry. Co., 193 Mich. 674.

§ 65i. ——As to warnings and instructions.

Duty to warn and instruct, see ante § 54.
Admissibility of evidence as to warnings and instructions, see ante § 64f.
Jury questions as to warnings and instructions, see post § 67 l.
Instructions as to warnings and instructions, see post § 71d.

¶ 1432. A brakeman injured while attempting to couple cars supplied with double deadwoods, where by his own testimony he saw and recognized the danger, and attempted to couple the cars in the manner in which it should be done, cannot be said to have been hurt by reason of defendant's failure to instruct him how to make the coupling.—Fenlon v. Duluth, S. S. & A. R. Co., 108 Mich. 284.

¶ 1433. The jury were warranted in finding that a mill company had not discharged its duty in taking reasonable precautions to keep the passageway back of the shears of its iron mill clear of scraps and in giving instructions to the young lads employed by it before setting them to work at these big shears, in an action for the death of one such lad caused by coming in contact with exposed cogwheels as he was attempting to pass over the obstructions in such passageway; where, it appeared that the passageway was narrow, and had an exit at one end only, that the gears and the other machinery were so exposed in such passageway that if the scraps accumulated on the floor, one passing through such passageway would be in danger of coming in contact with such cogwheels, that the boys so employed were instructed by the mill foreman to bind the scraps into bundles of fagots and pile them on the floor of such passageway to be gathered up by another employee, but that they were not instructed to keep the passageway clear at those points where the exposed cogwheels were.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 1434. A mill company was not negligent in failing to tell its employee, who was injured while working at its pony planer, that a device connected with the machine was weak, and would not protect him from the knives as a hood would do, where, it appeared that such fact was evident, and there was nothing to indicate that he relied upon its strength in any way.—Erickson v. Cummer Mfg. Co., 140 Mich. 434.

¶ 1435. In a personal injury suit, recovery cannot be had on the theory of the master's failure to warn of the danger, where there is no evidence that the injured person was unaware of the dangers or that he was not warned, or that the failure to warn was the cause of the accident.—Gehl v. Pittsburg Coal Co., 163 Mich. 285.

¶ 1436. In an action by an employee of a stone crushing plant against the owner for damages for injuries sustained while in the performance of his duty in pinching down an empty car to the crusher, pursuant to custom, as a result of the carelessness of the engineer of a switching engine in the employ of defendant in bumping cars against such car, evidence held insufficient to establish that the workman was entitled to any special warning as to the movement of the

switch engine.—Salo v. Martin, 187 Mich. 617.

§ 65j. ——As to competency and negligence of fellow-servants.

Liability of master for acts of fellow-servant, see ante § 55.
Admissibility of evidence, see ante § 64g.
Jury questions as to negligence of fellow-servants, see post § 67o.
Instructions as to acts of fellow-servants and duty to employ competent servants, see post § 71e.

¶ 1437. The use by an employee of a riveting "soft-head" which he knows to be defective is not conclusively negligent so as to bar recovery by a fellow-servant engaged in striking the soft-head where the evidence tends to show that the soft-head had been turned back as dangerous and defective but subsequently retained as the only one available and upon refusal of the employer to repair it.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 1438. It cannot be held that a lineman's injury caused by the breaking of a pole upon which he was working arose from the negligence of his fellow-servants and therefore his recovery of damages from his employer was barred where there is no evidence that any of the linemen in defendant's employ at the time of the accident were employed in that capacity at the time the pole was set in the original construction of the road, or that they had any knowledge or means of knowledge of the original defect of the pole, except by taking it out of the ground.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

¶ 1439. In an action against a railroad company by an engineer for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a longer period, and that he had once by mistake carried a passenger beyond his stopping place, and had for that reason spoken disparagingly of himself to his employer, does not by itself show him to be incompetent.—Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

¶ 1440. In an action for wrongful death of an engineer due to the alleged incompetence of the yardmaster evidence that the latter was hasty and a very passionate man at all times, and that it took but little to excite him does not tend to show that he was unfit for the position; and the fact that he sent the train of which the deceased was engineer on the main track when a train was past due does not of itself imply negligence, although death follows.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 1441. A jury was justified in finding that a railroad company was negligent in failing to learn the intemperate habits of an engineer in its employ and in retaining him; where in an action by another servant for damages against such company, it appeared that the accident complained of was caused by the negligence of such engineer while he was in an intoxicated condition, that he had been in the habit of drinking intoxicating liquors to excess for a period of over nine months while in the employ of such company, and that no actual knowledge or notice of such habit ever reached any superior officer of such engineer.—Hilts v. Chicago & Grand Trunk Ry., 55 Mich. 437.

¶ 1442. There is no evidence of neglect consisting in incompetence of a fireman to transmit signals to the engineer and of an injury resulting from such incompetence: where plaintiff, a switchman, testifies that he gave a signal for a slow backing movement on the fireman's side which was responded to by an ordinary backing movement, but the engineer and the fireman both deny that any such signal was given, and the engineer further testifies that he could see and did see plaintiff on the inside of a curve on the fireman's side and was looking for signals while slowly backing, which testimony of the engineer and fireman is not contradicted or impeached.—Catlin v. Michigan Cent. R. Co., 66 Mich. 358.

¶ 1443. The presumption that an employer has done his duty in selecting competent servants is overcome by proof that the servant was incompetent when employed.—Lee v. Michigan Cent. R. Co., 87 Mich. 574.

¶ 1444. In the absence of evidence that care was exercised in selecting an employee who has been in the service only two or three weeks, proof that he was incompetent when employed need not be supplemented by proof that the employer knew of such incompetency.—Lee v. Michigan Cent. R. Co., 87 Mich. 574.

¶ 1445. The fact that an employee, after operating machinery correctly for several months, forgot on one occasion and turned a brake the wrong way, thereby causing the fall of a mine cage and ensuing injury to a fellow-servant, has no tendency to show incompetency.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1446. Due care on the part of a mining company in employing a boy seventeen years old to manage a brake by which the hoisting and lowering of passenger cages in the mine was controlled is shown by the facts that the machinery was simple and easily managed, and that the master mechanic, before employing the boy, made inquiries of the boy's father, who was a practical engineer, and was informed that the boy had had two years' experience in managing the brake at another mine, where the duties of the brakeman were more difficult, and that he was capable of doing the work which the

company required.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1447. In an action for negligent death evidence that the head sawyer had worked up through various positions in a saw mill during twelve years' service and had been recently appointed from the next lower position does not tend to show negligence in the selection of a competent fellow-servant.—Kellogg v. Stephens Lumber Co., 125 Mich. 222.

¶ 1448. Negligence in the selection of a fellow-servant in the person of a head sawyer is not made out by testimony that slabs accumulated on several occasions to the knowledge of the foreman, that the sawyer looked around at the tally board, and that half the time the sawyers were talking about hunting ducks, where there is other testimony going to show his entire competency and carefulness in the work.—Kellogg v. Stephens Lumber Co., 125 Mich. 222.

¶ 1449. Testimony that the conductor on an electric street car which while backing up collided with another car, was slow in ringing bells and stopping his car; that he got excited and gave wrong signals; that he was too short to reach the bell cord without standing on his tip toes, but that he was not known to have had an accident, and that the witnesses testifying had not reported him as incompetent, failed to raise any presumption that the defendant knew or ought to have known of the conductor's incompetency or that it should have removed him if it had known of such facts.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 1450. Where a servant in charge of a traveling crane was shown to have been in defendant's employ for a period of more than two months, during which he had operated the crane some two dozen times, and it further appeared that he had been familiar with machinery before entering defendant's employ, and that upon the happening of the accident he did what he should have done to avoid further injury, there is sufficient evidence to establish his competency, the accident having resulted from the lapse of memory not inconsistent with skill and competency.—Ferry v. American Suction Gas Producer Co., 153 Mich. 266.

¶ 1451. Plaintiff, a fireman employed by defendant, was injured in a collision and sought to recover on the ground that defendant's engineer with whom he worked was incompetent. The evidence showed that said engineer had continued in defendant's employ for a year and shown himself fairly competent. Plaintiff introduced evidence to show that plaintiff on one occasion overloaded his fire with coal and upon another occasion failed to shake down the fire at the proper time and offered such evidence to prove the engineer's incompetency in failing properly to instruct plaintiff. There was further evidence that the engineer on another occasion ran past a station and exposed his train to danger of collision. It appeared, however, that this act on his part was necessary in order to back his train upon the siding. Held, the evidence wholly failed to establish defendant's negligence in failing to employ a competent engineer.—Larry v. Detroit & M. Ry. Co., 167 Mich. 380.

¶ 1452. That a master employed an incompetent boy to assist a servant who was injured through his negligence is not shown by evidence that the boy without the knowledge of the master occasionally smoked cigarettes, and laughed and giggled while at work.—Jackson v. Schillinger Bros. Co., 182 Mich. 504, 7 N. C. C. A. 576.

¶ 1453. The incompetency of a common laborer assisting a mine trammer is not established by evidence that he was a poor worker, "didn't take to his work well" and that he smoked cigarettes.—Sabela v. Newport Min. Co., 184 Mich. 676.

§ 65k. ——As to assumption of risk.

Doctrine of assumption of risk, see ante § 56.
Jury questions as to assumption of risk, see post § 67q.
Directing verdict on ground of assumption of risk, see post § 70b.

¶ 1454. Plaintiff, who was experienced in saw-mill work, fell from a ladder in defendant's mill, where he had been engaged for a month or more firing a boiler. The ladder, which was intended as a means of reaching the top of boiler, consisted of strips of wood nailed upon a wooden post or stanchion, which supported the wall encasing the boiler, and which extended a foot or eighteen inches above the brickwork. The sawdust carrier passed over the boiler, and sawdust scattered upon the top of the boiler ignited. Plaintiff testified that the night watchman told him to take a broom, hurry up the ladder, and sweep it off; that he took the broom in his right hand, and went up the ladder; that, when he reached the top of the post, he thought it extended farther up; that it did not extend up far enough for him to land on the boiler; that it was dark, and he could not see, and that he fell, and was injured. He further testified that he had seen the post, but never noticed how high it was, and that on the occasion of the accident he knew that he had reached the last slat, but was feeling for the post, which he supposed went higher. Held, that this was not a case of latent danger, but of one which was apparent to the casual observer, and which defendant had every reason to suppose was known to plaintiff.—Lamotte v. Boyce, 105 Mich. 545.

¶ 1455. The assumption of risk by a servant engaged in applying anti-slip compound to a pulley is not negatived by evidence that he advised the foreman to have the pulley tightened and the foreman promised to do so

where it is not shown that the proposed repair would have done away with the necessity of applying the compound.—Cantwell v. John Brennan & Co., 125 Mich. 349.

¶ 1456. Assumption of risk is established by evidence that the deceased was killed while attaching a signal wire on the slippery roof of a shed in close proximity to two live wires of high voltage, that he knew of the danger and avoided it until he slipped on the roof and was thrown against or caught hold of the live wire.—Davis v. Port Huron Engine & Thresher Co., 126 Mich. 429.

¶ 1457. An employee tending pulp shakers in a starch factory after three days' work assumes the risk of injury caused by slipping on a wet floor and inserting his foot in a box 17 inches high containing a screw conveyor which he was compelled in his work to step over in going from one shaker to another, where his own testimony shows some familiarity with machinery and the nature of his work was explained to him.—Storrs v. Michigan Starch Co., 126 Mich. 666.

¶ 1458. The operator of a chicory grinder assumed the risk of personal injuries and had no cause of action against his employer; where, in an action for the loss of an arm caught in the gearing of such grinder, it appeared that the exposed gearing was open to view and did not escape the observation of such operator; even though it appeared that a previous fire had disarranged the apparatus of the mill so that a block was substituted for the box formerly used as a step for the operator of the grinder to reach the feed attachment above the rolls and belt, and that such block, while plaintiff was standing thereon, tipped, causing plaintiff's arm to come in contact with the rapidly moving belt resulting in the injuries complained of.—Minnie v. Mueller, 140 Mich. 3.

¶ 1459. The servant of a railway construction company, who was injured while riding outside of a way car in a collision of the work train with some loaded cars left without warning on a spur, did not assume the risk of such injury; where in an action for damages, it could be inferred from the evidence that the shock of the collision was much greater than the shock ordinarily resulting from cars coming together on the siding.—Milbourne v. Arnold Elec. Power Station Co., 140 Mich. 316.

¶ 1460. The evidence on plaintiff's case alone is sufficient to show that a servant by trade a metal polisher but who had worked at logging for some weeks and was at the time working for the first day as a chainman at the foot of a rollway, knew the danger of the bank of logs becoming insecure in course of the work and of the risk of their falling when a spiked skid was removed whose spikes rested in the top logs, where in the course of his previous work he had been daily at and within sight of the loading operations whereby logs were banked by use of the skids, and where at the time he was killed the bank had become shaky and visibly so to any one and he tried to carry away the skid for the purpose of strengthening the bank or pile in response to directions telling him that it was shaky; and though he was not heard to have received any instructions but where there was ample opportunity for them to have been given without any of the witnesses having heard it.—Carnes v. Guelph Patent Cask Co., 141 Mich. 23.

¶ 1461. In an action for personal injuries sustained through a bolt or piece of slab being caught upon a saw and thrown forward with great force and striking the plaintiff, the servant must be held to have assumed the risk of his employment where it appears that he had joined the ends of the belt with rivets as directed by the foreman, although he intended to fasten it by lacing, but there was no lacing material at hand, and he thereafter continued the work, there being no evidence of a lack of knowledge of the manner in which the belt was fastened, nor any representations made to him to lead him to suppose that the belt would be fastened in any other way than it was.—Eligh v. Goldie, 143 Mich. 596.

¶ 1462. A boy seventeen years old of more than usual intelligence cannot recover in an action for personal injuries sustained by him while engaged in feeding and operating a slitting machine in defendant's factory on the theory that it was the duty of defendant to have instructed him how to do the work safely on account of his youth and especially to have instructed him not to replace the box coverings while the machine was in motion when the evidence shows that he had worked at the machine three weeks, that it was not a complicated one and the dangers were apparent.—Hess v. Escanaba Woodenware Co., 146 Mich. 566.

¶ 1463. In an action for personal injuries sustained by a person engaged in digging a trench to lay water pipe by the caving in of the sides there can be no recovery where the evidence shows that the trench was about seven feet deep, and about three feet wide at the top, that the side walls were frozen to a point three feet or more from the top, and that the plaintiff had been engaged in this work for three weeks; there being no latent danger in the fact that the frozen earth might cave in, and if there was it was a risk assumed by him, being as apparent to him as to any one else.—Hodgson v. Michigan Cent. R. Co., 146 Mich. 627.

¶ 1464. In an action by a servant for personal injuries caused by being caught on a revolving shaft, where the evidence showed that plaintiff was about 18 years old, had been employed in the shipping department which included cutting the boards from

which crates were made for 15 months before the accident, and that the plaintiff as helper had frequently and for a long time assisted in sawing crating material under a competent operator, and was put in charge of the saw and had done this work for at least two weeks before the injury it was held that the risk connected with the work was assumed by him, and that the danger of being caught on the shaft from which the saw was driven was apparent.—Hertel v. Safety Folding Bed Co., 149 Mich. 223.

¶ 1465. Where a carpenter foreman, after completing work proper for a carpenter in the wrecking of a building, was directed by the owner to remove steel beams which he claimed was the work for a steel man, with full knowledge of the weight of the beams and that the handles of the derrick used for lowering the beams were defective, ordered one of the workmen to take one of the cranks off, using a rope as a brake instead, and, while lowering the beam the other handle broke, causing the beam to fall and pull him, while hanging to the rope, upon the cogwheels and injure him, held that he assumed the risk of the employment.—Dams v. Vinton Co., 189 Mich. 12.

§ 651. ——As to care or contributory negligence of servant.

Admissibility of evidence as to contributory negligence, see ante § 64h.

Jury questions as to contributory negligence, see post § 68.

Directing verdict on ground of contributory negligence, see post § 70d.

¶ 1466. The fact that laborers talk, laugh and sing while employed in work involving danger does not necessarily indicate that they are careless or negligent.—Smith v. Peninsular Car Works, 60 Mich. 501.

¶ 1467. The fact that upon switch-engines switchmen ride standing upon the platform provided for that purpose in front of the engine has no tendency to prove that they are justified in riding in a sitting position upon the cow-catcher of a road-engine.—Glover v. Scotten, 82 Mich. 369.

¶ 1468. Where the testimony of one who was injured by a saw's failing to operate in the usual manner, that is, to drop back through a slot in the table when not in use, showed that if he had looked before the accident he would have seen the saw, and thus could have avoided putting his hand over it, held, that he was contributorily negligent.—Johnson v. Hovey, 98 Mich. 343.

¶ 1469. A declaration for a personal injury averred that plaintiff, a freight brakeman, attempted to make a coupling of a car that had been kicked upon an unballasted siding; that he was ignorant of the condition of the siding, and could not see it, it being a dark and cloudy night; that plaintiff took two or three steps along on the ties, and while in the act of coupling said kicked-off car to another car, he being at the time between the two cars, he stepped with the train between the rails, and, instead of stepping upon the earth or a tie, as he expected, stepped between a couple of ties, and was tipped over, his feet falling unexpectedly over a foot, causing him to lose his balance, his control over his equilibrium and his body and limbs, and his right arm was caught between the two deadwoods of said car, and crushed. Plaintiff's testimony showed that the cause of the injury was his act in placing his arm between the deadwoods, where it could be and was caught when the moving car came back against the stationary car; that the movement by which his arm was so placed was not involuntary; that he was not thrown and did not stumble into this position; that he stood with his arm against the stationary car, in a position at that time discovered by him, and waited for the moving car to come against it, and the instant it did so his arm was caught. Held, that plaintiff's testimony failed to show either that he was in the exercise of due care, or that the unballasted condition of the track caused the injury in the manner complained of.—Mueller v. Lake Shore & M. S. R. Co., 105 Mich. 487.

¶ 1470. An employer cannot be held liable for injuries to a boy twelve years old, resulting from his falling against uncovered cogwheels during a scuffle with a companion, on the ground that he was too young to be placed at work in the vicinity of uncovered machinery, where it appears from his own testimony that he was familiar with the construction of the machines, and was fully aware of the danger.—Borck v. Michigan Bolt & Nut Works, 111 Mich. 129.

¶ 1471. An experienced miner who voluntarily stepped into a car for the purpose of barring down ore, when the danger of doing such work was apparent because of the danger of being struck by the ore when it started to run, was guilty of contributory negligence and assumed the risk of coming in contact with an electric trolley wire over the car, it appearing that the defendant had provided suitable and safe places for its employees to stand in barring down the ore.—Leppala v. Cleveland Iron Mining Co., 122 Mich. 633.

¶ 1472. In an action for wrongful death of a brakeman, testimony of the engineer, that, after throwing the switch and signaling the engineer the deceased disappeared behind the moving car and was not seen alive again, is open to the presumption that he attempted to cross the track and does not show necessarily that he was guilty of contributory negligence or breach of the company's rules by walking on the track ahead of the moving car.—Jones v. Flint & P. M. R. Co., 127 Mich. 198.

¶ 1473. A switchman is not guilty of contributory negligence in getting on the side of a freight car and attempting to move to the rear, where the testimony shows that he could not easily get to the rear at once and that it was too dark to see a pile of lumber piled too close to the track.—Bradburn v. Wabash R. Co., 134 Mich. 575.

¶ 1474. In an action for personal injuries caused by a descending elevator crushing the foot of the complainant there can be no recovery where the evidence shows that the servant was perfectly familiar with the surroundings and stood waiting for the elevator and was talking with a friend, and she stood with the ball of her foot upon the floor, but a part of her foot extended over into the elevator shaft.—Roberts v. Sanitas Nut Food Co., 142 Mich. 589.

¶ 1475. The presumption that a brakeman, killed between a cattle chute and a passing car, was in the exercise of due care in making the coupling at the time of the accident, is negatived, where the evidence shows that he was directing the movement of the train in making the coupling, that it was midday and there was no obstruction to his view, that he was on the ground and had full control of his movements, was familiar with the surroundings and with a casual glance could have seen the danger, and where no reason is shown for his getting between the chute and the car which crushed him.—Wilson v. Lake Shore & M. S. Ry. Co., 145 Mich. 509.

¶ 1476. A person employed in the packing department of a factory engaged in the production of calcium carbide is not guilty of contributory negligence in permitting a plumber and steam-fitter, not subject to his control, to break a steam pipe and allow water to come in contact with calcium carbide, causing an explosion, where there is no evidence that he knew what such steamfitter was doing, or that he had any warning of the danger.—Charron v. Union Carbide Co., 151 Mich. 687.

¶ 1477. Where plaintiff, a brakeman, has passed a given station a dozen times or more, and had opportunity to notice the location of buildings along the track, and knows it is his duty to familiarize himself with the location of such buildings, the evidence is conclusive that, by using reasonable diligence, he would see a cattle chute located three feet eleven inches from the track, and plaintiff cannot recover for injury due to striking his body against said chute.—Carr v. Grand Trunk Ry. Co. of Canada, 152 Mich. 138.

¶ 1478. The deceased, in charge of defendant's electric generating station, was killed by coming in contact with the lead wires, while attempting to get a rubber ball out of the pit in which the generating wheel was suspended. The evidence showed that the deceased knew of the presence of the lead wires in the pit; that said wires went to the switchboard; that they carried a dangerously high voltage; that he had been warned not to touch them either in or out of the pit; and that his duty did not call him to invade the pit in any way at any time, or to touch the machine except to oil the journals when it was running. Held, deceased was contributory negligent and his widow could not recover for his death.—Sweezo v. Cheboygan Electric Light & Power Co., 166 Mich. 25.

¶ 1479. In an action for personal injuries sustained by the conductor of a traveling crane used as a switch engine wherein the alleged negligence of the defendant consisted in furnishing a defective lantern, it appeared that the plaintiff's lantern blew out and that in walking in the dark towards a car which he knew was approaching he was caught between it and a pile of weights near the track; held, that the plaintiff was guilty of contributory negligence.—Charters v. Industrial Works, 179 Mich. 1.

§ 66. Sufficiency of proofs under Federal Employers' Liability Act.

Liability under Federal Employers' Liability Act, see ante § 37.
Assumption of risk, see ante § 58.
Contributory negligence under Federal Employers' Liability Act, see ante § 63b.
Instructions under Federal Employers' Liability Act, see post § 72.

¶ 1480. A verdict in favor of the plaintiff in an action under the Federal Employers' Liability Act, for the death of a switchman, held not against the weight of the evidence.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 1481. In an action under the Federal Employers' Liability Act to recover damages for injuries sustained by reason of defective facings on the brake of a certain handcar preventing the car being stopped properly, where there was evidence showing that the car when running at a certain rate of speed could not be stopped by application of the brake within a certain number of feet, but no evidence tending to show within what distance the car could be stopped with brakes equipped with proper facings, held that there was no proper basis for a finding of negligence on the part of defendant or any of its servants operating the car at the time of the accident.—Miller v. Ann Arbor R. Co., 196 Mich. 297.

¶ 1482. In an action under the Federal Employers' Liability Act by a car repairer to recover for personal injuries sustained while engaged in repairing a defective car drawbar, evidence examined and held that plaintiff was precluded from recovery by having assumed the risk incident to the em-

ployment in which he was engaged when injured.—Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398.

Doctrine of res ipsa loquitur as applicable in actions under Federal Employers' Liability Act, see note, 10 N. C. C. A. 853-860.

§ 67. Questions of law and fact.

Weight and sufficiency of evidence, see ante § 65.
Jury questions in actions for wrongful discharge or wages, see ante §§ 23, 30.
Jury questions in actions for injury to third persons, see post § 80.
Directing verdict, see post § 70.
General law as to province of court and jury, see Trial, VI.

¶ 1483. Even though plaintiff depended upon inference to establish the main fact in his case, the question whether or not that inference was sufficiently rebutted by direct testimony in defendant's favor was for the jury, and uncontradicted testimony to the contrary is not conclusive, the rule being different from that where the defense consists of a distinct fact, not inconsistent with plaintiff's proofs.—Woods v. Chicago & G. T. R. Co., 108 Mich. 396.

¶ 1484. Where the evidence of the plaintiff on a material point in an action for personal injuries to a servant is met by that of the defendant, the issue is for the jury.—Scoop v. W. H. White Co., 182 Mich. 539.

¶ 1485. That caustic soda will destroy the eye by burning when brought in contact with it cannot be held as a matter of law to be matter of common knowledge.—Dascho v. Michigan Alkali Co., 163 Mich. 612.

¶ 1486. The question of what was the gauge of a railroad track at the time of an accident is one for the jury.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 1487. Where a plaintiff is injured while performing his duty of shifting a machine belt, it is proper to submit to the jury, as an element establishing defendant's liability, evidence that the plaintiff's physical strength was insufficient for the task.—Lehto v. Atlantic Min. Co., 152 Mich. 412.

¶ 1488. Where the negligence charged is the failure of an employer to provide a proper signaling device to control from the bottom of the mine shaft the movement of a bucket, or a ladder by which miners might escape in emergencies, evidence of an injury not attributable to such omissions should not be submitted to the jury.—Benson v. Jones & Laughlin Ore Co., 185 Mich. 7. (Brooke, C. J., and Ostrander, J., concurring in reversal on ground that negligence was not shown.)

§ 67a. Jury questions as to relationship and scope of employment.

Evidence as to existence of relation and scope of employment, see ante §§ 64a, 65a.
Evidence as to competency or negligence of fellow servants, see post §§ 64g, 65j.
Directing verdict on ground of fellow servant's negligence, see post § 70c.

¶ 1489: Where conflicting evidence is presented as to whether an employee was working for a corporation or for an independent contractor, the question held properly submitted to the jury.—Druck v. Antrim Lime Co., 177 Mich. 364.

¶ 1490. Whether an employee was in his employer's service at the time of an accident is a question for the jury, when depending on conflicting testimony.—Stetson v. Mackinac Transp. Co., 182 Mich. 355.

¶ 1491. In an action by an employee for personal injuries due to a fall down a silo chute owing to the fact that the doors in the silo had been placed upside down and the levers in two of the doors which formed part of the ladder up the side of the chute turned down as plaintiff's weight was placed upon them, it was a question for the jury whether plaintiff was acting within the scope of his employment at the time of the injury where only 15 or 20 minutes' work remained to be done in filling the silo and all the doors were on and plaintiff's son was in the silo and did not need any help and plaintiff ascended the ladder to help his son, if he needed any help, otherwise, to see how near the work was to being done, and, as soon as the work was done, the machine was to be moved to a neighbor's where plaintiff was to assist in the work.—Van Driel v. Stevens, 200 Mich. 291.

¶ 1492. Whether a hostler employed in cleaning the ash pans of locomotives is a shopman within the meaning of Act No. 104, Pub. Acts 1909, How. St., 2nd Ed., §§ 4110-4116, held a question for the jury.—Boesler v. Copper Range R. Co., 184 Mich. 430.

¶ 1493. It is a question for the jury whether a plaintiff might, from the nature of his employment, reasonably assume that he was to use a certain dangerous machine.—Marklewitz v. Olds Motor Works, 152 Mich. 113.

§ 67b. Jury questions as to cause and manner of injury.

Evidence as to cause of injury, see ante § 65b.

¶ 1494. Whether an injury from the kick of a horse which ran away while being driven was due to the absence of a check-rein is for the jury to determine.—Hoffman v. Adams, 106 Mich. 111.

¶ 1495. Whether the inference suggested by plaintiff's theory as to the cause of an explosion of nitroglycerine, whereby her intestate had been killed, was the correct one, or whether it was sufficiently rebutted, was a question for the jury, upon testimony that the explosion occurred a few hours after an attempt had been made to change the method of conveying the partially finished compound, by employing for the purpose a rubber hose attached to a tank, that upon the plan's appearing to be impracticable, the hose had been permitted to remain attached to the tank but with the faucet shut off, and filled with so much of the compound as failed to escape at the open end, and that the compound contained acids which would generate gases and cause an explosion, and where the testimony in rebuttal was that nitroglycerine explodes at 380° Fahrenheit, and that hose of the size employed would not stand the pressure occasioned by the generation of that degree of heat.—Schoepper v. Hancock Chemical Co., 113 Mich. 582.

¶ 1496. An employee of a photographer was injured by an explosion of a substance given him by his employer for flashlight powder, the evidence showing that the ordinary components of flashlight powder are not explosive, either separately or in combination. Held, that whether some explosive substance was negligently permitted by the employer to be mixed with the powder, or whether the explosion was due to some other cause, or whether the flashlight powder itself was explosive, were questions for the jury.—Heath v. Calkins, 157 Mich. 288. (Grant, Ostrander and Brooke, JJ., dissenting.)

¶ 1497. In an action by an employee operating a spoke lathe for personal injuries sustained through stumbling and having his arm cut off in the machine, which was negligently started by the foreman while the employee was oiling it, causing the chips and sawdust to fly into his face, the question of proximate cause is for the jury and a verdict for the plaintiff will not be set aside.—Wellihan v. National Wheel Co., 128 Mich. 1.

¶ 1498. Where plaintiff testifies that in looping up a belt to keep the main shaft from burning it, he was drawn into the shafting and injured; that he was just reaching to touch the belt, but had not yet touched it; and that the ends of a rope pulley were hanging from the shaft and plaintiff felt these grip him and draw him into the shafting,—there is a question for the jury whether the contact with the said rope caused the accident.—Trombley v. McAfee, 152 Mich. 494.

¶ 1499. The question as to whether or not the use of uninsulated wire was the proximate cause of injury to a telephone lineman is one of fact for the jury.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 1500. Where, in an action for injuries sustained while operating a stamping press, defendant's theory that the injury was caused by the machine repeating, was supported by the evidence of several witnesses, the trial judge cannot, upon his judgment as to the mechanical possibility of the machine repeating, illustrated by the operation of the machine before him, determine as a matter of law that the machine could not repeat.—Clemens v. Gem Fibre Package Co., 153 Mich. 496.

¶ 1501. Plaintiff was injured by falling into a chute or raise while employed in a mine. There was conflicting evidence as to whether a light customarily kept burning at the chute, was out on the occasion in question. Held, that whether the absence of such light was the proximate cause of the accident, was a question for the jury.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 1502. Plaintiff was lying on a pile of blocks, in removing them from an elevator shaft, and in that position was near the revolving coupling of a line shaft. Plaintiff testified that he slipped off the pile, and into a projecting bolt in the coupling, and was injured. Evidence was introduced that plaintiff stated before the trial that he did not know how he was injured. Held, the question of the manner of his injury was for the jury.—MacDonald v. Freeman Mfg. Co., 160 Mich. 380.

¶ 1503. The question of whether a "flyback," injuring plaintiff, an edgerman in defendant's mill, was caused by failure to keep the edging machine in repair, is for the jury when there is some evidence in support of the theory, although defendant's testimony may show that it might have been caused in other ways.—Cousineau v. Embury, 171 Mich. 28.

¶ 1504. Where a saw mill company employs an ignorant and inexperienced machinist to run the machinery and fails to take proper precautions for guarding it, and such employee is not informed of the existence of a set screw in a revolving shaft which he is oiling, and stands closer to it and away from the saw and is injured by something knocking his hand against the saw, the question as to whether the proximate cause of the injury was the set screw striking his hand while engaged in oiling the shaft and knocking it against the saw is for the determination of the jury.—Tankovich v. Indiana Min. Co., 187 Mich. 186.

¶ 1505. In an action by an employee of a railway construction company to recover for personal injuries due to being brushed off a flat car, on which he was riding, by a

push car which was on the siding and too near the main track, where there was expert evidence that in the operation of railroads it was the custom to set push cars, unattended by men, off the track, or, if left on the track, to securely chain them, and it appeared that small boys had been accustomed to playing on the siding and that the car was moved in the dangerous position by small boys, held that it was a question for the jury whether defendant had furnished plaintiff with a reasonably safe place to work and whether the proximate cause of the injury was the failure to either remove the car from the siding or securely block or chain the wheels.—Adamski v. Michigan Ry. Engineering Co., 197 Mich. 561.

§ 67c. ——To railroad employees.

¶ 1506. Circumstantial evidence that the deceased brakeman was found within a few feet of a frog, blocked defectively, that his foot was struck by the wheel of a car, that eyelets missing from his shoe were found within a few inches of the frog, is sufficient to leave to the jury as to whether death was due to his foot catching in the frog.—Jones v. Flint & P. M. R. Co., 127 Mich. 198.

¶ 1507. The question whether the negligence of an assistant roadmaster in charge of a train, in unduly hastening the unloading of rails from a moving train, was the cause of an accident to one of those at work in unloading, was one of fact for the jury.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 1508. In an action for the negligent killing of a railroad switchman claimed to be due to defective blocking, there was testimony that when decedent was found after the accident his foot was firmly wedged in the space between the guard rail and the main rail, the sole and heel being pressed down flat; on the other hand, there was evidence that the decedent admitted, prior to his death, that he slipped from the foot board of a locomotive and got caught under the wheel. Held that, notwithstanding such admission, the question of the proximate cause of the accident was for the jury.—Parker v. Union Station Ass'n, 155 Mich. 72.

¶ 1509. Plaintiff, a station agent of defendant railway, was injured by a conductor of defendant while they were engaged in unloading a freight car. There was evidence that the conductor was intoxicated. Held, it was proper to refuse to rule as a matter of law that the fact of intoxication was not the cause of the accident.—Johnson v. Lake Shore & M. S. Ry. Co., 162 Mich. 301.

¶ 1510. The question of the cause of derailment is one of fact.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 1511. The question of whether the width of gauge of a railroad track was the proximate cause of the derailment of certain cars is a question for the jury.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 1512. In a suit to recover against a railroad for injuries to plaintiff's decedent, employed as an inspector of freight cars, and who was found injured after defendant's train had pulled out, the question of the manner in which the deceased received his injuries is for the jury where the evidence is conflicting and where there is evidence to sustain a finding making the defendant liable.—Habitz v. Wabash R. Co., 170 Mich. 71. (McAlvay and Brooke, JJ., dissenting.)

¶ 1513. Where plaintiff employed as a brakeman on one of defendant's dump trains used in excavating for canal locks, while riding on the front of the engine is injured when his train collides with the one ahead, there being evidence that the place was not properly lighted, the question whether the condition of the lights was the proximate cause of the injury is properly submitted to the jury.—Murphy v. Great Lakes Dredge & Dock Co., 175 Mich. 216.

§ 67d. Jury questions as to negligence of master.

Existence of custom affecting duty of care as jury question, see Customs § 8.

¶ 1514. In an action by a servant against his master for injuries from a kick received by the running away of a horse attached to a delivery wagon which he had been engaged to drive, it appeared that plaintiff was but eighteen years old, and had recently been ill; that the horse was nervous and high-spirited, and "ready to spring and go" if another rig should come up behind; that defendant had driven the horse for some time prior to the accident; that the harness was without a check-rein; that plaintiff had never before driven the animal, and was given no warning. Held, that whether defendant was negligent in intrusting the horse to plaintiff, and in furnishing an insufficient harness, was a question for the jury.—Hoffman v. Adams, 106 Mich. 111.

¶ 1515. Testimony in an action for personal injuries that the plaintiff, an employee in the defendant's shop was in the performance of his duty in oiling a spoke lathe when the foreman threw it into gear causing the sawdust and chips to fly in the plaintiff's face and that he took one step and stumbled and that his arm was cut off in the machine, is sufficient to go to the jury on the question of defendant's negligence unless the foreman was a fellow-servant.—Wellihan v. National Wheel Co., 128 Mich. 1.

¶ 1516. In an action for personal injury causing death, evidence that the mate of

the vessel upon which deceased was employed, directed the swinging of a scaffold from which deceased was thrown into the water and drowned, and that it was the duty of the mate to attend to work which he ordered done and to oversee such work himself, raises a question for the jury whether such mate was negligent.—Rick v. Saginaw Bay Towing Co., 132 Mich. 237.

¶ 1517. A train dispatcher ordered a car, without knowledge of any defects in its condition, to follow another car which was in a defective condition. Had the second car been in good condition, and had the train crew of the front car obeyed the rule of the company as to torpedoing the track, the collision would not have occurred. Held, in an action by the conductor of the second car for injury, that it was reversible error to submit to the jury the question of the dispatcher's negligence.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 1518. Where, in a suit for personal injury caused by the plaintiff being drawn into a pulley shaft, photographs of the situation are placed in evidence, and witnesses testify as to the facts just before, during, and immediately after the accident, it is proper to submit to the jury questions of negligence, contributory negligence, and proximate cause.—Little v. Bousfield & Co., 154 Mich. 369.

¶ 1519. In an action for the death of a servant, offered testimony to the effect that the servant was sent away from his usual employment to a place underneath a chute for loading cars with pigs of iron, that the car standing there was removed, half loaded, without notice to the operator, who continued to let the pigs fall through, one of which struck and killed the servant, was sufficient to make a case for the jury on the question of the defendant's negligence.—Barto v. Detroit Iron & Steel Co., 155 Mich. 94.

¶ 1520. Complainant, employed as a janitress in defendant's building, entered an elevator therein in charge of defendant's regular elevator operator for the purpose of riding to the third floor to her work. She told said operator to stop at the third floor. He did so, opened the gate, and plaintiff, after the elevator had come to a full stop, started to walk out. The elevator suddenly dropped some ten or twelve feet and plaintiff was injured. Said elevator had, prior to the accident, always worked well, and subsequent to the accident it was found to be under perfect control of the lever. Held, the evidence was sufficient without direct proof of the operator's negligence to establish a prima facie case of negligence against defendant.—Mirabile v. Simon J. Murphy Co., 169 Mich. 522.

¶ 1521. Plaintiff's decedent was employed as an inspector of freight cars by defendant railroad. He approached the foreman asking for further instructions. The latter told him that they would eat lunch and then inspect the train standing on the track. Thereupon the deceased took his lantern and a hose and started out in the direction of the oil house for the apparent purpose of eating his lunch. The foreman and other employees shortly afterwards went along one side of the train inspecting same, but saw nothing of the deceased, supposing him to be on the other side. When they reached the end of the train the foreman signaled it to go ahead without finding out where the deceased was, and the latter was injured. Held, the evidence of the foreman's negligence was sufficient to leave to the jury.—Habitz v. Wabash R. Co., 170 Mich. 71.

¶ 1522. In the absence of eyewitnesses, the fact that a brakeman was found in a dying condition beside a track on which he had been switching cars is not sufficient to take to the jury an action against a railway company to recover for his death.—Beach v. Michigan Cent. R. Co., 180 Mich. 524.

¶ 1523. Whether the engines of a boat were improperly started before an employee who had just fastened a cable to a dock, had time to escape the tightening cable, when based on conflicting evidence is a question for the jury.—Stetson v. Mackinac Transp. Co., 182 Mich. 355.

¶ 1524. Evidence in an action by a telephone lineman injured by electric shock while stringing new wires on poles, held to present a question for the jury as to the defendant employer's negligence.—Collins v. Michigan Cent. R. Co., 193 Mich. 303.

¶ 1525. Where a station agent failed to deliver a message sent by the train dispatcher to the engineer and conductor, informing them of a washout, it is a question of fact for the jury to determine whether the dispatcher owed a duty to find out whether such message was delivered and was negligent for his failure so to do.—Graham v. Detroit, G. H. & M. Ry. Co., 168 Mich. 41. (Brooke, J., dissenting.)

¶ 1526. In an action by a railroad switchman for damages for personal injuries sustained as the result of being caught between the beam at the front of a switch engine and a post in a fence through which a side track passed into a building as he jumped off the footboard of the engine, held on conflicting evidence, that it was a question for the jury whether the engine was being operated at an excessive speed.—Sergeant v. Grand Rapids & I. Ry. Co., 198 Mich. 385.

¶ 1527. Where a servant was injured by the falling of a scaffold on which he was at work under the direction of a foreman

with other employees in installing a heavy piece of metal work, the negligence of the master and lack of contributory negligence of plaintiff were questions for the jury.—Miller v. Mathis Bros., 199 Mich. 406.

¶ 1527a. Although the evidence of defendant's negligence in a personal injury suit may be slight, it is sufficient to carry the case to the jury, whose province it is to determine, under proper instruction, what reasonable inferences, if any, it affords as to defendant's negligence in not inspecting and keeping a hotel elevator operated by plaintiff employee in repair.—Ammer v. Postal, 168 Mich. 405.

§ 67e. Jury questions as to violation of Child Labor Law.

Statutory provisions as to employment of children, see ante § 35.

¶ 1528. The question whether a minor was employed as a hostler about a railway roundhouse in violation of Act No. 285, Pub. Acts 1909, §§ 4009-4063, How. St., 2nd Ed., held properly submitted to the jury.—Boesler v. Copper Range R. Co., 184 Mich. 430.

¶ 1529. Whether a machine at which a minor is placed at work in violation of Act No. 285, Pub. Acts 1909, §§ 4009-4063, How. St., 2nd Ed., is dangerous, is ordinarily a question for the jury.—Great Lakes Laundry Co. v. Aetna Life Ins. Co., 184 Mich. 294.

¶ 1530. The question as to whether the employment of a child to run an electric freight elevator is within the prohibition of Pub. Acts 1901, No. 113, § 3, as being dangerous to life and limb of the child must be left to the jury.—Braasch v. Michigan Stove Co., 147 Mich. 676.

¶ 1531. In an action for personal injuries to a boy about 16 years old sustained through working a machine consisting of rollers through which sheets of metal about 40x22 inches were passed, the question as to whether these rollers were a danger to the life and limb was a question of fact for the jury.—Sterling v. Union Carbide Co., 142 Mich. 284.

¶ 1532. Plaintiff's foreman, in attempting to close the door of a still used in the manufacture of soda ash, took hold of the outer edge, swung it back and forth two or three times, and feeling that it was giving way shouted a warning to the men standing near to get out of the way. All of the men assisting in the work except plaintiff escaped injury from the falling door. There was evidence that plaintiff was under sixteen years of age, and that he had been at work only two days. Held, it could not be said as a matter of law that plaintiff's age and inexperience in no way contributed to his injury.—Antosik v. Michigan Alkali Co., 166 Mich. 415.

§ 67f. Jury questions as to sufficiency of appliances, tools, and place to work.

Duty to furnish safe tools, appliances and places, see ante § 46.

Evidence as to sufficiency of tools, appliances and places, see ante §§ 64b, 65d.

¶ 1533. An employee was killed by a knife flying out of a rapidly revolving shaper-head, the first time it was used, and as soon as it reached its highest velocity, before it was applied to cutting lumber. The head was got up on a new plan, and differed from others in use, particularly in the device employed to check the knife's centrifugal tendency. The head was made accurately from the plan but there was some testimony that it violated mechanical science by having nothing but contact pressure to resist centrifugal force. Held, that the fact that the knife did fly out when fastened in as well as it was designed to be had a tendency to prove that the design was bad, and that the case should have gone to the jury on the question whether the implement was reasonably safe and properly designed, and whether the principle involved in it was not a departure from safe methods as before applied.—Marshall v. Widdicomb Furniture Co., 67 Mich. 167.

¶ 1534. In an action for personal injuries the plaintiff is held to have made a sufficient showing of negligence to entitle him to go to the jury, where it appeared that while pulling down an iron door, moved by means of a chain running over pulleys, and fastened to the top of the door, a weight being attached to the other end he was injured by its falling upon him. The chain broke and on inspection it was found to have been connected together at one point with coils or strands of wire, which had broken or pulled apart. Plaintiff was unaware of the existence of this wire connection, and one of his fellow-servants who had been in the defendant's employ for eight years testified to his want of such knowledge and that he had never known of any repairs or inspection of said chain.—Tangney v. Wilson & Co., 87 Mich. 453.

¶ 1535. In an action by an employee for personal injuries alleged to have been sustained by reason of an unfit appliance furnished by the employer, it is error to submit to the jury the question whether the particular kind of appliance was commonly used by other employers in the same line of work, where defendant's evidence that it was so used is in no way controverted.—Shadford v. Ann Arbor St. R. Co., 111 Mich. 390.

¶ 1536. The fact that a witness who examined a broken cable after the accident found a "little rust" upon it was insufficient to raise a question for the jury as to its safe condition.—Hennig v. Globe Foundry Co., 112 Mich. 616.

¶ 1537. In a servant's action for injuries due to being thrown from a platform while oiling a shaft, the court should have eliminated from the consideration of the jury all questions of negligence based upon the alleged dangerous proximity of the platform to revolving belts, and upon the alleged insufficient light, no tangible evidence having been presented by plaintiff to sustain either of these theories.—Zimmerman v. Detroit Sulphite Fibre Co., 113 Mich. 1.

¶ 1538. In an action by a servant against a master for personal injuries sustained by falling from a derrick the question of negligence is properly left for the jury where it was the duty of the plaintiff to go to all parts of the derrick supporting himself by holding to the cross pieces and he testifies that a cross piece to which he was holding was rotten and gave way precipitating him to the ground, which testimony is contradicted by defendant by testimony tending to show contributory negligence, but no inspection of the derrick had been made and it was a frail structure erected four years before and exposed to the weather.—Ouellette v. Michigan Alkali Co., 129 Mich. 484.

¶ 1539. It cannot be said as matter of law that an employer who continues in use a belt so loose that it is likely to leave the pulley at any time, running in a position where, on leaving the pulley, it is likely to do injury to an employee, is guilty of no negligence.—Krohn v. Joseph N. Smith & Co., 151 Mich. 247.

¶ 1540. In an action to recover for injuries received while in the performance of his duty as lineman in the employ of defendant, in stringing wires for a telephone, evidence that plaintiff had told the wire chief of the defendant company that he had not proper wire, and that he had asked for more wire to make certain connections, is sufficient to justify the court in submitting to the jury the question of whether it was the duty of the defendant to furnish plaintiff with a sufficient quantity of insulated wire, and whether it had performed such duty.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 1541. Whether a master furnished adequate steam capacity to make the operation of machinery reasonably safe was a question for the jury, where the evidence was subject to different inferences.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 1542. Plaintiff's intestate was killed by the explosion of defendant's soda fountain tank while being instructed how to charge the same by another competent employee. The evidence indicated that the tank was an old and rusty one; that it had worn thin at the bottom and was shattered in that place by the explosion; that it had been painted over by defendant without removing the rust; and that it had been kept in a damp cellar on a wet floor. Held, there was evidence to go to the jury that defendant's negligence in failing to provide a tank in safe condition caused the accident.—McDonnell v. Central Drug Co., 160 Mich. 455.

¶ 1543. Complainant was employed in operating defendant's stamping machine. A spring in the mechanism controlling the press became loose. Plaintiff informed defendant of this and proposed to quit. Defendant told him to continue at work and he would immediately have the spring repaired. Three days before the accident the press came down without the operation of the controlling lever, and there was evidence that this resulted from the fact of the spring being loose. On the occasion in question the press fell in like manner and plaintiff was injured. Held, there was sufficient evidence of defendant's negligence to warrant the submission of the question to the jury.—Prisel v. Coney, 168 Mich. 602.

¶ 1544. There is evidence for the jury as to the defective condition of a machine when it appears from the testimony of the defendant's foreman and other witnesses that the machine was defective and that the defect would tend to cause the accident which caused the injury.—Wiers v. Shaw-Walker Co., 171 Mich. 324.

¶ 1545. Where the question whether an employee was injured as the result of a defect in a freight elevator he was operating depends on conflicting testimony, the question of the employer's negligence is for the jury.—McGary v. Buick Motor Co., 182 Mich. 345.

¶ 1546. Where a scaffolding which had held three men for two hours while they were at work on defendant's house broke when a fourth man, plaintiff, went on it, whether it was safe for four men, held not conjectural and a question for the jury, in an action to recover damages for injuries so sustained.—Bayer v. Grocholski, 196 Mich. 325. (Fellows and Brooke, JJ., dissenting.)

¶ 1547. It is not negligence per se for an employer to keep a barrel of paint containing benzine upon his premises, for use in connection with his business.—Burke v. Parker, Webb & Co., 107 Mich. 88.

¶ 1548. Plaintiff employee was lying on a pile of blocks in discharging his duty of removing them from an elevator shaft, and in that position was near the revolving coupling of a line shaft. Plaintiff testified that he slipped off the pile, and into a projecting bolt in the coupling and was injured. Held, it was a question for the jury whether a safe place to work was provided.—MacDonald v. Freeman Mfg. Co., 160 Mich. 380.

¶ 1549. Plaintiff, a laborer, was employed by defendant in its shipyard. He was directed to carry iron grate bars up ladders

and to lay them upon the deck of a vessel. Upon reaching the top of the ladders plaintiff had to step about one foot high over a railing and upon the deck. After making some sixteen trips up one ladder, he was directed by the foreman to use the other ladder. There was evidence that as he reached the top he stepped on the freshly painted deck of the vessel and was injured. Held, it was a question for the jury whether defendant had been negligent in failing to supply a safe place to work.—Orso v. Great Lakes Engineering Works, 164 Mich. 568.

¶ 1550. In an action for alleged wrongful death of a foreman who was testing an automobile on a track constructed for that purpose by defendant when it ran off the track at a banked curve while going 40 miles per hour, the court is not warranted in submitting the question to the jury as to the defendant's negligence in the method of construction where plaintiff's intestate drove faster than defendant's rules allowed, no practical automobile manufacturer gave evidence that the track was not reasonably safe for the purpose of testing cars at various speeds, and it seems that the evidence of civil engineers tends to support the conclusion that it is safe.—Blick v. Olds Motor Works, 175 Mich. 640.

¶ 1551. The negligence of an employer where the premises on which an employee is injured are inadequately lighted is generally a question for the jury.—Wulff v. Bosaler, 199 Mich. 70.

§ 67g. ——Railroad tracks, cars and equipment.

¶ 1552. In an action by a switchman for injuries received while uncoupling cars, it appeared that he was injured by reason of an unblocked frog, and there was evidence that such frog had been unblocked for two months, that other frogs in the same yard were unblocked, and that the yard-master had been notified some time before the accident of their condition. Held, that notice to the yard-master was notice to the company, and that defendant's negligence was a question for the jury.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567.

¶ 1553. In an action for the death of an engineer, where the question as to whether the rail which it was claimed caused the derailment in question, was removed from its place, the question was properly withheld from the jury, where a witness for defendant testified that he marked the rail with a chisel on a flange, and that the same rail was still there some days before the trial with his mark on it, and where six other witnesses testified in substance that it had never been changed, some stating that it was a safe rail, while one witness for plaintiff testified that he believed that the worn rail he had seen the day after the accident was not there some days before the trial.—Peppett v. Michigan Cent. R. Co., 119 Mich. 640.

¶ 1554. Under Comp. L. 1897, § 6318, requiring railroad companies to protect frogs so as to prevent employees from catching their feet in them, testimony that the blocking was old and worn is sufficient to go to the jury on the question of defendant's negligence in an action for wrongful death of an employee.—Jones v. Flint & P. M. R. Co., 127 Mich. 198.

¶ 1555. Where the evidence will support a reasonable and legitimate inference that the death of a brakeman was the result of his foot catching in an unblocked frog, the question of the defendant's negligence is for the jury.—Scott v. Boyne City, G. & A. R. Co., 182 Mich. 514.

¶ 1556. In an action for personal injuries to a brakeman alleged to have been caused by his stepping into a hole between the ties while between two moving cars, testimony by the plaintiff as to the existence of the hole and a pile of dirt and snow controverted by testimony of the defendant is held sufficient to warrant an instruction leaving the question to the jury.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 1557. Where, owing to the formation of ice upon the tracks at a point where the roadbed was slightly depressed a car backing upon a side-track was derailed, killing a brakeman, it was held that it was the company's duty to provide a track which, measured by the standard of good railroading as actually conducted, could be said to be reasonably safe, and that whether it had complied with such duty, or whether it should have foreseen the danger of water's freezing over the tracks, and have adopted sufficient measures to prevent it, was, under all the circumstances, for the jury.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 1558. There was evidence that plaintiff's decedent, a brakeman in defendant's employ, was injured as a consequence of stepping into a hole in an obscure place on the track scales of defendant, while employed in his usual duties, and that such hole had existed for a considerable space of time. Held, there was evidence to go to the jury of defendant's negligence in failing to provide a reasonably safe place for the brakeman to work.—Gilbert v. Ann Arbor R. Co., 161 Mich. 73.

¶ 1559. Evidence held sufficient to justify the submission of the negligence of a railroad company in permitting a gauge of less than four feet eight and one-half inches upon a curve, to the jury.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207

¶ 1560. Where, an engineer, who for purposes of inspection is a vice principal before starting upon a trip, discovers that the push-bar upon the front of his engine is cracked, but, thinking that it will answer for the trip, which would otherwise be delayed, he

does not report the defect, and, in attempting to make a coupling, the pushbar is broken and the brakeman injured, the question whether it was negligence to use the engine in its defective condition is for the jury.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 1561. There was evidence that the complainant brakeman tried to use the lever to uncouple two cars, and was unable to pull the pin; that he signaled the engine for "slack," and still could not do it; and that after being injured by going between the cars he again tried without success to operate the lever. No evidence of when the device was last used was offered. Held, it could not be said as a matter of law that there was no evidence of the defective condition of the coupling device.—Wight v. Michigan Cent. R. Co., 161 Mich. 216.

¶ 1562. Where it does not appear that there was any standard width for coal cars but that the width thereof varied, the question whether a car between the side of which and a coal tipple an employee of the company was caught and injured, was of unusual width should not have been submitted to the jury.—Lewis v. Wolverine Coal Co., 186 Mich. 564.

¶ 1563. Plaintiff's decedent was employed by the Pere Marquette Railroad as a yardmaster. Defendant railroad used the Pere Marquette tracks. There was evidence that defendant was accustomed to employ a lookout and lights on its engines, and that on the occasion in question its engine had none. It ran into plaintiff's decedent while he was in discharge of his duties, and killed him. Held, the case was properly submitted to the jury on the question of law and fact.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 1564. The question of the negligence of the defendant in an action for injuries sustained by a brakeman slipping and falling in front of a switch engine which had a defective brake so that it could not be stopped in time to avoid the accident, held properly submitted to the jury.—Nelson v. Michigan Tanning & Extract Co., 184 Mich. 108.

¶ 1565. The question of an employer's negligence in providing an employee with a defective electric hand lamp, was properly submitted to the jury, where the employee, on the lamp failing to work, took it for repairs to an electrical repair shop maintained by the defendant in connection with his business, and, a few minutes after returning with the lamp in working order, was killed while using it.—Breen v. Grand Rapids & I. Ry. Co., 184 Mich. 446.

¶ 1566. The question whether a vise is a proper and reasonably safe tool for drawing up trolley wires upon a curve, and whether such tool is in common use, is for the jury where the evidence is contradictory.—Shadford v. Ann Arbor St. Ry. Co., 121 Mich. 224.

¶ 1567. The defendant traction company was accustomed to inspect its cars every evening. Plaintiff, a conductor, was injured by a collision of his car with a car ahead. The motorman of plaintiff's car testified that the car acted "funny," and the brakes seemed not to be working just right. Held, there was evidence to go to the jury of defendant's negligence in failing to keep the car in reasonably safe condition.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 1568. Whether a defendant railway's failure to supply its car with a brake as required by statute contributed to causing a collision at a crossing by which the motorman was killed, and whether said motorman acted without negligence, are questions for the jury, and the court cannot decide them in favor of defendant as a matter of law on the theory that the plaintiff might have stopped his car before reaching the crossing.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 1569. In an action by a conductor of a motor car, who was injured by the absence of a step on the side of the car used in ascending and descending from the top, when he went to repair a rope attached to the trolley, it cannot be said that there was no evidence for the jury of defendant's negligence where it is reasonable to infer from evidence that the car was in the same condition at the time of the injury as when inspected at the barn.—Leary v. Houghton County Traction Co., 171 Mich. 365.

§ 67h. ——Operation of mines.

¶ 1570. An employee in defendant's mine was injured by the falling of some staging upon which he was at work, but with the construction or repair of which he had nothing to do; and the evidence tended to show that the fall was caused by the displacement of a timber brace by blasting a large quantity of ore down upon the top of the staging from twenty-four to thirty-six hours before the accident. No inspection of the staging was made by defendant, whose negligence, it was held, was for the jury.—Eddy v. Aurora Iron Mining Co., 81 Mich. 548.

¶ 1571. A plank in a platform constructed in a mining shaft was disturbed by blasting at a lower level, and plaintiff, an employee in the mine, while attempting to cross such platform, fell and was injured. Upon the question of fact whether the planks were spiked down, the workman who supervised the construction of the platform, and a shift boss who was with plaintiff at the time of the injury, testified in the affirmative. The latter further testified that, upon replacing some of the planks after the explosion, the spikes fitted the same holes they had been drawn out of; that the planks "went down even" at the first effort, with

no more force applied than simply stepping upon them. A fellow workman testified that he saw no spikes in the plank, and other witnesses testified that blasts such as the one used would not be likely to disturb a platform if spiked down. Held, that, upon the whole evidence, the question was for the jury.—Smizel v. Odanah Iron Co., 116 Mich. 149.

¶ 1572. There was evidence that defendant mining company failed to provide in an elevator cage as handholds the iron bars and rings required by section 151, Act No. 100, Pub. Acts 1905. In a suit for the death of plaintiff's intestate, occurring while ascending in the cage, held, it was a question for the jury whether there was neglect to comply with the statute.—Kleinfelt v. J. H. Somers Coal Co., 156 Mich. 473.

¶ 1573. Where a plaintiff miner is injured by a rock falling from the roof of the drift, it is for the jury to decide whether it was defendant's duty to remove such rock, whether the failure so to remove it was the negligence of defendant, and whether plaintiff was negligent.—Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489.

¶ 1574. Plaintiff and other miners were engaged in mining shale rock in a drift leading off from the main shaft of the mine. Cars were loaded with the shale by them and pushed out to the main gallery to be hoisted. Defendant's boss, Peake, went down into the mine and did the dynamiting in the drift whenever it was necessary. Above the drift in question there was a drift from which coal had at one time been mined, and as the work progressed the roof of said drift constituted the roof of the shale drift in question. The coal drift had at one time been timbered and the timbers were removed by defendant and no new ones put in. A rock fell from the roof of the drift and injured plaintiff. Held, the question whether defendant owed a duty to furnish plaintiff a safe place to work under these conditions was for the jury.—Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489.

¶ 1575. On evidence showing that the engine used by a mining company to hoist its men to an upper level when holes were blasted in the sinking shaft was antiquated and in bad repair the question of defendant's negligence in furnishing such machinery should have been submitted to the jury.—Panela v. Castile Min. Co., 177 Mich. 669.

¶ 1576. In an action for wrongful death caused when a loose trolley wire in a mine struck deceased, a trammer, the question of the mining company's negligence is for the jury where it appears that the wire was loose twenty-four hours before the accident and was tied up with a piece of fuse as directed by the trammer-boss, that it was loose just before the accident and was placed on top of the end of the defective clamp with which it was fastened and that it was later pushed off and struck deceased.—Meola v. Quincy Min. Co., 174 Mich. 305.

¶ 1577. Evidence that an employer placed electric wires in a narrow passage in a mine through which miners were obliged to pass, and recognized the danger by adopting a system for covering the wires, and that an employee was injured from contact with an exposed wire, is sufficient to take the question of the employer's negligence to the jury.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

§ 67i. ——Master's knowledge or notice of defects or dangers.

¶ 1578. In a suit by a trammer for injury from rock falling from an overhanging wall, the question as to whether plaintiff called the attention of the captain and boss to the loose overhanging rock is properly submitted to the jury where the evidence is conflicting.—Scendar v. Winona Copper Co., 169 Mich. 665.

¶ 1579. Whether an employer should have anticipated injury to passing employees from flying chips from iron being chipped with a cold chisel, held a question for the jury.—Webb v. Buick Motor Co., 182 Mich. 551.

¶ 1580. Plaintiff was employed to run a heading machine in defendant's barrel factory. There was evidence that the loose pulley upon which the belt connected with the main shaft was shifted in order to stop plaintiff's machine, got out of order; that plaintiff was thereafter accustomed to throw off the belt and loop it up to keep the main shaft from burning it, whenever he wanted to stop his machine; that, while standing on a barrel in the act of looping up the belt, plaintiff was involved in the shafting and injured; and that for some time previous the loose ends of a temporary rope pulley had been hanging from the shaft, in which plaintiff alleges he was caught and drawn into the shaft; and that defendant knew of the method of looping up the belt, and of the rope pulley. Held, there was a question for the jury whether the defendant might not reasonably apprehend that the ends of the rope pulley would unwind and hang down.—Trombley v. McAfee, 152 Mich. 494.

§ 67j. Jury questions as to methods, rules, and orders.

¶ 1581. It is not negligence per se for a railroad company to shunt cars along the tracks in its yard pursuant to a long-standing custom fully known to its employees.—Schaible v. Lake Shore & M. S. R. Co., 97 Mich. 318.

¶ 1582. Whether swinging a plank for staging on the side of a vessel by means of a single rope with a loop at each end, into which the end of the plank was inserted, was negligence is for the jury under evidence

that if two lines had been employed, as was customary, or if a single line had been properly attached, the accident could not have happened.—Rick v. Saginaw Bay Towing Co., 132 Mich. 287.

¶ 1583. The testimony of two witnesses that in their opinion it would be safer to have an extra man stand by a wringer ready to stop it in case of accident while the operator was winding burlap about the rollers, is not sufficient to raise the issue for jury as to whether the work could be properly and safely done by one person exercising care of a reasonably cautious and prudent man.—Fryczynski v. W. W. Rice Leather Co., 171 Mich. 113.

¶ 1584. Whether a telephone lineman's method of drawing two wires across a trolley wire at once, was more unsafe than to draw them across one at a time, held, upon the record in an action for injuries by him against the telephone company, his employer, a question of fact for the jury.—De Kallands v. Washtenaw Home Tel. Co., 158 Mich. 25.

¶ 1585. In an action against a railway company for injuries, where compliance with rules of the company is in question, it is the duty of the trial court to construe and apply the rules.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 1586. In an action against a railroad company by a locomotive engineer for injuries sustained in a collision, it was error to submit to the jury the question whether defendant's rules for the control and management of its trains were reasonably sufficient for the protection of employees, where there was no evidence of carelessness in the formulation of the rules, or of prior accident attending their operation, or of more effective regulations adopted by other roads.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 1587. In an action for injuries sustained by a motorman on a suburban street car in a collision with another car which was backing up, plaintiff's claim that it should have been left for the jury to say whether the accident was not due to the want of reasonable and necessary rules for the backing of cars was denied, where there was no showing that any rule different from that adopted by the defendant, was in use on any street railway in the country.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 1588. Plaintiff, a section hand, was employed by defendant railroad in clearing up a wreck, and was injured while riding into town to dinner on one of defendant's engines. Plaintiff offered in evidence the rule books of other railroad companies to prove that a certain rule of defendant's was not as well adapted to protect the employees as the corresponding rule of said other companies. Had the employees in charge of the engine obeyed the defendant's rule, the accident would not have happened. Held, the court properly refused to submit to the jury the question on this evidence whether defendant's rule was sufficient.—Moyer v. Ann Arbor R. Co., 159 Mich. 645.

¶ 1589. Where it seems that it was snowing and was somewhat dark when a special train struck the rear of another train at a station it is a question of fact for the jury whether it was the duty of a brakeman of the train at the station to protect his train under a rule requiring such protection when "fog, snow, darkness, dangerous places or other circumstances render it necessary."—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 1590. It cannot be said as a matter of law that a brakeman injured by the moving of cars is required for his protection to place a light at the rear of the train made up except for the testing of the air, before attempting to cut the air from the engine in order to repair a leaky hose, though a rule of the railroad company provides that those working about cars or engines in such a manner that personal injuries might result if the car or engine is moved must protect themselves by such a light.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 1591. It is for the jury to say whether plaintiff was directed to clean off revolving rolls on the dangerous side, where having cleaned them on the safe side he was directed by his foreman to clean them better, pointing to them from the dangerous side, and the foreman came and stood by him while he cleaned them again, this time on the wrong side.—Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

¶ 1592. The extent to which a foreman was affected by habits of intoxication, and whether he was so affected when he gave directions to an employee to do a dangerous act is a question for the jury in an action by the employee for injuries sustained in obeying such directions.—Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

§ 67k. Jury questions as to tests and inspections.

¶ 1593. Whether a master made the necessary inspection of the place where a servant was required to work is a question for the jury, where the evidence relating thereto is conflicting.—Kochin v. Superior Copper Co., 181 Mich. 542.

¶ 1594. Plaintiff, a locomotive engineer in defendant's employ, was injured by the explosion of the boiler of the engine, alleged to have been caused by defendant's negligence in not properly inspecting the boiler, and in permitting its use when a large number of its stay-bolts were broken. The last hammer test was made by two of defend-

ant's inspectors not more than fourteen days before the explosion. One of the inspectors testified that, if the bolts were broken off, but the ends were tight together, there might be very little difference in the sound of the hammer and the jar from what there would be if they were solid,—not enough to convince him that they were broken; that, if there were four bolts broken in a row, their discovery might depend upon whether or not the sheet was sprung. There was testimony tending to show that at least ninety per cent of the broken bolts could have been discovered by the hammer inspection; that a large number of bolts had been broken for so long a time before the injury that their ends had become smooth; that the process of wearing them smooth must necessarily have been very slow; and that these bolts break gradually. Held, a jury question whether a proper hammer test had been made.—Woods v. Chicago & G. T. R. Co., 108 Mich. 396.

¶ 1595. Where a railroad company when sued for injuries from the defective condition of the handle-bar on a hand-car introduced testimony that it employed an inspector whose duty it was to examine the car every morning and report, and that the section foreman was also required to make an examination and report, and where plaintiff's testimony tended to show that the inspector instead of examining the car relied upon the foreman's testimony that it was all right, held, that a question of fact was raised for the jury.—Greenfield v. Lake Shore & M. S. R. Co., 117 Mich. 307.

¶ 1596. The rule that negligence cannot be inferred from mere proof of an accident and consequent injury does not apply where a pressman is injured while operating a press used to form stove tops, due to the falling of the upper die, where the evidence shows that the press had been making trouble continually, due to the cutting of a clutch pin, which caused the press to drop. The question of whether the clutch pin was gradually cutting, and whether proper inspection would have prevented the injury was for the jury in such case.—Burnside v. Novelty Mfg. Co., 121 Mich. 115.

¶ 1597. A 35-foot ladder attached to a water tank, only occasionally used, cannot be held, as a matter of law, to be a common tool or appliance within the meaning of the rules which exempt the master from the duty to inspect them upon the presumption that those using them will, and should, first discover defects.—Nichols v. Pere Marquette R. Co., 145 Mich. 643.

¶ 1598. An eye-bolt of defendant's hoisting apparatus broke, and the plaintiff's intestate, an employee of the defendant, was injured by the falling of a coal bucket. There was testimony from several witnesses that the bolt was defective, and that the defects might have been discovered by an ordinary inspection. Held, that the question whether the defect might have been so discovered was one for the jury.—Nelson v. Pittsburg Coal Dock Co., 158 Mich. 306.

¶ 1599. Plaintiff was injured while employed in turning car axles at a lathe by the giving way of a crane used to lift the axles upon the lathe. There was evidence that the arm of the crane had been lengthened without strengthening its base; that excessive loads were lifted; and that an inspection would have revealed that the base had become brittle and infirm. Held, the evidence of defendant's negligence was sufficient to go to the jury.—Niblock v. Ann Arbor R. Co., 158 Mich. 582.

¶ 1600. Plaintiff was injured by the breaking of a jar of nitric acid while attempting to move another jar near it. There was evidence that the jar broke from a latent defect and not from the application of any force from the outside; and that defendant made only a visual inspection, whereas the only effective test was to strike it with something. Held, the evidence warranted the submission of the question of defendant's negligence to the jury.—Krettnich v. Detroit Chemical Works, 163 Mich. 462.

¶ 1601. In a suit for injuries caused to plaintiff by the falling of the door of a still while plaintiff and others were attempting to close the same, there was evidence that the bolt in the upper hinge of the door broke while an attempt was being made to close it; that the door weighed from seven hundred to eight hundred pounds; that the bolt had rusted in the hinge so that it was necessary to drill the upper half out; that the lower half was tight and driven out with a hammer; and that there had been no inspection for a long time. Held, there was sufficient evidence to go to the jury as to whether defendant owed a duty to inspect the door, and as to whether it had been negligent in the matter of such inspection.—Antosik v. Michigan Alkali Co., 166 Mich. 415.

¶ 1602. In a suit by a trammer for injury from rock falling from an overhanging wall, the question as to whether defendant properly inspected and tested the wall is for the jury where a witness testifies that the inspection and tests made fell far short of what was usually done at defendant's mine.—Scendar v. Winona Copper Co., 169 Mich. 665.

¶ 1603. Evidence that an employer was informed of and failed to remedy a defect in a boiler, and that an insufficient inspection was made, is sufficient to take to the jury the question of his negligence in an action to recover for the death of an employee as the result of the explosion of the boiler.—Sturgis v. Mt. Clemens Sugar Co., 184 Mich. 456.

§ 671. Jury questions as to warnings and instructions.

Necessity of warnings and instructions, see ante § 54.

Evidence as to warnings and instructions, see ante §§ 64f, 65i.

Instructions as to warnings and instructions, see post § 71d.

¶ 1604. Although a section man who was in the habit of handling rails could hardly need information as to the way they should be handled, even in loading a moving car with them, it could not be said as a matter of law that the railroad company did not owe him the duty of warning him against danger of rails falling off after being thrown upon the moving car in question.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 1605. The question of negligence of an employer in failing to instruct its servant on the dangers of his work was for the jury, in an action for personal injuries from the premature explosion of dynamite in a stone quarry; where it appeared that such servant, working according to his instructions, first placed the fuse in a hole drilled in the rock, and then tried to insert the stick of dynamite; that it was frozen, and the hole being a little too small, he pressed down the stick of dynamite with his thumb, and the friction resulted in such explosion; and where expert testimony was given to the effect that such a method of loading the hole was extremely dangerous, that the dynamite was liable to be exploded by the friction against the fuse, that frozen dynamite was more liable to such friction.—Kopp v. Monroe Stone Co., 140 Mich. 649.

¶ 1606. Where there is a conflict of evidence as to whether or not plaintiff was instructed as to the operation of a brake upon a stamping press, or as to its liability to become loose, and the necessity for tightening it, or as to the promptness with which he should remove his foot from the treadle, or as to the reports that the machine had repeated, and as to the necessity for not removing work with his fingers, such question should be submitted to the jury.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 1607. Evidence was given that a train dispatcher authorized a conductor of one train to leave a part of a broken train on a main track at Cushman while he went back on a branch track to get the rest of the train. The broken train was so left at night, and without lights. The dispatcher then ordered the plaintiff, an engineer, to run his train down the main track with no other warning than to look out for trains switching at Cushman. Plaintiff ran into the broken train and was injured. Held, there was evidence to go to the jury of the defendant company's negligence.—Dugan v. Boyne City, G. & A. R. Co., 158 Mich. 450.

¶ 1608. Plaintiff employee was lying on a pile of blocks discharging his duty in removing them from an elevator shaft, and in that position was near the revolving coupling of a line shaft. Plaintiff testified that he slipped off the pile, and into a projecting bolt in the coupling, and was injured. Held, that whether it was the duty of defendant employer to warn plaintiff of the presence of the bolt, was for the jury.—MacDonald v. Freeman Mfg. Co., 160 Mich. 380.

¶ 1609. Plaintiff was employed by defendant to draw off the molten product from the melting pot in the process of manufacturing porcelain. A tank was used to receive the molten mass, and it was necessary to fill it with the proper amount of water before receiving the mass. Plaintiff filled the tank about one-third full of water and upon the contact of the molten mass with the water an explosion occurred injuring plaintiff. An expert witness testified that such explosions occurred at times from an insufficient supply of water whereby the water was suddenly converted into steam. Held, it was a question for the jury in this case whether there was a natural law involved about which defendant owed a duty to inform the plaintiff.—Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590.

¶ 1610. Plaintiff prior to his injury had been employed in and about defendant's caustic soda plant, had helped to take out and put in the kettles used for boiling, and had shoveled the finished product. He was injured while cleaning a kettle pit by a piece of the soda flying up and burning his eye. Held, it was a question of fact for the jury whether defendant owed a duty to warn plaintiff of the injurious nature of the soda.—Dascho v. Michigan Alkali Co., 163 Mich. 612.

¶ 1611. Submission to the jury of the question whether a locomotive was moved without warning to a hostler who was cleaning the ashpan, or whether moved in obedience to his order, held not prejudicial to the defendant in an action under Act No. 104, Pub. Acts 1909, §§ 4110-4116, How. St., 2nd Ed.—Boesler v. Copper Range R. Co., 184 Mich. 430.

§ 67m. ——Immature or inexperienced employees.

¶ 1612. Negligence in loading rails on moving flat cars was for the jury; where the rails lay along the track for three miles, were 30 feet long and of the weight of 650 pounds, and were loaded on the car while the same was moving at the rate of four miles an hour, necessitating the plaintiff and those with him on the work to run in order to keep up, meanwhile lifting and loading; and when one of the rails, so loaded on the car, fell off and broke the leg of the plaintiff, who was a green hand and had not been warned of the danger of the employment.—

Palmer v. Michigan Cent. R. Co., 87 Mich. 281.

¶ 1613. Question whether reasonable care required that plaintiff, 15 years of age, injured by getting his hand cut off in a feed cutter which he was operating for the first time on the day of the injury, should have been instructed as to the manner of operating the machine safely, is for the jury, though he knew of and appreciated the danger of putting his hands in the machine where they might come into contact with the knives.—Ertz v. Pierson, 130 Mich. 160.

¶ 1614. In an action against the owner of a paper mill for injuries resulting to an inexperienced employee fourteen years of age from having her hand caught between the rollers of a machine about which she was employed, it was a question for the jury whether the owner, in view of the plaintiff's youth and inexperience, was in duty bound to instruct her how to do her work, or was justified in leaving her to learn the proper method from observation and experience, inasmuch as it was obvious that her hand would be injured if it should get between the rollers.—Allen v. Jakel, 115 Mich. 484.

¶ 1615. In an action by an employee for personal injuries caused by a wabble saw the cause is properly submitted to the jury where the declaration alleges that pieces of the timber would become wedged between the saws, thereby throwing it from under the hand of the operator and his hand upon the saw, that the defendant had notice and failed to warn the plaintiff, and the testimony shows that the saws were defective and dangerous, that the plaintiff had no experience and knew nothing of the danger and was not warned by the defendant.—Chilson v. Lansing Wagon Works, 128 Mich. 43.

¶ 1616. In an action for wrongful death of one employed as a laborer and oiler in the basement of a sawmill caused by his clothing catching on a set-screw on a shaft, evidence that the basement was poorly lighted, that the set-screw projected about two inches, that it was unprotected, that it was located in a place where the deceased would climb over it to oil other machinery, that he was inexperienced in that branch of the work, and that he had never been instructed or warned as to the set-screw, is sufficient to go to the jury on the question of the defendant's negligence.—Barr v. Guelph Patent Cask Co., 129 Mich. 278.

¶ 1617. In an action for personal injuries to a boy 14 years old who had been injured while in defendant's employ in removing table tops from a sanding machine, through his endeavor to straighten some material going through the sander, with the result that his hands were caught between the rolls, the question whether the employer was negligent in having omitted to instruct and warn him as to the proper method of doing the work was one for the jury.—Kolodziejski v. Seestadt, 143 Mich. 38.

¶ 1618. In an action for personal injuries to a boy 14 years old set at work and told how to run an elevator, the question as to whether he should have other and further instructions as to the danger incident to his employment, and should have been warned of the dangers is a question for the jury.—Braasch v. Michigan Stove Co., 147 Mich. 676.

¶ 1619. Where plaintiff, who was employed in unloading cars at defendant's factory, at the direction of the foreman went between certain cars for the purpose of coupling them, and while there was injured through another car being bumped into the cars upon which he was working, it is a question for the jury as to whether defendant was guilty of actionable wrong in failing to provide for some warning of the danger of the approaching car to be given to one occupying the position which plaintiff occupied, where the evidence showed that plaintiff was unfamiliar with the methods of defendant, and had not thought that an absence of any regulation of the subject would result in such reckless conduct as to push a car against the dead car at which he was lawfully stationed.—Pecard v. Menominee River Sugar Co., 153 Mich. 84.

¶ 1620. In an action for damages against a shingle manufacturing company for personal injuries received by a green employee while attempting to remove a sliver from a revolving saw, within the line of his employment, it is a question for the jury whether the plaintiff was sufficiently instructed and warned before being set at such an employment.—Martin v. Jerry Madden Shingle Co., 168 Mich. 176.

¶ 1621. Where there was a sharp dispute among the witnesses as to whether the plaintiff, who was eighteen years of age and who had no experience with a buzz planer, represented himself as twenty-one years old and as having had experience, and also as to his skill in operating the machine as an indication of his experience, the evidence did not so preponderate in favor of the defendant that the question should not have been submitted to the jury to find whether the defendant gave the plaintiff notice that the machine was dangerous, and to find the facts concerning plaintiff's representations to the defendant, and also whether from his lack of skill a prudent man would have known of his lack of experience.—Wiers v. Shaw-Walker Co., 171 Mich. 324.

¶ 1622. Plaintiff, a seventeen-year-old boy, was employed in defendant's factory as an operator on a punch machine. Owing to his having placed a truck too close to the machine the treadle operating the machine became caught in the truck and plaintiff's hand was caught in the machine after he had

supposedly stopped it by releasing the treadle. Held that similar accidents had happened in the factory and it was defendant's duty to notify plaintiff of the danger, and whether he did so or not was a question for the jury under the evidence.—Berky v. American Seating Co., 178 Mich. 586.

¶ 1623. Whether a boy under eighteen years of age was properly instructed before being placed at work at a dangerous machine in violation of section 11 of Act No. 285, Pub. Acts 1909 (How. St., 2nd Ed., § 4019), are properly submitted to the jury, when resting on conflicting testimony.—Powell v. E. H. Stafford Mfg. Co., 183 Mich. 1.

¶ 1624. In an action for the death of a hoisting machine operator who had been ordered to help in the construction of a platform around a flue 85 feet high, where it appeared that deceased was inexperienced in such work, and was not warned about the danger or character of the work, held that the negligence of the defendant was a question for the jury.—Lobenstein v. Whitehead & Kales Iron Works, 192 Mich. 118.

§ 67n. Jury questions as to guards and signals.

¶ 1625. Where in an action for a negligent injury the evidence conclusively shows that it was not usual or feasible to put a cover or screen over the machine in the use of which plaintiff's hand was mutilated by coming in contact with the knives which formed a part of the machine, it is error to submit to the jury the question whether defendant was negligent in not covering up or protecting the machine by some screen, device, or apparatus that would have prevented the injury complained of.—Mackin v. Alaska Refrigerator Co., 100 Mich. 276.

¶ 1626. A servant was put to work operating rattlers in a foundry where no attempt to guard machinery as required by Public Acts 1909, Act 285, § 15, How. 2nd Ed., § 4023, was made. To start the machinery it was necessary to climb upon a barrel several times a day and put a heavy and defective belt by hand on a pulley eight feet above the floor. Held, the negligence of the master in failing to provide proper appliances and a safe place to work was a question of fact for the jury.—Glassbrook v. Lansing Wheelbarrow Co., 177 Mich. 29.

¶ 1627. It cannot be said to be negligence as matter of law for a master owning a vessel tied up for the winter and employing a crew thereon, who ate, lived and slept on board, to fail to have watchmen on duty to guard them while sleeping against danger by fire, where the only fire was in a small boiler used to heat the cabins and in kerosene lamps used to light it.—Lang v. H. W. Williams Transp. Line, 119 Mich. 80.

¶ 1628. A semaphore had been placed by men of experience in railroading, and was visible for more than half a mile. Its warning would have been reasonably effective to prevent the accident had it not been for the unexpected failure of the air brakes. Plaintiff testified that, if it had been located about a mile farther east, he could have stopped his train without the brakes in time to avoid the collision. Held, that it was error to submit to the jury, upon this evidence, the question of defendant's negligence in locating the signal; it not being bound to guard against the possibility of unusual accident.—Whalen v. Michigan Cent. R. Co., 114 Mich. 512.

¶ 1629. Where an employer is conveying plaintiff, an employee, to a certain point by boat but is required by circumstances to put him ashore in the dark on its own premises at another place which is strange to him, and the captain of the employer's boat directs him to its boarding house, the employer owes plaintiff the duty to direct him by a reasonably safe way if any exists, and if the way is unsafe or may become so during plaintiff's journey over it, to advise him of it or to escort him, and whether an escort with a lantern is sufficient under the circumstances is for the jury.—McFarland v. Charles Hebard & Son, 174 Mich. 347.

¶ 1630. Whether defendant company discharged its duty to plaintiff, an employee, is for the jury, where it seems that he, with other employees, was landed on its premises which were strange to him from one of its boats when it was dark and was directed by the captain to go by way of a tramway to the company's boarding house, that there was a merchandise dock on which plaintiff might have been landed, that to get upon the tramway it was necessary to climb a pile of timber, that a tram car drawn by a horse was heard approaching, that no light was carried by plaintiffs' party or upon the car and that plaintiff who was afraid of the car which he could not see stepped to the side of the tramway and fell off and was injured.—McFarland v. Charles Hebard & Son, 174 Mich. 347.

¶ 1631. Plaintiff was employed as a timber man in the fifteenth level of defendant's mine. While pushing a car along a track running over the mouth of a chute of which plaintiff had no knowledge, he fell into the same, and was injured. There was contradictory evidence as to whether an electric light was burning over the chute at the time. Held, the question was a material one in determining defendant's liability for the injury, and was one for the jury.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 1632. Plaintiff was injured by falling into a chute or raise while employed in the mine. Two of defendant's witnesses testified that a light was customarily kept burning at the raise for the protection of workmen. Held, that this evidence established a question for the jury as to whether the lights were placed for the benefit and safety of

employees.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 1633. An elevator in a mining shaft was operated by an engine stationed on the second story of the shaft house. Signals were given to the engineer by means of a wire extending down the shaft to the bottom of the mine, at which place a signal man was stationed. The orders were that no one except the signal man should give the signals to the engineer, but on the first story of the shaft house there was a landing at which a signal might be given by other persons. Plaintiff was being drawn up with other laborers on the elevator. On arriving at the first story landing several of the laborers lifted the automatic gates of the elevator and stepped out. Plaintiff lifted the gate to get out and while in this position the elevator started up and he was injured. It did not appear whether the engineer started from a signal given from the bottom of the mine, or from said first story landing. Held, it was a question for the jury whether defendant was negligent for failure to provide a proper signal system.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 1634. Where plaintiff was injured while blasting in a mine because of delay in hoisting the bucket containing the miners after lighting the fuses, held, on evidence showing that the electrical signaling apparatus was defective and not properly inspected, the question of defendant's negligence should have been submitted to the jury.—Panela v. Castile Min. Co., 177 Mich. 669.

§ 67o. Jury questions as to negligence of or care by fellow-servants.

Liability for acts of fellow-servant, see ante § 55.

Instructions as to acts of fellow-servant and duty to employ competent servants, see post § 71e.

¶ 1635. It was not error to allow the jury to pass on the question whether a lineman was injured through the negligence of fellow-servants in imposing an undue strain by drawing wires over a decayed pole apparently sound, where there was evidence warranting the finding that he might rightfully have assumed that it was sound when erected and therefore strong enough to withstand the strain imposed at the time he was injured.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

¶ 1635a. Defendant, a contractor, built a concrete cellar wall. Defendant's brother, who was in charge of the work, ordered plaintiff, employed as a mixer, to help remove the curbing from the wall. The wall fell and injured plaintiff. Held, it could not be held as a matter of law that the brother in giving the order was the fellow-servant of the plaintiff.—Gerstler v. Weinberg, 160 Mich. 267.

¶ 1636. Plaintiff and other miners were engaged in mining shale rock in a drift leading from the main shaft of the mine. Cars were loaded with the shale by them and pushed out to the main gallery to be hoisted. Defendant's boss, one Peake, went down into the mine and did the dynamiting in the drift whenever it was necessary. Above the drift in question there was a drift from which coal had at one time been mined, and as the work progressed the roof of said drift constituted the roof of the shale drift in question. The coal drift had at one time been timbered and the timbers were removed by defendant and no new ones put in. A rock fell from the roof of the drift and injured plaintiff. Peake had knowledge of the condition of the roof and the danger of falling rocks. Held, the question whether Peake and plaintiff were fellow-servants was for the jury.—Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489.

§ 67p. ——Care in hiring or retaining servant.

¶ 1637. Where a defendant company has exercised due care and prudence in choosing its servants no presumption of unfitness afterwards arises; but the master cannot shut his eyes to what may afterwards take place. So, where repeated instances of carelessness or incompetency are shown on the part of the servant, it remains for the jury to determine whether they did come to the knowledge of the master, or would have, had ordinary care been exercised on his part.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 1638. Whether an employer exercised due care to ascertain the qualifications of a servant at the time of hiring him is for the court to determine, whether the testimony as to what took place at such time is undisputed.—Walkowski v. Penokee & G. Consol. Mines, 115 Mich. 629.

¶ 1639. In an action for the wrongful death of an engineer resulting from the alleged incompetence of the yardmaster, where there was evidence that the latter was intemperate, and the attention of the company had been called to such fact, it was the company's duty to make careful and frequent investigation upon the subject. In the present case, held that there was sufficient evidence given to put the company on guard, and it was a matter for the jury to pass upon.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 1640. What is reasonable care in the selection by an employer of competent men for positions of responsibility and what is reasonable diligence on the part of such employer in seeing that such employees remain trustworthy in the discharge of their duties, is a question of fact for the jury.—Hilts v. Chicago & Grand Trunk Ry., 55 Mich. 437.

¶ 1641. In an action for personal injuries by a brakeman who had been injured while

coupling cars and who had had no other experience in switching than that he had been a helper in the freight yard for one month the question of the incompetency of the yardmaster employed by the railroad sued for the alleged negligent injury is for the jury to determine where it appeared that he did not know the yardmaster except to have seen him at work in the office, and that plaintiff was injured in making up a freight train at the east end of the train and he had no notice from any source that a crew was working at the west end or that the main train would be moved, and several witnesses had testified that the yardmaster was incompetent, but the plaintiff himself knew nothing about his experience or knowledge.—Lee v. Mich. Cent. Railroad Company, 87 Mich. 574.

¶ 1642. In an action for injuries sustained by a motorman in a collision of his car with another car which was backing up, the fellow-servant rule applied as to the negligence of the conductor of the latter car in being absent from the rear platform of his car and his consequent failure to stop the car earlier; and the testimony on that question made the competency of the conductor a proper one for consideration, if his incompetency and the defendant's negligence in relation thereto were proved, to relieve plaintiff from the effect of such rule.—Seccombe v. Detroit Elec. Ry., 133 Mich. 170.

¶ 1643. Plaintiff, a station agent of defendant railway, was injured by a conductor in defendant's employ, while they were engaged in unloading boxes from a freight car. There was evidence that the conductor was drunk at the time; that in the month previous his habits were known to defendant and he had promised to reform; and that since such promise his heavy drinking had been notorious. Held, the question of defendant's negligence was properly left to the jury.—Johnson v. Lake Shore & M. S. Ry. Co., 162 Mich. 301.

§ 67q. Jury questions as to knowledge of and assumption of risk.

Doctrine of assumption of risk, see ante § 56.
Evidence as to assumption of risk, see ante § 65k.
Directing verdict on ground that risk assumed, see post § 70b.
Instructions as to assumption of risk, see post § 71f.

¶ 1644. Whether a workman employed in constructing a sewer should, in the exercise of due care, have known of the fact that the earth had been loosened three years before by reason of an excavation for a water main a few feet distant, thereby increasing the danger of a cave-in, and should therefore be held to have assumed the risk as incident to his employment, is a question for the jury.—Ostrander v. City of Lansing, 111 Mich. 693.

¶ 1645. An employee on a vessel was directed, by the mate, with other employees to throw a staging over the side and scrape the outside of the vessel. While he went to get some pails the other employees swung the staging over by means of a rope with a loop at each end into which the ends of the plank were inserted, so that there was nothing to prevent the plank from tipping. Deceased was thrown into the water and drowned and action was brought for his death. Held that he did not as a matter of law assume the risk, though by minute examination he might have seen that the rope was not so fastened as to prevent the plank from tipping.—Rick v. Saginaw Bay Towing Co., 132 Mich. 237.

¶ 1646. The question of whether an employee killed by being thrown into a coal conveyor by the tipping of a plank in a walk alongside the conveyor had discovered the danger in his work is for the jury in the absence of any evidence of such knowledge or evidence that it was clearly apparent.—Clark v. Wolverine Portland Cement Co., 138 Mich. 673.

¶ 1647. In an action for wrongful death of an employee, evidence that he was killed by falling into a coal conveyor on account of a loose plank in the walk alongside the conveyor is sufficient to go to the jury on the question of the assumption of the risk, although the employee had been performing the same duty for two weeks, the fact that the plank was loose could have been discovered by pushing it with the foot, and there is testimony that at times it would rock under foot.—Clark v. Wolverine Portland Cement Co., 138 Mich. 673.

¶ 1648. The question of whether a telephone lineman knew that he was not insulated by being upon a dry cedar pole is one of fact for the jury.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 1649. The question of whether a telephone lineman knew that live telephone wires which were in contact with his body were grounded, or would be grounded by a wire which got away from his helper, is one of fact for the jury.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 1650. A servant does not as a matter of law assume the risk of a defect in a piece of steel which requires a chemical and microscopic examination to disclose.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 1651. Where a notice: "Danger. Keep off." posted on an elevator in a building, has been regularly disregarded by defendant's employees and no effort made to enforce it, and the same is removed two or three weeks before the accident in question, plaintiff employee is not barred as a mat-

ter of law from recovering for personal injuries sustained through the falling of the elevator, on the ground that he knew of the notice and assumed the risk.—Johnson v. Burke, 167 Mich. 349.

¶ 1652. Plaintiff, an expert lineman in employ of defendant, received a shock and injury while taking hold of a guy wire used to brace one of defendant's poles upon which plaintiff was working. The pole was at a corner and the stress tended to cause the live wires to break the pins, sag down, and come in contact with the braces, which in turn communicated the current to the guy wire in question. Shortly before the accident said guy wire had become charged and repairs were made by other linemen of defendant, defendant having knowledge thereof. When plaintiff was sent to work upon said poles, he was not informed of said fact. Held, he did not as a matter of law assume the risk.—Huber v. Twin City General Electric Co., 168 Mich. 531.

¶ 1653. Where a servant points out that a tool is defective and the master tells him to go ahead using it until it can be repaired, it cannot be said, as a matter of law, that the master did not promise to repair the tool so as to relieve the servant of assuming the risk.—Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312. (Brooke, Grant and McAlvay, JJ., dissenting.)

¶ 1654. Plaintiff, a laborer, employed by defendant in its shipyard, was directed to carry iron grate bars up ladders and to lay them upon the deck of a vessel. Upon reaching the top of the ladders plaintiff had to step about one foot high over a railing and upon the deck. After making some sixteen trips up one ladder, he was directed by the foreman to use the other ladder. As he reached the top he stepped on the freshly painted deck of the vessel and was injured. Held, plaintiff should not be held as a matter of law to have assumed the risk.—Orso v. Great Lakes Engineering Works, 164 Mich. 568.

¶ 1655. Plaintiff, a foreman in the employ of defendant truck company, was lowering a tank at the time of his injury. He had been with various truck companies for about fifteen years and had equal, if not greater experience in the work than the officer, of the company. The ropes to be used were selected by him. An officer of the company and plaintiff noticed that the lead line was fraying on the edge of the tank and on such officer's order plaintiff mounted the tank to clear it. The weight of the tank was known to him. When the line was freed it broke and plaintiff was injured. Held, as a matter of law that plaintiff assumed the risk of injury and that the legal aspect of the case is not changed even if it is assumed that the rope was provided and selected by defendant.—Coleman v. Turner Cartage Co., 174 Mich. 231.

¶ 1656. Where an inexperienced municipal employee ordered to calk pipes in an uncurbed trench is assured of the safety of the place and does not hear an order to another workman to watch and warn, and is injured by the trench caving in, whether he assumed the risk is a question for the jury.—Keenan v. City of Mt. Pleasant, 176 Mich. 620.

¶ 1657. Whether a trench in which an employee was commanded to work was so obviously dangerous as to charge him with the assumption of the risk of injury, is a question for the jury, where he continued his work after the attention of his foreman had been called to the danger of a cave-in which the latter refused to remedy.—Baucino v. Fitzpatrick, 186 Mich. 1.

¶ 1658. Where a servant employed as a hoisting engineer by defendant was ordered to do some riveting upon a smokestack eighty-five feet from the ground, the work being dangerous in character and the servant being inexperienced, in an action for his death due to falling from the scaffold it was held that the risk was not assumed as matter of law.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

¶ 1659. In an action by a foreman in charge of a gin pole and engaged in erecting the iron and steelwork of a building for damages for personal injuries sustained as a result of the falling of the pole because of the insufficiency of the platform on which it rested, held that it was a question for the jury whether defendant's superintendent promised to repair the platform and whether plaintiff assumed the risk.—Barkow v. Donovan Wire & Iron Co., 190 Mich. 563.

¶ 1660. What constitutes a reasonable time during which an employee may, without assuming the risk of injury, remain in an employment in reliance upon the promise of his master to remedy a defect, is generally a question for the jury depending on the facts of each particular case.—Cole v. Mamer Brick Co., 183 Mich. 290.

§ 67r. ——Employees in and about factories, shops and mills.

¶ 1661. In an action against an employer for an injury caused by his setting plaintiff, a boy of thirteen years old, at work upon a dangerous machine, it is not proper to instruct the jury that if the employee was properly instructed the employer would not be liable; where the questions whether the machine was dangerous, and whether the boy was too young to understand its dangerous nature, were also in the case and on the evidence were for the jury.—Steller v. Hart, 65 Mich. 644.

¶ 1662. In an action for personal injuries of an operator at a saw, it is proper to

submit to the jury the question of whether or not the operator knew or ought to have known of the defective condition of the saw.—Chilson v. Lansing Wagon Works, 128 Mich. 43.

¶ 1663. The question of whether an infant employee knew or should have known the danger confronting him, and assumed the risk, was properly submitted to the jury, in an action for the death of such infant caused by being caught in the gearing of his employer's machinery; where it appears that such infant, a boy of 14, was employed to gather the scrap as it fell from the shearing machines in defendant's iron mill, and bind the fagots in bundles, that the space in which he worked was about 6 or 7 feet wide between the machinery and the wall of the mill, and with an exit at one end; that as deceased was working at the further end of this space other employees piled bundles of fagots in this space, under the direction of the foreman, to a height of about three feet, that this obstruction was directly opposite an exposed gearing, about 5 or 6 feet above the floor, that in the course of his employment it became necessary for deceased to pass out of this passage, which, attempting to do by crawling over such obstruction, he was caught in such exposed gearing and killed, that up to the day of his death such infant had worked at smaller shears in another part of the mill, and that the instruction given to him on beginning his employment as a mill hand was to be careful and not get his hands where he would get hurt.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 1664. In an action for personal injuries, where it appears from the evidence that the servant knowing the defective condition of a machine drew the attention of the master thereto and continued working thereon upon the repeated promises that it would be remedied, the question whether he assumed the risk is one for the jury and it is error to direct a verdict.—Eligh v. Goldie, 143 Mich. 596.

¶ 1665. Where an employee complains of the looseness of a belt on machinery twice in a single day, and is assured each time that the belt will be repaired in a little while, and is ordered back to work, and is injured about an hour after his second complaint, it cannot be said, as a matter of law, that he worked such an unreasonable time after discovering this defect and after the promise of defendant to repair it, that he should be held to have assumed the risk.—Krohn v. Joseph N. Smith & Co., 151 Mich. 247.

¶ 1666. A part of the duty of plaintiff, a bright boy of fifteen, was to shift the belt to a loose pulley, in order to stop his machine. He testified that he saw his boss and others make the shift, and that he did it in the same way several times, successfully; that he had no instructions from his boss; and that he was injured while attempting to shift in the manner as aforesaid. Defendant testified that plaintiff had been previously warned that he was making the shift incorrectly, and was properly instructed. Held, that the question whether the plaintiff assumed the risk was for the jury, and the trial court was right in refusing to direct a verdict for defendant.—Lehto v. Atlantic Min. Co., 152 Mich. 412.

¶ 1667. One of the two cables supporting the elevator, which plaintiff was employed to run, broke. Plaintiff consulted his superior as to the safety of running with one cable, and was told to go ahead. The cable broke, and he was injured. There was evidence that some wires were broken in the cable causing it to fray, and there was a fracture and hidden weaknesses in it unknown to the plaintiff. Held, it was for the jury to say whether plaintiff assumed the risk.—Wilson v. Escanaba Woodenware Co., 152 Mich. 540.

¶ 1668. Where the servant knew before the day on which he was injured that the steam capacity of machinery which he was operating was inadequate, but was assured by the foreman that the machinery would be all right, that is, that it would run steadily, the question whether he assumed the risk on the day of the injury was one for the jury.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 1669. Whether a servant knew that the steam capacity of machinery which he was operating was inadequate to render such operation reasonably safe was a question for the jury, where it was open to them to infer either that the servant continued to work after making a discovery of its inadequacy or that the discovery and injury to him was simultaneous.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 1670. Plaintiff, sixteen years old, was taken from his accustomed line of work in a tannery and set to operate the extract wheel, with which work he was unfamiliar. One Mills, who was in authority in this department and to whom the men came for directions, ordered the plaintiff to climb upon the belt pulley of the extract wheel, some eleven feet from the floor, and turn the same, in order that Mills might fix a screw in a line-shaft pulley. While pulling on the said pulley, it suddenly turned, and plaintiff fell and was injured. Held, it was for the jury to pass on the question whether plaintiff assumed the risk.—Belmer v. Boyne City Tanning Co., 160 Mich. 669.

¶ 1671. Plaintiff prior to his injury had been employed in and about defendant's caustic soda plant, had helped to take out and put in the kettles used for boiling, and

had shoveled the finished product. He was injured while cleaning a kettle pit by a piece of the soda flying up and burning his eye. While so engaged plaintiff had on gloves and his feet were wrapped in bags or cloths, but he was not told the purpose of this protection. Held, it was a question for the jury whether plaintiff assumed the risk.—Dascho v. Michigan Alkali Co., 168 Mich. 612.

¶ 1672. Whether plaintiff, an edgerman in defendant's mill, assumed the risk of "fly backs" occasioned by the use of set screws in the collars of the edger for the purpose of tightening the saws, resulting in their being thrown out of plumb, is a question for the jury when the contract of employment did not bind him to make repairs.—Cousineau v. Embury, 171 Mich. 23.

¶ 1673. Where plaintiff was injured while oiling a fan operated by a belt, and the cause of the injury was a defect in the belt because of which his hand was forced into the fan, whether its condition was known to plaintiff so that he was cognizant of the danger of oiling the fan as he did, was a question for the jury.—Cummins v. Boyne City Tanning Co., 177 Mich. 217.

§ 67s. ——Railroad employees.

¶ 1674. Whether a danger was obvious, and plaintiff's decedent knew of it, or by reasonable care might have known of it, so as to assume the risk, are questions for the jury.—Gilbert v. Ann Arbor R. Co., 161 Mich. 73.

¶ 1675. Where a railroad brakeman sues the company for injuries caused by his stepping into a hole in the road-bed while uncoupling a car on a side-track, in the absence of evidence as to how long before the accident he had been in defendant's employ, or that he ever had seen the said track before the accident, it cannot be said as a matter of law that the injury occurred from a risk assumed by plaintiff.—Ragon v. Toledo, A. A. & N. M. R. Co., 91 Mich. 379.

¶ 1676. Where, owing to ice upon the tracks at a point where there was a slight depression in the road-bed a car backing upon a side track was derailed, killing a brakeman, it was for the jury to say, the fact not being undisputed, whether decedent knew or should have known of the depression, and should therefore be held to have assumed the incident risks.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 1677. One injured while employed in putting in a bridge, by the falling of a girder, cannot be said, as a matter of law, to have assumed the risk of a rope's proving insufficient to support the weight of the girder, where he claims to have had no knowledge of any defect in the rope, and it appears that he was not himself engaged in using it at the time of the accident.—Thomas v. Ann Arbor R. Co., 114 Mich. 59.

¶ 1678. A brakeman killed while between cars to uncouple them because of his foot being caught between a rail and planks of a crossing, cannot be held to have assumed the risk of the defective crossing, as a matter of law, where the evidence shows that he did switching at some forty other crossings.—Fluhrer v. Lake Shore & M. S. Ry. Co., 121 Mich. 212.

¶ 1679. The question whether a freight brakeman who was struck by a telegraph pole as he was climbing up a ladder at the side of a car, assumed the risk of such contact was for the jury, where it appeared that he had previously walked by this pole or had ridden by it back and forth on the tops of cars, but testified that he had no knowledge that the pole was near enough to the track to be dangerous—Potter v. Detroit, G. H. & M. R. Co., 122 Mich. 179.

¶ 1680. It was a jury question whether the danger to be apprehended from the recoil of a tightly strung wire when cut was as obvious to a section foreman to whom such wires were a novelty as to the vice principal who directed it to be done without giving any special warning.—Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606, per Montgomery, J., and McGrath, C. J.

¶ 1681. The question whether a lineman assumed the risk of injury from using a vise to draw up trolley wires upon a curve, the employee being injured by the wire slipping, is for the jury where the plaintiff testifies that he was not acquainted with the dangers of his employment, and was not familiar with the tools to be used, and that he relied upon the statement of his superior that the vise was a suitable tool, which statements are denied by the defendant, who insists that the tool was reasonably safe for the use to which it was put.—Shadford v. Ann Arbor St. Ry. Co., 121 Mich. 224.

¶ 1682. In an action for personal injuries, where plaintiff was injured through a defective valve in a steam pipe used in connection with a pump, and where it appeared that plaintiff had complained of the condition and that the employer had promised that it would be repaired as soon as certain workmen returned, and where 30 days elapsed after this promise and before the injury, and where plaintiff testified that he daily expected the return of the workmen, the court could not hold as a matter of law that the plaintiff might not have reasonably expected a performance of the promise any time up to the date of the injury.—Mann v. Lake Shore & M. S. R. Co., 124 Mich. 641.

¶ 1683. Whether the defect in a 35-foot wooden ladder attached to a water tank,

was obvious or discoverable by the ordinary care of one using the ladder, was a question for the jury, in an action for damages for plaintiff's fall from such ladder; where the evidence shows that the ladder had been in position from 12 to 15 years, that the slats were set in notches and fastened with nails, that the ladder had been properly tested six months prior to the accident, at which time no defects were found, that there were no obvious defects when plaintiff used the ladder, that one of the slats pulled loose and caused plaintiff to fall, that the nails which held the slat to one of the timbers had pulled out on one side of the ladder where there was a spot of decayed wood in the timber, and that when the slat was in position this decayed portion was hidden from view.—Nichols v. Pere Marquette R. Co., 145 Mich. 643.

¶ 1684. Whether the danger to which an injured employee was subjected is obvious where he was injured while obeying orders of an alleged incompetent foreman in getting under a loaded freight car which was held up by jacks under either corner, wooden horses being placed under the car to help sustain the weight, and which fell killing him, is a question of fact for the jury.—McClure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 1685. Defendant railway's contract with all its switchmen stipulated that all hose on passenger trains after their arrival at stations should be cut by car men and not by switchmen. Plaintiff's decedent, a switchman, was injured while cutting the hose of a particular train at the direction of the yardmaster. The evidence was contradictory as to whether plaintiff's decedent had for sometime engaged in the cutting of hose despite the provisions of the contract. Held, the court could not hold as a matter of law that plaintiff's decedent had waived the terms of the schedule and assumed the risk.—Baker v. Michigan Cent. R. Co., 169 Mich. 609. (Stone, Brooke, Ostrander and Steere, JJ., dissenting.)

¶ 1686. Plaintiff's decedent, a switchman, was working under the authority of the yardmaster. The deceased asked the yardmaster, whether he should cut off the last coach of a certain train and the yardmaster replied, "yes." The contract of defendant railway with the switchmen provided that the car men and not the switchmen should cut the cars. Held, it was a question for the jury whether the decedent had voluntarily assumed the risk of cutting off the coach so as to bar the recovery of the plaintiff for his death resulting therefrom.—Baker v. Michigan Cent. R. Co., 169 Mich. 609.

¶ 1687. Where plaintiff employed as a brakeman on one of defendant's dump trains, is injured in a collision, it being claimed the premises were not properly lighted so that the engineer could see the other train, it cannot be said as a matter of law that this was a risk incident to plaintiff's employment.—Murphy v. Great Lakes Dredge & Dock Co., 175 Mich. 216.

¶ 1688. In an action by an employee of a railway construction company for damages for personal injuries due to being brushed off a flat car, on which he was riding, by a push car which was on a siding and too near the main track, held that the submission to the jury of the question whether the engineer should have discovered the push car and stopped his train in time to avoid the collision was not error, where it appeared that for several miles north of the point of the collision, from which direction the train was coming, the track was straight and level, and the collision occurred a few minutes before 5 o'clock in the afternoon, and the push car could have been seen for several hundred feet north of the switch.—Adamski v. Michigan Ry. Engineering Co., 197 Mich. 561.

§ 67t. ——Employees in and about quarries and mines.

¶ 1689. Whether the deceased, a "hitch cutter," who prepared footings for timbering, had knowledge of the danger of a top fall equal to that possessed by his employer was for the jury on the facts considered with evidence that the "hitch cutters" were directed by the defendant to examine each place where they were about to go to work, and to satisfy themselves, before beginning the work, that the place was safe; that they were frequently cautioned as to this duty, and were warned against working, under any circumstances, beneath overhanging ground, without assuring themselves that it was safe; that they were allowed to take all the time and have all the assistance necessary to make it safe, if they considered it dangerous; and that they understood that this was one of their particular duties, and that no one would go ahead of them to perform it.—Andrews v. Tamarack Min. Co., 114 Mich. 375.

¶ 1690. The elevator in a mining shaft was operated by an engine stationed on the second story of the shaft house. The signal to the engineer was given by means of a wire running up to the engine room, by a signal man stationed at the bottom of the shaft. The rules were that only the signal man should give signals, but it was possible for any one at the landing at the first story of the shaft house to give the signal by means of the wire. Plaintiff was injured while attempting to alight from the elevator at the first story landing, the signal having been given by some person. Plaintiff was familiar with the signal system. Held, it was a question for the jury whether he assumed the risks incident to the place of his employment.—Delbusso v. American Cement Plaster Co., 165 Mich. 318.

¶ 1691. Plaintiff was injured through falling rock while working on the face of a quarry. It appeared that it had been the practice of the foreman to examine the condition of the face of the quarry after each blast. The foreman placed plaintiff at work without warning him of any danger from falling rock or in any way calling his attention to the fact that blasting had been done, and that no examination had taken place. Held, that the question of assumption of a risk is one for the jury.—Druck v. Antrim Lime Co., 167 Mich. 154.

¶ 1692. It cannot be said as a matter of law that a trammer in a mine, killed when a trolley wire struck him, knew of its defective condition though the evidence tends to show that the wire was loose from its clamp and sagging 24 hours before the accident and was tied up with fuse and it appears that immediately before the accident deceased was riding on a motor when it came to the place of the defective clamp, and that the wire was again loose and the operator stopped the motor and placed the wire on the top of the end of the clamp from which position it subsequently fell against deceased, where such operator did not know whether deceased saw his action. —Meola v. Quincy Min. Co., 174 Mich. 305.

¶ 1693. An exploring shaft in a mine was descended into by means of a series of short ladders which were nailed together and nailed to the timbers placed in said shaft. Employees also descended into same by means of a large bucket let down by a cable. Two of the ladders were so joined together that a space was left between the rounds equivalent to a space left by a missing round. Plaintiff employee was being lowered in said bucket into said shaft. A pump boy wishing to get into said bucket started to climb down the ladder and coming to the said missing round fell through the ladder, and down upon said bucket, knocking plaintiff off and injuring him. Plaintiff knew of said missing round in said ladder. Held, he could not be held as a matter of law to have assumed the risk of the accident.—Menere v. Cooper Range Consol. Co., 169 Mich. 367.

¶ 1694. Whether a miner assumed the risk of injury from a piece of uninsulated electric wire in a narrow passage in a mine is a question for the jury depending upon his opportunity to observe it, and whether his failure to do so was due to inattention or indifference.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

¶ 1695. Whether a person employed to work on the ground to assist in stringing wires on high towers, comprehending the risk of injury so as to assume the risk from obeying an order of his superior, who failed to give any instructions, to climb a tower and loosen a wire drawn tight by a team attached to it, held properly submitted to the jury.—Hemmila v. Cleveland Cliffs Iron Co., 184 Mich. 567.

§ 68. Contributory negligence as jury question.

Contributory negligence of servant, see ante § 59.
Burden of proof as to contributory negligence, see ante § 62b.
Presumptions as to contributory negligence, see ante § 63b.
Evidence as to contributory negligence, see ante §§ 64h, 65 l.
Directing verdict on ground of contributory negligence, see post § 70d.
Instructions as to contributory negligence, see post § 71g.

¶ 1696. It cannot be said as matter of law that a servant was guilty of contributory neglect in leaving his assigned place of work in a factory room and going to the other side of the room where he was struck and killed by a flying knife thrown by a cutter head revolving in a horizontal plane, it being as likely to fly one way as another and though he had no permission or occasion to go there.—Marshall v. Widdicomb Furniture Co., 67 Mich. 167.

¶ 1697. In a particular case where plaintiff was injured while adjusting a machine which he was employed to run, the question of his contributory negligence was held to have been properly submitted to the jury. —Shumway v. Walworth & N. Mfg. Co., 98 Mich. 411.

¶ 1698. A fireman on a steam derrick assisting the engineer in oiling a derrick chain is not guilty of contributory negligence in failing to close the derrick doors to guard against a possible contingency of falling through such doors where such contingency was so remote that no ordinary man would have foreseen it.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 1699. Whether a servant is guilty of contributory negligence is a question for the jury, where in pulling a truck he backed into an open shaft.—Murphy v. Grand Rapids Veneer Works, 142 Mich. 677.

¶ 1700. Contributory negligence of plaintiff lineman in ascending a pole decayed at the heart is properly left to the jury, where the pole was erected two years before the time it fell under him and where at the time it fell a wire was being stretched which might have put a strain on the pole, the facts being such that the jury might properly have found him justified in assuming that it was sound and sufficient when erected and such that if it was then sound they might have also found that the strain put on it would have been safely carried.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

¶ 1701. A servant is not guilty of contributory negligence as a matter of law in

using an unduly tempered piece of steel, from which a piece chips off and strikes him, where, under the evidence, there is a question for the jury as to whether excess of phosphorus in the steel or the hardening of the head of the piece had anything to do with the accident and it is conceded that the steel was in the first place the proper kind for making the tool.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 1702. Plaintiff employee was lying on a pile of blocks discharging his duty of removing them from an elevator shaft, and in that position was near the revolving coupling of a line shaft. He testified that he slipped off the pile, and into a projecting bolt in the coupling, and was injured. Held, it was a question for the jury whether plaintiff was contributorily negligent.—MacDonald v. Freeman Mfg. Co., 160 Mich. 380.

¶ 1703. Plaintiff was employed to assist in pouring molten metal from a large ladle into molds. For that purpose small ladles were used which were gathered up each day and put in an open shed outside the shop, by a man who worked about the shop. Plaintiff went as usual and got from the shed one of the ladles which without his knowledge contained a little rain water. Upon the molten metal's being poured into said ladle an explosion occurred and plaintiff was injured by the flying molten metal. Defendant had not instructed plaintiff as to the danger of receiving molten metal into a vessel containing water. Held, plaintiff was not contributorily negligent, but such question was properly left to the jury.—Borkowski v. American Radiator Co., 165 Mich. 266.

¶ 1704. Where plaintiff, a cripple, had for months been using a stairway without hand rails, its continued use by him was not contributory negligence, as a matter of law, but a question for the jury.—Davis v. Buss Machine Works, 175 Mich. 61.

¶ 1705. In an action for personal injuries sustained by a yard employee while unloading boilers, evidence that plaintiff stayed on the boiler while it was being moved held sufficient to require the submission of the question of contributory negligence, to the jury.—Charters v. Industrial Works, 179 Mich. 1.

¶ 1706. An employee riding a bicycle through the power room of the factory in which he was employed, on his way from work, injured by falling into an unguarded engine pit upon running over an air hose which had been lying on the floor for several days, is guilty of contributory negligence as a matter of law.—Schwager v. Saginaw Plate Glass Co., 179 Mich. 360.

¶ 1707. Where a teamster in charge of a dray placed himself in such a position as to be injured by the slipping of a chain furnished by a carrier and attached to a piece of steel by servant of the consignee, which was being unloaded from a car and placed on the dray in his charge, he is guilty of contributory negligence as a matter of law.—Shadduck v. Grand Rapids & I. Ry. Co., 179 Mich. 433.

¶ 1708. In an action by a factory employee against the owners for damages for injuries received as a result of his clothing becoming entangled in projecting unguarded set screws in removable chucks used for holding logs in place in a rotary veneer peeler, evidence held insufficient to establish that plaintiff was guilty of contributory negligence as a matter of law in blindly selecting a chuck with set screws, and failing to observe them.—Edward v. Grand Haven Basket Factory, 187 Mich. 505.

¶ 1709. The lever of the clutch apparatus used for starting a milling machine was repaired in the afternoon, shortly before the hour of plaintiff's injury. The repair man failed to put in a cotter pin in a bolt in the lever. The bolt worked loose, and plaintiff, in attempting to operate the lever, was injured. Held, he was not as a matter of law guilty of contributory negligence in failing to discover the absence of the cotter pin.—Deary v. Hecla Co., 161 Mich. 677.

§ 68a. ——Inexperienced or youthful employees.

¶ 1710. Where a boy under sixteen was injured at an employment requiring the use of a machine through which large metal sheets were run, and he had not been instructed in the use of the machine, the question as to his judgment in acting as he did at the time of the injury is one for the jury to determine.—Sterling v. Union Carbide Co., 142 Mich. 284.

¶ 1711. Where a boy of sixteen years was engaged in operating a stamping press, and with regard to the instruction given him defendant's foreman testified that he took plaintiff over to the press and started to operate it, ran it a little while, and showed plaintiff how to do it, and then watched plaintiff after he had gone to work at it, until he felt sure that plaintiff understood it, and then left him, the question of plaintiff's contributory negligence under such instructions, is for the jury.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 1712. Plaintiff employee was directed by defendant to leave his regular work, and help put a tram car which had jumped the track, back on the rails. He had no previous experience at this and was given no instructions. He used a crowbar and a ratchet lifting jack. While attempting to pry the car over, the car slipped and plaintiff was injured. Held, it was error for the trial court to hold as a matter of law

that plaintiff was guilty of contributory negligence.—Johnson v. Desmond Chemical Co., 156 Mich. 669.

¶ 1713. The duty of the plaintiff, aged fourteen, was to remove boards after they came through the defendant's planing machine. In attempting to remove from the mill a small piece of wood which plaintiff thought would interfere with the operation of the machine, plaintiff's hand was drawn by the suction of a dust collecting apparatus into the machine. Held, that plaintiff, not being warned of the danger of the suction, was not as a matter of law guilty of contributory negligence.—Lund v. Sargent Mfg. Co., 158 Mich. 3.

¶ 1714. Plaintiff, sixteen years old, was taken from his accustomed line of work in a tannery and ordered to operate the extract wheel, with which he was unfamiliar. One Mills, who was in authority in this department and to whom the men came for directions, ordered the plaintiff to climb up on the belt pulley of the extract wheel, some eleven feet from the floor, and turn the same, in order that Mills might fix a screw in a lineshaft pulley. While pulling on the said pulley, it suddenly turned, and plaintiff fell and was injured. Held, it was for the jury to say whether the accident was unavoidable.—Belmer v. Boyne City Tanning Co., 160 Mich. 669.

¶ 1715. Plaintiff's deceased was employed by defendant to wheel sand to a mixer, and stay on shore as his part of the work in the construction of a dam. Defendant's superintendent ordered the deceased to take a scow and repair a leak which had sprung in the new dam. In the effort to reach the point of leakage the scow ran into some submerged timber braces used in the construction. The scow became unmanageable, got into the swift current of the sluiceway, and deceased was drowned. Defendant did not instruct deceased in his new duties or warn him of the hidden timbers. Held, the deceased was not, as a matter of law, guilty of contributory negligence.—Snow v. Escanaba Power Co., 162 Mich. 579.

¶ 1716. In a suit for personal injuries sustained by plaintiff while temporarily operating a molding machine in defendant's mill, the evidence was that plaintiff for a period of nine years had been employed as a common laborer to shovel coal and handle lumber about the mill; that occasionally and for brief periods of time, upon a shortage of hands, he operated some of the machines located in defendant's old building; that the molding machine in question located in defendant's new building differed in construction from those located in the old building; that plaintiff was called from his usual work as a common laborer to operate said machine on the occasion in question; that he informed defendant's foreman he did not know how to run said machine; that he was given no instructions or warnings; and that he was injured by invisible revolving knives while placing his hand upon the bed plate of said machine in an attempt to discover, while standing at the rear of the same, the reason for its failure to work properly. Held, plaintiff was not as a matter of law guilty of contributory negligence.—Molyneaux v. Bradley, Miller & Co., 167 Mich. 278. (Ostrander, C. J., dissenting.)

¶ 1717. A ladder way into an exploration shaft of a mine was constructed by joining together several short ladders and nailing the same to the permanent timbers in said shaft. On account of a defect in the original construction of said ladder one of the rounds was missing. The persons expressly charged with duty of seeing that the ladder was safe knew about its defective construction and the dangers incident thereto. While plaintiff employee was being lowered into said shaft by means of a bucket and a cable, a pump boy started to descend said ladder for the purpose of boarding said bucket, fell through the space left by said missing round, and struck and knocked plaintiff off said bucket. Held, plaintiff was not as a matter of law guilty of contributory negligence in failing to repair said defect in the ladder or to take steps to remove the danger, although he knew of the same.—Menere v. Copper Range Consol. Co., 169 Mich. 367.

¶ 1718. Where an inexperienced municipal employee is ordered to calk pipes in an uncurbed trench five feet deep and is assured of the safety, whether working in a reclining position, instead of standing up so as to more readily avoid danger from a cave in, is contributory negligence, is a question for the jury.—Keenan v. City of Mt. Pleasant, 176 Mich. 620.

¶ 1719. Where a boy under eighteen years of age in the course of his employment was compelled to stand in a narrow space between moving belts within an arm's length of revolving knives, and was injured by coming in contact with the knives in some manner which he was unable to explain, but evidently due to his hand coming in contact with one of the moving belts, his contributory negligence was held to be for the jury.—Radic v. Thomas Jackson & Co., Ltd., 178 Mich. 618.

¶ 1720. Whether a boy under eighteen years of age, who was placed at work at a dangerous machine in violation of Act No. 285, Pub. Acts 1909, § 4019, How. St., 2nd Ed., was guilty of contributory negligence, held a question for the jury when resting on conflicting testimony.—Powell v. E. H. Stafford Mfg. Co., 183 Mich. 1.

¶ 1721. Decedent, employed as a hoisting engineer, was ordered to do riveting upon a smokestack, eighty-five feet from the ground. The work was dangerous and no instruction was given to him. He was killed as the re-

sult of a fall from the scaffold upon which he was at work. Held contributory negligence was not shown as a matter of law.—Lobenstein v. Whitehead & Kales Iron Works, 179 Mich. 279.

¶ 1722. In an action for the death of a hoisting machine operator who had been ordered to help in the construction of a platform around a flue 85 feet high, where it appeared that deceased was inexperienced in such work and was not warned of the dangerous character of the work, held that the contributory negligence of deceased was a question for the jury.—Lobenstein v. Whitehead & Kales Iron Works, 192 Mich. 118.

§ 68b. ——Obedience to or disregard of rules, orders or warnings.

¶ 1723. Where a brakeman, on going into the employment of a railroad company, signs a contract binding him to obey all orders, rules and regulations, but in which the general language applies equally to all classes of employees, the agreement to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom. And while the clause binding him to use care and caution applies to anything he may undertake to do, it is for the jury to decide whether he has violated it.—Jones v. Lake Shore & M. S. Ry. Co., 49 Mich. 573.

¶ 1724. In an action for alleged negligence causing death, the jury is not bound by the testimony of a witness as to warning given deceased where his testimony upon cross-examination differs from that upon direct examination and is also contradicted by the fact that deceased in disregard of the alleged warning rushed into the danger and was killed.—Preuschoff v. B. Stroh Brewing Co., 132 Mich. 107.

¶ 1725. Contributory negligence is for the jury in an action for injury caused by plaintiff's clothing being caught by a projecting set screw, where it appeared that the light was dim and while he saw the revolving shaft he might not have seen the projecting screw, and that he took the position in the presence of the alter ego of the employer, and under directions witnessed by him.—Sipes v. Michigan Starch Co., 137 Mich. 258.

¶ 1726. A fireman on a steam derrick is not guilty of contributory negligence as a matter of law, in obeying the directions of the engineer in oiling a derrick chain although there was a safer method of doing the oiling than that adopted by the engineer.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 1727. Plaintiff, an employee of defendant, was injured by being caught in unguarded gearing upon the breaking of a ladder upon which he was at work. Upon conflicting evidence as to whether it was part of plaintiff's duty to use the ladder in question or whether such use was against the orders of defendant, plaintiff's contributory negligence was held to be for the jury.—Smith v. Mt. Clemens Sugar Co., 179 Mich. 97.

¶ 1728. One experienced in the use of dynamite and the effects of explosions in blasting stumps who violates instructions to use light charges by using an unusually heavy charge of dynamite, and stands in the open to fire the blast, and fails to seek protection from flying pieces by stepping behind a brush pile which would have afforded adequate protection, and as a result was injured, is guilty of contributory negligence as a matter of law.—Gatewood v. Consolidated Coal Co., 192 Mich. 247.

§ 68c. ——Reliance on assurances of safety or promise to repair.

¶ 1729. Where, in an action for injuries received while using machinery known by plaintiff to be defective, there is no evidence that, in answer to complaints made by him, defendant promised to remedy the defects, it is error to submit to the jury the question of defendant's liability upon that theory.—Breig v. Chicago & W. M. R. Co., 98 Mich. 222.

¶ 1730. A lineman injured by a trolley wire slipping when being drawn up, upon a curve, due to the failure of a vise to hold the wire, cannot be said to be guilty of contributory negligence, as a matter of law, because of working from the inside of the curve, contrary to natural laws, whereby wire stretched upon a curve and held in place by a vise would be dangerous, where the plaintiff claims that he was not familiar with the work, that he was told by the foreman that it was safe to work on the inside of the curve, if the vise held fast to the guy wire, that it was necessary to work on the inside, and that it was just as dangerous to work on the outside of the curve.—Shadford v. Ann Arbor St. Ry. Co., 121 Mich. 224.

¶ 1731. Whether the danger of working where defects exist, under promise of repair, is so imminent that no prudent person would undertake to perform the service is usually a question of fact.—Glassbrook v. Lansing Wheelbarrow Co., 177 Mich. 29.

¶ 1732. In an action by a foreman in charge of a gin pole used in erecting the iron and steel work of a building for damages for personal injuries sustained as a result of the falling of the pole because of the insufficiency of the platform on which it rested, held that it was a question for the jury whether plaintiff was guilty of contributory negligence in continuing to work after a promise by defendant's superintendent to

repair the platform.—Barkow v. Donovan Wire & Iron Co., 190 Mich. 563.

¶ 1733. Plaintiff was employed in fastening the tongs to poles to be raised and loaded on a wagon. He complained to defendant, his employer, that the tongs were dull, and slipped on the poles. Defendant told him to go ahead using them until they could be repaired. Plaintiff continued; the tongs kept slipping, and he was injured. Held, plaintiff was not as a matter of law guilty of contributory negligence in relying on defendant's advice, in view of the fact that others used the dull tongs after the accident.—Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312. (Brooke, Grant and McAlvay, JJ., dissenting.)

§ 68d. ——Contributory negligence of factory, shop, or mill employees.

¶ 1734. Whether it was negligent for plaintiff to attempt to oil with his left hand a buzz-saw while in motion was held properly submitted to the jury.—Ribble v. Starrat, 83 Mich. 140.

¶ 1735. If, in a damage case there is evidence, in effect, that the plaintiff, while at work at a saw in the defendant's mill stood on some loose boards covering a hole in the floor, and through these boards sliding apart was thrown forward upon the saw; that he had worked in the same place several weeks, but, according to his claim, did not know that the boards covered a hole; that the boards, though not nailed down, had remained in place a long time, and that the defendant knew of his dangerous surroundings, the question of contributory negligence is for the jury.—Smith v. Dunham, 74 Mich. 310.

¶ 1736. An operator at a wabble saw is not guilty of contributory negligence as a matter of law in using a table known by him to be defective where the testimony tended to show that the table was defective, that it was not firm and rigid, that it was supported by strips which would work out and drop down and that he would put them back in whenever he saw them working out.—Chilson v. Lansing Wagon Works, 128 Mich. 43.

¶ 1737. The question whether an employee was occasionally compelled to put his hand between the feed rolls and the saws of a lath machine, held improperly submitted to the jury in the absence of evidence warranting it.—Lydman v. De Haas, 185 Mich. 128, 8 N. C. C. A. 649.

¶ 1738. The question whether it was necessary as a matter of custom, for an employee to place his hand between the feed rolls and saws of a lath machine, should not be submitted to the jury in the absence of evidence on the subject.—Lydman v. De Haas, 185 Mich. 128, 8 N. C. C. A. 649.

¶ 1739. In an action for damages against a shingle company for personal injuries received by a green employee in being brought into contact with a revolving saw while attempting to remove a sliver therefrom, it is for the jury to say whether under all the circumstances the saw was or was not a warning in itself and whether a plain menace of danger was not involved in seizing the silver as the plaintiff seized it.—Martin v. Jerry Madden Shingle Co., 168 Mich. 176.

¶ 1740. Where a person's hand was drawn into the rollers of a corn husker and injured, the fact that he used his hands in removing the débris accumulated in front of the rollers instead of sticks furnished for that purpose does not show contributory negligence as a matter of law when this was the method employed by his instructor.—Garfield v. Lapham, 173 Mich. 217.

¶ 1741. A workman employed in a sawmill to carry slabs from the gangplank, while pulling backwards at one that was too heavy for one man to carry, slipped on some wet bark and fell against certain cogwheels that caught his pantaloons and injured him. He had not been warned and did not know that the wheels were uncovered. Held, that the question whether he was guilty of contributory negligence ought to have been left to the jury.—Swoboda v. Ward, 40 Mich. 420.

¶ 1742. In an action by an employee who was injured while working on a pump located in a large mill, where it appeared that a throttle valve was so worn that when closed it leaked steam into the cylinder pump; that on the day of the injury plaintiff heard steam escaping into the well and went down to attend to it and reached his arm through the spokes of the flywheel to tighten a nut, and that because of the defective condition of the valve, steam escaped and started the pump going thus catching his arm and injuring his hand, and where a new pump was being erected, and there had been a promise to repair the throttle valve, as soon as absent workmen returned, and 30 days had gone by since the promise, and where the escaping steam had been sufficient to start the old pump, but the new one had not been so started until the occasion in question, the court could not hold as a matter of law that the plaintiff was so reckless as to preclude him from asserting a reliance on the promise to repair.—Mann v. Lake Shore & M. S. R. Co., 124 Mich. 641.

¶ 1743. Where an employee engaged in testing motors extends his hand through a flywheel for the purpose of adjusting a pulley and is injured by the sudden starting of the motor, it cannot be said that he was guilty of contributory negligence as a matter of law even though there was a safer way of adjusting the same—it appearing that there was no reasonable apprehension of the motor being started.—Johnson v. E. C. Clark Motor Co., 173 Mich. 277.

¶ 1744. Where plaintiff suing for a negligent injury has testified that he was forced

against a shaft, his admissions to the effect that when injured he was hanging on the shaft with his arm over it do not preclude his recovery if the jury believe he was injured in the manner testified to, but go merely to his credibility.—King v. Ford River Lumber Co., 98 Mich. 172.

¶ 1745. It is for the jury to say whether a servant was negligent where he assumed a squatting posture in attempting to turn an air cock with a wrench, and, slipping on a greasy floor, fell against a moving belt from which at the time a guard had been removed of which removal he testified he was not aware, and where it was a question whether the situation and character of the belt and its nearness to him was not such that the want of the guard should have been noticed by him.—Swick v. Aetna Portland Cement Co., 147 Mich. 454, per Hooker and Carpenter, JJ., others concurring in the result.

¶ 1746. In a suit for injuries suffered by plaintiff employee engaged in cleaning out the vats used for washing pulp in a paper mill, the evidence indicated that, before defendant's millwrights came to repair the belt used in running the machinery in the vat, plaintiff shut off the power and tied the lever so that the belt could not shift from the loose to the tight pulley unless some one released it; that plaintiff got down into the tank to clean out the refuse so as to allow the trapdoor to close; and that in removing the belt from the loose pulley to repair it, the millwrights threw it into the driving pulley instead of taking it from the loose pulley as they might have done. The evidence was conflicting as to whether the millwrights warned plaintiff of his danger. Held, plaintiff was not guilty of contributory negligence as a matter of law and such question was properly left to the jury.—Courtois v. King Paper Co., 172 Mich. 305.

¶ 1747. Where plaintiff's eye was injured by a particle of dust while he was using an emery wheel, the question of his contributory negligence in not wearing goggles is for the jury where it appears that plaintiff did not see a sign informing the employees where the goggles could be obtained, which sign was covered with dust making it difficult to read, that plaintiff had been employed only a few days, that the other employees did not wear goggles and that the foreman said nothing about goggles when informing him how to do the work.—Drake v. Industrial Works, 174 Mich. 622.

¶ 1748. Plaintiff operated rattlers in a foundry. To start the machinery it was necessary to climb upon a barrel and adjust the belt upon a moving pulley by hand. It being a cold day, plaintiff wore mittens, one of which caught upon a wire hook in the belt and pulled plaintiff's arm between the belt and the pulley. Held, that plaintiff's contributory negligence was a question for the jury.—Glassbrook v. Lansing Wheelbarrow Co., 177 Mich. 29.

¶ 1749. Plaintiff was injured while adjusting a belt to set in motion rattlers in a foundry. To adjust the belt it was necessary to climb upon a barrel and throw the belt while the line shaft was in motion, no loose pulley having been provided as required by statute. He knew the danger but continued to work on promise of repairs soon to be made. Held, plaintiff was not negligent as a matter of law.—Glassbrook v. Lansing Wheelbarrow Co., 177 Mich. 29.

¶ 1750. Where an employee was injured by being caught by exposed gearing upon the breaking of a ladder upon which he was at work, the gears in question being situated about nine feet from the floor and about three feet from the side of the ladder, it was held that his contributory negligence was for the jury.—Smith v. Mt. Clemens Sugar Co., 179 Mich. 97.

¶ 1751. Where an employee was injured by being caught in exposed gearing upon the breaking of a ladder upon which he was at work, it was held that he was not as a matter of law guilty of contributory negligence in using a ladder which had been broken and mended.—Smith v. Mt. Clemens Sugar Co., 179 Mich. 97.

§ 68e. ——Contributory negligence of employees in and about mines.

¶ 1752. It is for the jury to decide whether an experienced employee is guilty of contributory negligence in passing from a pit mine by way of an inclined track upon which a "skip-car" is run and which track is generally used by the men, it being the most convenient though not the only way of reaching the mine.—Luke v. Wheat Mining Co., 71 Mich. 364.

¶ 1753. While passing from a pit mine on an inclined track upon which a "skip-car" used in taking out ore was run, and which track was generally used by the men, it being the most convenient though not the only way of reaching the mine, an old employee was struck by the descending car lowered by the foreman's direction without the usual signal or warning. In an action for the injury received, held, that the question of plaintiff's contributory negligence was for the jury.—Luke v. Wheat Mining Co., 71 Mich. 364.

¶ 1754. Where plaintiff, a night-worker in defendant's mine, was injured by the fall of some staging because of a displaced brace, and the work of bracing and supporting the timber was done in the daytime, and it appeared that plaintiff, who was an experienced miner, knew that the staging was not steadied by a certain method which was safer than the one employed, and that he did not discover the displaced brace, he could not

be said, as matter of law, to have been guilty of contributory negligence.—Eddy v. Aurora Iron Mining Co., 81 Mich. 548.

¶ 1755. Plaintiff had formerly been employed as a timberman in the fifteenth level of defendant's mine. He left the mine for a time, and then returned to work on the same level. Meanwhile defendant had built a chute or raise directly under the iron rail track in the fifteenth level, and leading down to the sixteenth level. The raise was seven feet long and four feet wide, the hole extending out about one foot on each side of the track. The only passage across the raise or "chute" was a car track with board planking between the rails which were two feet apart. Plaintiff worked for some time in the mine and passed the chute many times. A light was customarily put there as a warning, but there was evidence that it was absent on the occasion in question. Plaintiff was never told of the chute, and did not learn of it until the injury. Held, the question of plaintiff's contributory negligence was one for the jury.—Kaukola v. Oliver Iron Mining Co., 159 Mich. 689.

¶ 1756. Plaintiff was employed by defendant mining company and stationed in its shaft house as a lander on the tram track and as a bell man. A trestle led out from the shaft house curving to the right. Loaded cars ran out on this trestle and when unloaded were drawn back by a cable which was operated by an engine stationed some distance from the shaft house. The engineer operated his engine only upon signal from the plaintiff. Once or twice just preceding the accident, when the empty car was being drawn back, the cable slipped off the idlers of the trestle on account of the curve of the trestle, and fell down to the right of the trestle. Plaintiff went out upon the trestle on these occasions, replaced the cable on the idlers, and walked back on the left side of the trestle where there was a considerable space for going on foot, while the right side of the trestle afforded only a narrow footing outside the rails. On the occasion of the injury, plaintiff went out again to place the cable back on the idlers, and having done so, signaled the engineer to draw in the empty car and started to walk back on the right side, or narrow portion of the trestle. While so walking the cable slipped off the idlers and knocked plaintiff off the trestle causing his injury. Held, plaintiff was guilty of contributory negligence as a matter of law, since he knew that if the cable slipped off it would come off upon the right side and place him in danger of being injured.—Dolstrom v. Newport Min. Co., 165 Mich. 309.

¶ 1757. The plaintiff, a miner, was injured by falling rock. It appeared that the plaintiff had thought that the rock was dangerous a month before the accident, but on the assurance of the shift boss that the place would be timbered had continued his work. Held, that the question of negligence in assuming the risk was properly submitted to the jury.—Asplund v. Calumet & Hecla Min. Co., 177 Mich. 529.

¶ 1758. Whether a miner used due care in traversing a narrow passage in a mine without waiting until the electric current was turned off from the wires therein, or whether he should have seen or heard an approaching car which compelled him to step aside from the track and lean against the wall where he was injured by coming in contact with an exposed wire, or whether he should have chosen another passage, are questions for the jury.—Hazzard v. Consolidated Coal Co., 183 Mich. 363.

¶ 1759. Whether it was contributory negligence for a miner in an emergency to ascend a ladder leading from a shaft instead of taking a bucket as he might have done, held a question for the jury in an action for personal injuries.—Benson v. Jones & Laughlin Ore Co., 185 Mich. 7. (Brooke, C. J., and Ostrander, J., concurring in reversal on ground that negligence was not shown.)

§ 68f. ——Contributory negligence of railroad employees in general.

¶ 1760. Where a railroad employee was injured while riding upon the pilot of a locomotive in accordance with a custom and by the direction of his superiors any question of contributory negligence is for the jury.—Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226.

¶ 1761. Contributory negligence as a matter of law is not shown in an action by a section hand caused by the derailment of a hand car on which he was riding, though in a train which had just passed, he saw an open rack car loaded with planing mill refuse, and thought it was dangerous to so load it, but immediately followed the train on the hand car which was derailed by striking a piece of hardwood flooring which had fallen from the car.—McLean v. Pere Marquette R. Co., 137 Mich. 482.

¶ 1762. A section foreman, who, on a stormy morning, carelessly walks along a railroad track in the same direction as an approaching train without looking back and with the intention of cleaning a switch of snow, and is injured by the train, is guilty of contributory negligence as a matter of law.—Barnhart v. Pere Marquette R. Co., 188 Mich. 537.

¶ 1763. In an action by a section hand against a railroad company under Pub. Acts 1909, No. 104, How. St., 2nd Ed., §§ 4110-4116, to recover damages for personal injuries sustained while walking on the track in the same direction as an approaching train on a stormy day, held that the plaintiff's negligence was, as a matter of law, greater than that of the defendant.—Barnhart v. Pere Marquette R. Co., 188 Mich. 537.

¶ 1764. A servant of a railway construction company, who took his seat on the outside of a house car to watch the tools of the construction train, was not guilty of contributory negligence, in an action for injuries to such servant received in collision with cars negligently left upon a spur track, where the space he occupied was five or six feet long and he braced his foot against a projecting bolt, since such collision was a danger which he could not anticipate, and since it cannot be said as a matter of law that the risk of his being thrown off the car by its ordinary management was such that no person of ordinary prudence would have assumed it.—Milbourne v. Arnold Elec. Power Station Co., 140 Mich. 316.

¶ 1765. Plaintiff, a station agent of defendant railway, was injured by a conductor of defendant while they were engaged in unloading a freight car. The conductor was under the influence of liquor. Held, the question whether plaintiff was contributorily negligent in view of his knowledge of the conductor's condition was for the jury.—Johnson v. Lake Shore & M. S. Ry. Co., 162 Mich. 301.

§ 68g. ——Of brakemen and switchmen.

¶ 1766. A man who had been employed for one month in switching cars in defendant's yards was killed while in performance of his duties by being brushed between a car and a building maintained by defendant dangerously near a sidetrack on which the car was passing. It did not appear that the deceased had ever before switched a car on said sidetrack or past the building, or that he had any reason to apprehend the existence of special danger. Held, that the question of his contributory negligence was for the jury.—Sweet v. Michigan Cent. R. Co., 87 Mich. 559.

¶ 1767. The question of plaintiff's contributory negligence in trying to uncouple cars while they were in motion was held to be for the jury.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567.

¶ 1768. Stepping between moving cars to uncouple them is not, as a matter of law, negligence, but the question is one for the jury.—Eastman v. Lake Shore & M. S. R. Co., 101 Mich. 597.

¶ 1769. Whether a brakeman, in sitting upon a flat car between two tiers of logs while backing upon a sidetrack for the purpose of making a coupling, was guilty of contributory negligence precluding a recovery for injuries sustained by being crushed between the logs on the car's leaving the track, is a question for the jury, the evidence being conflicting as to the danger of the position.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 1770. In action for wrongful death of a brakeman while coupling cars the testimony of another brakeman, who saw the deceased go in front of the car which was being backed down for the coupling, to change the coupling link, that that was a part of deceased's duty as a brakeman, and was the proper thing to do, was sufficient to defeat the contention that the testimony showed the deceased to have been negligent as a matter of law.—Knapp v. Chicago & W. M. R. Co., 114 Mich. 199.

¶ 1771. In an action for wrongful death, the failure of a brakeman to detect defective blocking of a frog required by Comp. L. 1897, § 6313, to be kept in a safe condition and to avoid it in crossing the track in front of a moving car is not contributory negligence as a matter of law where the testimony goes to show that the defects were not easily discernible.—Jones v. Flint & P. M. R. Co., 127 Mich. 198. (Hooker and Grant, JJ., dissenting.)

¶ 1772. In an action for personal injuries to a railroad brakeman, testimony that he was injured on account of a hole between the ties on the main track while walking between moving cars and not at a switch as contended by defendant raises a question of fact as to the plaintiff's contributory negligence.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 1773. The following of a custom by a brakeman, in passing in front of moving cars in the performance of his duty, is not as a matter of law contributory negligence.—DeCair v. Manistee & G. R. R. Co., 133 Mich. 578.

¶ 1774. In a suit by a switchman for personal injuries received while engaged in coupling cars in defendant company's switchyard, it appearing that plaintiff tripped over a pile of gravel and fell in front of a moving train, evidence examined, and held to present a question for the jury whether plaintiff was guilty of contributory negligence.—Gillespie v. Grand Trunk Ry. Co. of Canada, 150 Mich. 303.

¶ 1775. An employee who is injured while engaged in coupling cars upon a switch track at a factory, is not guilty of contributory negligence in going between cars where, from all the evidence which appeared in the record, he could have performed the duties which he undertook to do from between the cars where he had placed himself with perfect safety except for an intervening and unexpected propulsion of an additional car against the dead cars between which he was standing.—Pecard v. Menominee River Sugar Co., 153 Mich. 84.

¶ 1776. Where telephone wires are strung over defendant railway's track at a height lower than that required by law, a plaintiff brakeman, riding backwards on defendant's freight car in discharge of his duty, and in ignorance of the presence of said wires, is

not guilty of contributory negligence as a matter of law for failure to turn around and look for such wires, although he might have seen the wires had he been facing forward.—Meyers v. Detroit & C. R. Co., 166 Mich. 403.

¶ 1777. A brakeman injured by collision between a derailed car and a pile of lumber is not as a matter of law guilty of contributory negligence in climbing up into the stirrup at the front end of the car, and holding to the ends of boards which were piled upon the car, and riding in that position.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 1778. On action against a railway company by a brakeman for injuries received when a conductor without his knowledge signaled an engineer to back into a car on which he was preparing a coupling, the brakeman's conduct in selecting the dangerous way of preparing the coupling is for the jury on the question of his negligence, where the car and engine were at rest when he started to prepare the coupling and he was not bound as a matter of law to apprehend that the conductor who had been absent would appear and signal for the coupling.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

¶ 1779. A brakeman who goes between moving cars to mount them is not guilty of contributory negligence as a matter of law.—Scott v. Boyne City, G. & A. R. Co., 182 Mich. 514.

¶ 1780. The question of the contributory negligence of a brakeman who slipped and fell in front of a switch engine which, because of a defective brake, could not be stopped in time to avoid injuring him, held properly submitted to the jury.—Nelson v. Michigan Tanning & Extract Co., 184 Mich. 108.

§ 68h. ——Of conductors, engineers and motormen.

¶ 1781. Plaintiff street car conductor, being ordered by the foreman to take a certain car out of the barn, stepped in between the car and another five feet behind it, and threw the trolley on the wire without waiting for the motorman or looking to see if the motorman's switch was on. The car suddenly jumped back, injuring him. Defendant's rules contained a warning against placing the trolley wheel on the wire while the controller was on. Held, plaintiff was precluded as a matter of law from recovery on account of contributory negligence.—Drouillard v. Detroit United Ry., 170 Mich. 444.

¶ 1782. Plaintiff, motor car conductor, was guilty of contributory negligence as a matter of law in descending from the top of an electric car of defendant, he having ascended in a manner not provided for by the company, and in the daytime, without noticing whether a step provided for the purpose was in place before undertaking to use it in descending, where its absence was open and apparent, and where he had been in defendant's service for seven years, during a large part of which he was a car inspector.—Leary v. Houghton County Traction Co., 171 Mich. 365.

¶ 1783. A train dispatcher authorized a conductor of one train to leave a part of a broken train on a main track at Cushman while he went back on a branch track to get the rest of the train. The broken train was so left at night, and without lights. The dispatcher then ordered the plaintiff, an engineer, to run his train down the main track with no other warning than to look out for trains switching at Cushman. Plaintiff going at a slow rate ran into the broken train and was injured. Held, that he was not as a matter of law guilty of contributory negligence.—Dugan v. Boyne City, G. & A. R. Co., 158 Mich. 450.

¶ 1784. An experienced railroad freight engineer who has knowledge that a passenger train has the right of way over all other trains, and, in violation of a rule which requires engineers to place their trains on sidings five minutes before the train passes, or if that is impracticable, to send a flagman ahead, deliberately starts his train from a siding within six minutes of the time the passenger train is due to pass a point a short distance ahead and starts to run through a reverse curve a third of a mile long without sending the brakeman ahead, as a result of which a collision occurs in the curve, is guilty of contributory negligence as a matter of law.—Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605.

¶ 1785. The comparative negligence of a motorman who was injured in a collision between two interurban cars, and of the defendant railway company, held a question for the jury in an action under Act No. 104, Pub. Acts 1909, §§ 4110-4116, How. St., 2nd Ed.—Darling v. Grand Rapids, G. H. & M. Ry. Co., 184 Mich. 607.

§ 69. ——In actions under Federal Employers' Liability Act.

Instructions in actions under Federal Employers' Liability Act, see post § 72.

¶ 1786. In an action under the Federal Employers' Liability Act against an express company for damages on account of the death of an express messenger resulting from a fall sustained by such messenger when he stepped out from his express car under the misapprehension that a baggage truck was in position beside the car so that he could step upon it, held that defendant's liability was a question for the jury.—Chapman v. United States Exp. Co., 192 Mich. 654.

¶ 1787. In an action under the Federal Employers' Liability Act by a section foreman of the defendant railroad company to recover damages for injuries sustained in a collision between a hand car operated by plaintiff and a similar car operated by another section foreman of defendant, whether the accident happened wholly or partially because of the negligence of the plaintiff in stopping his own car too suddenly, held a question of fact for the jury.—Miller v. Ann Arbor R. Co., 196 Mich. 297.

¶ 1788. Where the evidence is conflicting as to whether the cause of the death of a switchman was his own failure or that of a conductor of the crew to throw a switch, the question is one for the jury in an action under the Federal Employers' Liability Act.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 1789. Where a switchman was killed by reason of the failure of the conductor in charge of a switching crew, to throw a switch as it was his duty to do, in order to divert a string of cars from the track on which the deceased was walking in the nighttime, it cannot be said in an action under the Federal Employers' Liability Act, as a matter of law, that the negligence of the conductor was not the proximate cause of the death of plaintiff's intestate.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 1790. The foreman in charge of car repairing in a railroad yard, who was the only person having control of the key to the switch leading to the repair track, cannot be said as a matter of law to be free from negligence so as to relieve his employer from liability under the Federal Employers' Liability Act (Act April 22, 1908, 35 U. S. Stat. 65), for the death of a car repairer killed by the shunting on the repair track of a car against the one on which he was working under orders from the foreman, who, without warning the latter of his danger, subsequently opened the switch, as he intended doing when he gave the deceased order to work on such car, so as to permit the shifting of cars on the repair track.—Evans v. Detroit, G. H. & M. Ry. Co., 181 Mich. 413.

¶ 1791. In an action under the Federal Employers' Liability Act to recover damages for injuries sustained while plaintiff with other employees of defendant was unloading certain heavy timbers, one of which, without warning, shot out of the car and struck plaintiff, whether plaintiff under the circumstances assumed the risk, held for the jury.—Chapman v. Ann Arbor R. Co., 196 Mich. 671.

¶ 1792. In an action under the Federal Employers' Liability Act against an express company for damages on account of the death of an express messenger resulting from a fall sustained by him when he stepped out from his express car under the misapprehension that a baggage truck was in such position alongside the car that he could walk out upon it, the contributory negligence of the messenger in stepping back onto the truck cannot be regarded by the court as the proximate cause of the accident so as to prevent plaintiff's case from going to the jury, but ought to be regarded as raising a question of contributory negligence which is to be considered by the jury in diminution of damages in proportion to the amount of negligence attributable to such employee.—Chapman v. United States Exp. Co., 192 Mich. 654.

§ 70. Directing verdict.

General law as to directing verdict, see Directing Verdict.

¶ 1793. If an injured employee fails to show any negligence on the part of his employer, a verdict should be directed for the latter.—Lydman v. DeHaas, 185 Mich. 128, 8 N. C. C. A. 649.

¶ 1794. Verdict for defendant should be directed where plaintiff, a boy 16 or 17 years old, had worked with a planing machine for months, until he knew its manner of operation, the position of its cogwheels and the danger therefrom, and was injured by having his hand crushed between the cogwheels while sitting upon the bed of the planer waiting to have it adjusted for wider boards, the action being based on negligence in failing to warn him of the danger.—Berlin v. William B. Mershon & Co., 132 Mich. 183.

¶ 1795. In an action by an employee for injuries resulting from an explosion of varnish, the fact that it contained amyl acetate, which might explode if in sufficient quantity did not establish a circumstance calculated to arouse defendant's apprehension of danger, and the trial judge properly directed a verdict for the defendant.—Siegel v. United Elec. Heating Co., 143 Mich. 484.

¶ 1796. Where plaintiff was engaged to oil dangerous machinery in a cement mill, and was injured in the cogs, and there was evidence that the room was not properly lighted, that the air was cloudy from the dust, and that plaintiff was not properly instructed and warned, held that there was evidence to go to the jury, and a directed verdict for defendant was properly refused.—Higgins v. Peninsular Portland Cement Co., 152 Mich. 390.

¶ 1797. Plaintiff was injured by the fall of rock from the hanging wall of defendant's mine, after working therein as a trammer for thirty days. At the time of injury he was loading rock which had been broken down, shoveling it upon a tram car. Held, the case was ruled by Petaja v. Mining Co., 106 Mich. 463, and that the judge properly

directed a verdict for defendant.—Karppinen v. Tamarack Min. Co., 154 Mich. 528.

¶ 1798. Plaintiff employee of defendant company was directed to leave his regular work, and help put a tram car which had jumped the track, back on the rails. He had no experience at this and received no instructions. He employed a crowbar and a ratchet lifting jack. In attempting to pry the car over with the crowbar, the car slipped and plaintiff was injured. Held, it was error to instruct a verdict for defendant on the ground that defendant was not negligent.—Johnson v. Desmond Chemical Co., 156 Mich. 669.

¶ 1799. Plaintiff was injured by a log while employed in loading logs on the carriage of the saw in a sawmill. He introduced evidence to show that the kickers used to catch the logs and then to push them over on the carriage, gave way at the wrong time, and let the log fall on his foot. There was no evidence that the kickers had at any time before failed to work properly and defendant had, therefore, no knowledge of the defects. There was evidence that certain weights attached to a steam valve which controlled the kickers were found immediately after the accident out of their proper place and lying on the ground. Held, there was no evidence going to establish defendant's negligence, and a verdict for defendant should have been directed.—Edwards v. Engadine Lumber Co., 158 Mich. 428.

¶ 1800. Plaintiff's decedent, a brakeman employed by defendant, was killed by a rear-end collision. One Taylor, a brakeman, had been sent back to stop the train behind, and had left torpedoes on the track, which failed to explode. The evidence showed that the torpedoes had been bought of a reputable manufacturer; that similar lots bought through a course of years had worked perfectly; that defendant had kept them in a dry place; and that inspection of such goods was practically impossible. Held, on the question of defendant's negligence in failing to furnish good torpedoes, and to supply a proper inspection, a verdict should have been directed for defendant.—Siegel v. Detroit, G. H. & M. Ry. Co., 160 Mich. 270.

¶ 1801. Plaintiff was a street car conductor, and was standing on the running board of the car collecting fares, while it was in motion. A section man had left the handles of a wheelbarrow loaded with bricks projecting near the track. Plaintiff in passing along, got entangled therewith and was injured. Held, a verdict was properly directed for defendant on the question whether the defendant had failed to provide a safe place to work.—Wickham v. Detroit United Ry., 160 Mich. 277.

¶ 1802. Defendant contracted to build a concrete cellar wall and employed plaintiff as a mixer. After a day or two of hard rain, plaintiff was directed to remove the curbing used to support the cement. The wall fell and injured plaintiff. Held, the court was in error in directing a verdict for the defendant on the ground that there was no evidence of negligence, since the mere falling of the wall was some evidence that the cement was too green for the removal of the curbing.—Gerstler v. Weinberg, 160 Mich. 267.

¶ 1803. Plaintiff's decedent was employed by defendant to wheel sand to a mixer, and stay on shore as his part of the work in the construction of a dam. Defendant's superintendent ordered the deceased to take a point of leakage the scow ran into some scow and repair a leak which had sprung in the new dam. In the effort to reach the submerged timber braces used in the construction. The scow became unmanageable, got into the swift current of the sluiceway, and deceased was drowned. Defendant gave deceased no instruction as to the duty he directed him to perform. Held, the court was in error in directing a verdict on the ground that there was no evidence of negligence on defendant's part.—Snow v. Escanaba Power Co., 162 Mich. 579.

¶ 1804. Plaintiff had been working as a regular miner in defendant's mine for about three weeks. A blast was exploded in the evening in the raise in which plaintiff was working. Next morning plaintiff's assistant did not appear to timber the roof of the place blasted. Plaintiff was directed to work in another part until noon, when he was directed with another to timber the blasted place. While so engaged, a large quantity of ore fell in from the roof and injured him. Plaintiff knew that ore in small quantities was likely to drop at any time. Held, the questions whether the delay in timbering increased the danger, whether the plaintiff should have known of the increased danger, and whether defendant owed a duty to warn him of the increased danger, should under these facts have been submitted to the jury, and it was error to direct a verdict for the defendant.—Hosking v. Cleveland Iron Mining Co., 163 Mich. 538.

¶ 1805. Complainant's intestate was working with some Italians in setting in place a boiler front. The boiler front was lifted to a perpendicular position and while the intestate and the laborers were attempting to move it forward, the laborers let loose of it, and it fell forward upon the intestate. Held, that though the evidence be sufficient to show that the Italians could not understand the English language, so as to understand the orders given, defendant was not negligent on this ground for employing them to do the work, and a verdict was properly directed for defendant.—Rigge v. Wickes Bros., 165 Mich. 297.

¶ 1806. In an action against a railroad to recover for the death of a section man at a

crossing, it was held that there was no evidence indicating that the locomotive whistle was a defective one and that the case should have been taken from the jury because of plaintiff's failure to make a case under the evidence.—Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 1807. Plaintiff employee of defendant mine operator was injured by a mistake of defendant's engineer in hoisting the cage upward instead of lowering the same upon the plaintiff's signal, and sought to recover under Act No. 100, Pub. Acts of 1905, § 3, on the ground that defendant did not employ a competent and trustworthy engineer. The evidence indicated that the engineer in question had had many years' experience in running engines in many different industries; that at the time of his employment by defendant and for some time afterwards defendant's chief officer made careful inquiries as to his competency, and personally watched him closely at his work and found him a man of good habits, reliable and giving no evidence of incompetency; that said engineer worked in the position in question for some eighteen months prior to the accident with entire satisfaction; that defendant's officers frequently rode on the cage without noticing anything amiss in his work; and that no complaint was lodged against him by plaintiff or others. Held, the trial court should have directed a verdict for defendant.—Layzell v. J. H. Somers Coal Co., 168 Mich. 373.

¶ 1808. Complainant operator of an electrical passenger elevator in defendant's hotel was injured by said elevator dropping five floors to the basement. The evidence indicated that four weeks before the accident complainant was shoved up above the limits and against the beams so that he could not get down without the aid of the engineer; that this jarred the safety catch; that this fact was reported to the manager and engineer whose duty it was to look after the elevator; that at that time the safety catch was tied back with a rope and a loop of wire; that later the elevator slid from the dining room floor to the basement, breaking mirrors on each side of the car; and that it slid in like manner on other occasions prior to the accident which happenings were reported to the head clerk. Held, the trial court erred in directing a verdict for the defendant on the ground that there was no evidence of negligence.—Ammer v. Postal, 168 Mich. 405.

¶ 1809. A verdict should not be directed for the defendant in an action for injuries sustained by an employee from the explosion of a boiler, where the evidence tends to show that the boiler had been installed for ten years, and that the defendant had notice of its defective condition and failed to make repairs.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 1810. Where a miner was killed by the sudden starting of a skip which he was boarding, and the negligence alleged was the employer's failure to properly maintain and inspect the signaling apparatus, a verdict was properly directed for the defendant, where the testimony failed to show that at the time of the accident the signaling apparatus was out of order or that it failed to work.—Paskvan v. Allouez Min. Co., 187 Mich. 101.

¶ 1811. It was error to direct a verdict for defendant in an action by a carpenter against his employer for damages for personal injuries alleged to be due to the falling of a defective scaffold where the evidence as to defendant's negligence was conflicting.—Tautengan v. Zoller, 201 Mich. 94. (Brooke and Fellows, JJ., dissenting.)

§ 70a. ——For failure to show what caused accident.

Evidence as to cause of accident, see ante § 65b.

Jury questions as to cause of accident, see also ante § 67b.

¶ 1812. A brakeman on a gravel train engaged in building a branch of defendant's road was seen, as the train was starting back down a grade for the purpose of getting a start to go over a hill, to step from the "caboose" to the "plow-car," next thereto, and was found, a moment later, dead on the track, part of the train having passed over him. No one saw him fall from the cars, and no one knew how he was made to fall, or what he was doing when he fell. His cap lay at the foot of a tree plainly visible which was sixteen or eighteen inches from the track, and his body was about sixteen feet beyond the tree. There was testimony that some of the brakes were bent so they would hit trees as the train came up, but the record disclosed no occasion to go to the brakes. Held, that the cause of decedent's fall from the train was purely conjectural, and that a verdict should have been directed for defendant.—Manning v. Chicago & W. M. R. Co., 105 Mich. 260.

¶ 1813. Where, in an employee's action to recover for injuries from the breaking of a mended saw, there is evidence on defendant's part tending to show that plaintiff was not struck, as he claimed, by a piece of the saw, and that the saw was suitable and safe for the use it was applied to, although this was in conflict, the court properly refuses to direct a verdict for plaintiff.—Lau v. Fletcher, 104 Mich. 295.

¶ 1814. In an action against a railroad company for the death of a brakeman, it appeared that decedent was fatally injured on a dark night while attempting to couple cars at a street crossing; that one of the planks at the crossing between the rails had split off near one end, leaving a space sufficiently wide to admit a man's foot; that

decedent's version of the accident, given directly after it occurred, was that "he got caught in the planking between the plank and the rail, and the brake beam pushed him back"; that blood was found on the ground, close to the defect in the planking and at intervals toward where he was found injured; that decedent was picked up about two car lengths from the crossing, and that the space between the rails looked as though a body had been dragged along for that distance. Held, that it was not error to refuse to direct a verdict for defendant on the ground that it was purely conjectural as to whether decedent caught his foot or merely stumbled against the end of the planking.—Knapp v. Chicago & W. M. R. Co., 114 Mich. 199.

¶ 1815. A directed verdict was sustained in an action for the death of an engineer caused by the derailment of his train where, although plaintiff claimed that the derailment was caused by worn castings, she introduced no testimony to show that such wearing would cause a derailment, while the defendant produced nine experienced experts that such wearing had no tendency to cause a derailment.—Peppett v. Michigan Cent. R. Co., 119 Mich. 640.

¶ 1816. Plaintiff's decedent was killed while operating a ripsaw by being struck by a piece of timber thrown back by the saw. There was evidence that these "fly backs" had occurred on this machine before; that the timber flying back on this occasion was ripped part way and then broken off; that the guard and spreader were absent; and that when present these greatly lessened the likelihood and force of "fly backs." Held, on the question whether the defendant's negligence in leaving off the guard and spreader was the legal cause of the accident, the court erred in directing a verdict, as there was evidence to go to the jury.—Van Doorn v. Heap, 160 Mich. 199.

¶ 1817. Where it is a doubtful question whether the negligence of a fellow-servant or the defective condition of a tank supplied by defendant caused an explosion injuring plaintiff employee, it is error to direct a verdict for defendant.—McDonnell v. Central Drug Co., 160 Mich. 455.

¶ 1818. In a suit under the Death Act (Comp. L. 1897, § 10427), the evidence showed that plaintiff's decedent, a switchman in the employ of the defendant, mounted a ladder on the end of defendant's freight car for the purpose of reaching a hand brake near said ladder, in order to stop the car; that after climbing part way up the ladder he gave a sudden and vigorous leap towards the wheel of said brake, and endeavored to grasp same; that he missed said wheel, fell to the ground, and was killed by the car. Plaintiff sought to recover on the theory that the ladder in question was defective; that the decedent after mounting same noticed such defect and fearing that it would give way attempted to leap and seize the brake wheel in order to save himself. There was no direct evidence of the defective condition of the ladder or of the decedent's purpose in grasping for the brake wheel. Held, the trial court erred in failing to direct a verdict at defendant's request on the ground that there was no evidence that the alleged condition of the ladder was the proximate cause of the accident.—Groesbeck v. Grand Trunk Ry. Co. of Canada, 167 Mich. 259.

¶ 1819. Some evidence was offered to show that plaintiff's decedent, a brakeman employed by defendant railway, caught his foot while going between cars at a switch and was run over and killed. Plaintiff rested his case upon the claim that decedent caught his foot at the defective blocking at said switch. The evidence did not clearly indicate at what point the decedent caught his foot, and there was at the place a gridiron of holes into any of which he might have stepped and brought about the accident in question, the presence of which holes was necessary for the operation of the split switch in question. Held, the cause of the accident was speculative and a verdict for defendant should have been directed.—Scott v. Boyne City, G. & A. R. Co., 169 Mich. 265. (Moore, C. J., and Bird and Blair, JJ., dissenting.)

§ 70b. ——On ground that the risk was assumed.

Assumption of risks, see ante § 56.
Evidence as to assumption of risks, see ante § 65k.
Jury questions as to assumption of risks, see also ante § 67q.

¶ 1820. An employee's eye was destroyed by a chip of metal flying from a metal planer which he was operating. In an action to recover damages for the injury, based upon the employer's alleged negligence in failing to keep the machine in suitable repair, so that chips should not be thrown from it, it appeared that the plaintiff was a skilled machinist, acquainted with such machines; that he had operated the particular machine for thirteen months; and that he learned of the alleged defect when he commenced work. Plaintiff testified that he used the machine for five months without complaint; that he then explained the matter to the foreman, and asked leave to make some repairs, but was informed that time could not be spared to do so; that he told the general foreman, a few days before the accident, that the machine was not fit to do good work, and was told that it would be fixed as soon as it could be reached in the course of repairs. Held, that the testimony did not support the theory that plaintiff remained at work relying upon his employer's promise that the defect should be remedied, and that, upon his own showing, verdict should have been directed for defendant.—Hayball v. Detroit, G. H. & M. R. Co., 114 Mich. 135.

¶ 1821. A directed verdict for the defendant was sustained where plaintiff, a young man 19 years old, who had worked for some 3 days in defendant's sawmill, was injured by having his foot come in contact with an unprotected saw under a table, while walking between two tables in assisting another employee in removing plank; it appearing that the fact that the saw was not boxed was open to observation and that plaintiff was aware of the fact.—Mushinski v. Vincent, 135 Mich. 26.

¶ 1822. Verdict for defendant should be directed on the ground that the risk was assumed, in an action for the death of a motorman of an electric railway caused by contact of a defective trolley pole which he with another employee, was removing from the top of a car, with a high tension wire, where it appeared that he was familiar with the system, and knew the location of the wire and that contact with it was dangerous, though he had not been instructed specifically as to the danger in removing the trolley pole or that electricity would arc if a conductor like the trolley pole came in contact with, or within half an inch of, a high tension wire.—Harrison v. Detroit, Y., A. A. & J. Ry. Co., 137 Mich. 78.

¶ 1823. A verdict for defendant cannot be directed upon the ground that if the machine was in proper condition, plaintiff assumed all of the ordinary risks, where the assumption of such risk depended upon the finding of the jury as to instructions given to him.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 1824. Where there is a possible phase of the case where the risk is not assumed, the trial judge cannot properly direct a verdict on the ground that such risk was assumed.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

¶ 1825. Plaintiff, an employee of an electric lighting company, obtained a promise from defendant's foreman that said foreman would see to it that the electricity was not turned on while plaintiff was engaged in working on certain wires. While plaintiff was engaged in such work some person unknown turned on the current and, as a result, plaintiff was injured, and brings this suit to recover for such injury. Held, that the court below properly directed a verdict for defendant, for the foreman had no authority from defendant to make such promise to plaintiff.—Guest v. Edison Illuminating Co., 150 Mich. 438.

¶ 1826. Plaintiff employee was directed by defendant to leave his regular work, and help put a tram car which had jumped the track, back on the rails. He had no previous experience at this and was given no instructions. He used a crowbar and a ratchet lifting jack. While attempting to pry the car over, the car slipped and plaintiff was injured. Held, it was error to direct a verdict for defendant on the ground that the dangers were obvious and plaintiff assumed them.—Johnson v. Desmond Chemical Co., 156 Mich. 669.

¶ 1827. Plaintiff was a lead glazier. He was instructed by defendant, his employer, to assist the foreman in putting up storm windows in a church, to which work he was wholly unaccustomed. The defendant told a lumber dealer to supply material for a scaffold. Plaintiff and the foreman erected the scaffold of the material supplied, which plaintiff testified was old and unsuited to the purpose. Plaintiff was injured by the falling of the scaffold. Held, the case was one for the jury, and the trial court erred in directing a verdict for the defendant.—Carnell v. Halpin, 159 Mich. 42.

¶ 1828. Plaintiff was a common laborer, employed up to the day of the accident in question in wheeling brick or in other common labor. On this day he was ordered to assist defendant in building a scaffold, under his directions and orders and in his presence. He was ordered by defendant not to use more than three nails in nailing the support of the scaffold, and not to drive them clear up, but to leave sufficient room to get the hammer claw under the heads of the nails, so that they could be easily drawn without splitting the boards. Plaintiff followed such instructions. This was the first scaffold he had ever built; he had no knowledge of how scaffolding should be built to be sufficiently strong; and did this work and went upon the scaffold relying upon the judgment and obeying the orders of defendant, without any knowledge of its weakness. Defendant assured plaintiff the scaffold was strong enough to hold an elephant. In a suit for personal injuries, held, the trial court erred in directing a verdict for defendant on the ground that plaintiff had assumed the risk.—Goda v. Maurer, 162 Mich. 621.

¶ 1829. Plaintiff was employed as a common laborer around defendant's ship yard. He was ordered as one of a gang of men to remove some scaffolding from the hold of a vessel lying in the yard. In removing a hatch-cover to get at the scaffolding, plaintiff and his companion took hold of the rings attached thereto and lifted their end of the hatch before the other men could get hold of the rings on the other end, thereby causing the cover to slip off from the coaming and drop into the hold. Plaintiff being unable to extricate his hand from the ring, was carried to the bottom of the hold and injured. Prior to the accident plaintiff had assisted in removing two other covers. Held, plaintiff assumed the risk, and a verdict was properly directed for defendant.—Cribb v. Great Lakes Engineering Works, 167 Mich. 328.

¶ 1830. A man, experienced as a carpenter, while working in defendant's shop had

occasion to use a planing machine nearly every day during a period of three months. He knew that certain adjustments had to be made in planing different woods, and by reason of these adjustments not being made, the planer "kicked back" and injured him. The negligence relied on was the neglect to warn and instruct plaintiff when he was first put to work on the machine. Held, the dangers about the machine were obvious and were discoverable by plaintiff by the use of ordinary care, and a peremptory instruction should have been granted.—Newberry v. Boyne City Tanning Co., 176 Mich. 437.

¶ 1831. A verdict was properly directed for the defendant in an action for the death of a trammer caused by a large loose rock falling down a stope, where the danger was apparent to and had been observed by him. —Lesh v. Tamarack Min. Co., 186 Mich. 399.

¶ 1832. In an action against a government contractor to recover for the death of a carpenter who was in charge of a crew of men in putting up and taking down forms in which concrete was poured, where there was some conflict in the evidence as to whether the form at which deceased was at work when killed was being taken down or was being built higher when the accident occurred, but there was no conflict in the evidence upon the question whether deceased saw or could have seen, in the exercise of ordinary care, just what the situation was, it was the duty of the trial judge to direct a verdict for defendant.—Willis v. Oscar Daniels Co., 200 Mich. 19, 16 N. C. C. A. 510.

§ 70c. ——On ground of fellow-servant's negligence.

Liability for acts of fellow-servants, see ante § 55.

Evidence as to fellow-servants' acts or negligence, see ante §§ 64g, 65j.

Instructions as to acts of fellow-servants and duty to employ competent servants, see post § 71e.

¶ 1833. Plaintiff belonged to a section gang of four men, including the foreman, and, while assisting in loading ties upon a hand car, was injured by some of the ties falling off and breaking his leg. There was no evidence tending to show negligence in the employment of any of the men. Held, that the four men were fellow-servants, and that a verdict was properly directed in defendant's favor.—Timm v. Michigan Cent. R. Co., 98 Mich. 226.

¶ 1834. Plaintiff was engaged with other section hands in replacing old ties with new, and a projecting step from a passing caboose struck a tie throwing it against plaintiff and injuring him. The steps projected 15 inches while parts of the engines used projected farther, and the evidence showed that such cabooses had been used four years without accident and that similar ones were in common use on other roads. The tie had been placed too near the track by his fellow-servants. Held, that verdict should have been directed for defendant.—Turner v. Detroit Southern R. Co., 137 Mich. 142.

¶ 1835. In an action for personal injuries alleged to have been caused by a defective brake on a hoisting derrick, verdict for defendant should not be directed on the ground that plaintiff's evidence showed that the injury was not due to the defective brake but to the negligence of the engineer in handling it, where he testified that the brake "gave way" and that he "heard the teeth rubbing against the foot brake," though he also testified on cross-examination that the engineer's taking "his foot off released the brake," since the latter would not require that the testimony first given should be disregarded.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 1836. In an action for personal injuries to a crossing tender caused by the alleged negligence of a switchman in leaving a switch unlocked the court should have directed a verdict for the defendant on the ground that the injuries to plaintiff by derailment of a car were caused by the act of a fellow-servant, inasmuch as the duty of keeping the switch locked and fastened when not in use was not an absolute but a delegated duty which was to be performed by the switchman.—Dixon v. Grand Trunk Western R. Co., 147 Mich. 667.

¶ 1837. Plaintiff, a conductor on defendant's electric railway, was injured by a collision with a car ahead. There was evidence that the brakes on the plaintiff's car were in an unsafe condition, and a published rule of the company required the crew on the car ahead, under the circumstances, to torpedo the track, which they failed to do. Held, that in view of the evidence of the unsafe condition of plaintiff's car being the proximate cause of the accident, defendant was not entitled to an instructed verdict on the ground that the negligence of the plaintiff's fellow-servant on the car ahead contributed to the injury.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 1838. Section 3, Act No. 100, Pub. Acts 1905, provides "that only a competent and trustworthy engineer shall be permitted to operate the cages and hoisting devices in all coal mines in this state." Defendant employed one Patton as a fireman of the hoisting engine. Nine years before Patton had had some experience as an engineer. At various times, in the absence of the engineer, he was accustomed to raise and lower the cages. Plaintiff warned Patton, who was in charge of the engine on the occasion in question, to raise the cage a few feet to enable plaintiff to clean out the sump at the bottom of the shaft. Patton did so. He then left the engine, to discharge some of his noisy duties as fireman. He mistakenly heard a signal, lowered the cage, and plaintiff was

injured. Held, on the question of the defendant's failure to provide a competent engineer, as required by the statute, that the court erred in directing a verdict for defendant.—Capeling v. Saginaw Coal Co., 156 Mich. 437.

¶ 1839. The Grand Rapids branch of defendant railroad runs west and joins the main line at White Pigeon. Train No. 551 was scheduled to run west from Grand Rapids to White Pigeon, and thence on the main line west to Elkhart. It was due to arrive at White Pigeon about the same time as an eastbound train, No. 550, on the main line. Defendant's dispatcher informed O'Doud, the conductor, and Bock, the engineer, of No. 551 that No. 550 had been withdrawn. O'Doud understood this simply to mean that it was withdrawn from the branch line; Bock, that it was withdrawn from the main line. Upon approaching White Pigeon, O'Doud inquired of the dispatcher where No. 550 was and was told near Elkhart. He ordered his train out on the main line for the purpose of backing it off on a main siding to await the passing of No. 550. One Allison, a brakeman, rode on the engine of No. 551 for the purpose of flagging No. 550, if necessary. Allison had no experience as a flagman. The trains collided and plaintiff, a brakeman on No. 550, was injured. Held, in a suit for injuries, a verdict was properly directed on the ground that the evidence showed negligence only in the plaintiff's fellow-servants and not in the defendant itself.—White v. Lake Shore & M. S. Ry. Co., 156 Mich. 480.

¶ 1840. Plaintiff was employed in a mine temporarily, in a stope above the fifth level, under the direction of another miner, one Kangas. Leading down into the fifth level were several "mills," or walled openings. One of these openings was used to throw rock down, and miners were forbidden to go down by it. Kangas had been directed to get a new rope for this mill, as the one in use was rotten. Kangas, in disobedience of the rules, sent plaintiff down this mill to get a pail of water from the fifth level. The rope broke and plaintiff was injured. Held, Kangas was a fellow-servant of plaintiff, and a verdict was properly directed for defendant.—Avikainen v. Baltic Min. Co., 160 Mich. 375.

¶ 1841. Plaintiff, a motorman on defendant's line, attempted to board defendant's car and ride it across the street and upon a Y, where it was his duty to relieve the motorman in charge. He was injured by the sudden starting of the car while so attempting to board it. Held, the trial court properly directed a verdict for defendant on the ground that plaintiff and the motorman were fellow-servants.—Howcroft v. Detroit United Ry., 163 Mich. 608.

¶ 1842. In defendant's foundry for casting iron there was at one end of the building a raised platform. Beneath this platform were tracks leading out of the building. Stationed on the platform was an operator assisted by a spotter. The operator's duty was to bring a crane load of the iron over the platform to a point above a chute leading down into the cars on the tracks. When the iron was brought into this position a plunger was employed to strike it so as to break off the pigs from the sow and cause them to fall through the chute into the car. Plaintiff's intestate, an ignorant foreigner, was employed about the track to clear it of sand and ice. While so engaged and while no car was under the chute, the operator brought a load of the iron into position above the chute. One of the pigs was broken off by striking a shield and fell through the chute, killing plaintiff's intestate. Held, the accident was due to the negligence of the operator of the spotter in bringing the load above the chute at that time, and a verdict was properly directed for defendant on the ground that the injury was through the negligence of a fellow-servant.—Barto v. Detroit Iron & Steel Co., 164 Mich. 135.

§ 70d. ——On ground of contributory negligence.

Contributory negligence of servant, see ante § 59.
Burden of proof and presumptions as to contributory negligence, see ante §§ 62b, 63b.
Evidence as to contributory negligence, see ante §§ 64h, 65 l.
Jury questions as to contributory negligence, see also ante § 68.
Instructions as to contributory negligence, see post § 71g.

¶ 1843. In an action by a servant for personal injuries alleged to have resulted from the master's negligence where it appears from the undisputed facts that if plaintiff had exercised the ordinary care which men of ordinary prudence usually observe he might have avoided the injury complained of, the court is not in error in directing a verdict for defendant.—Melzer v. Peninsular Car Co., 76 Mich. 94.

¶ 1844. A verdict will not be directed in favor of a master on the ground of contributory negligence of a servant engaged as pressman, and injured by the falling of the upper die of a press used to form stove tops, where the servant's testimony shows that he was performing the work in accordance with the usual custom, when injured, and as he had been instructed by the foreman.—Burnside v. Novelty Mfg. Co., 121 Mich. 115.

¶ 1845. In an action for personal injuries to a boy 15 years old for damages sustained by getting caught in the gearing of a printing press while he was stooping to pick up some sheets which had fallen to the floor, it was proper for the court to direct a verdict

for the defendant when the proofs showed that the press was in perfect order, was the one on which the boy had learned, and all of its parts were visible and he admitted his knowledge of the danger of approaching too closely, and that in picking up the sheets he took no account of how close his arm approached to the gearing, and the most ordinary care would have avoided danger. Further, there was grave doubt whether the clothing had been caught in the gearing or by a shaft pin or key.—Van Wyck v. Dickinson, 148 Mich. 418.

¶ 1846. In an action for personal injuries resulting from getting caught in the knives of a jointer where the evidence showed that the accident occurred after the plaintiff had been at work upon the two machines for nearly four weeks and he knew perfectly well how to shift the belt to the movable pulley and thus stop the knives, knew about setting the cogwheel in motion, knew the exact location of the cogwheel and of the revolving knives, and knew these things better than any one else, his carelessness in attempting to clean the accumulated chips and dust from the defective suction pipe of the machine without stopping it contributed to his injury and a verdict was properly directed for the defendant.—Mulholland v. Ideal Mfg. Co., 149 Mich. 126.

¶ 1847. In an action for the wrongful death of one employed as a laborer and oiler caused by his having his clothing caught on a shaft, testimony by his superior that he was oiling machinery which was not within his employment and in a part of the premises where he was not required to be, will not justify a verdict directed for the defendant where a fellow-servant testifies that the oiler's duty was to oil all machinery which in his discretion needed oiling and the superior admitted that he was the only oiler employed by the mill during the daytime.—Barr v. Guelph Patent Cask Co., 129 Mich. 278.

¶ 1847a. In an action against a city for the death of a sewer employee, a verdict should be directed in favor of the city where the evidence shows that the death was caused by the giving way of curbing which was being put in under direction of the deceased, who was responsible for its defects.—Winkleman v. City of Adrian, 151 Mich. 519.

¶ 1848. Plaintiff in discharging his duty in assisting to turn an engine on a turntable was injured. There was evidence that the turntable was too small; that the pilot of the engine projected out over the edge of it; that the lever used in pushing it was very close to the projecting pilot; and that the plaintiff had warned his employer, and had been assured that the defects would be attended to. Plaintiff's foot was caught by the pilot of the engine while he was walking just ahead of it, pushing the lever. Held, that since the evidence disclosed and the plaintiff admitted that the turntable might as easily have been pushed in the other direction so as to make him follow the pilot and be entirely out of danger, a verdict should be directed for defendant.—Conner v. Lake Shore & M. S. Ry. Co., 158 Mich. 688.

¶ 1849. Plaintiff, a conductor, in attempting to uncouple defendant's car found that the uncoupling lever was out of order. To operate same he found it necessary to and did place his arm between the cars. The bolts in the drawhead being defective, the drawhead gave way, and plaintiff's arm was injured. The defects of the bolts were such as not likely to be discovered by one performing plaintiff's duty in the usual way. Held, the trial court properly refused to direct a verdict for defendant on the ground of contributory negligence.—Van Leuvan v. Ann Arbor R. Co., 167 Mich. 355.

¶ 1850. Plaintiff was a trammer in defendant's mine charged with the duty of scratching down the ore from the stope upon the soller at the foot of the stope where it was loaded into cars. He was under orders of a shift boss, whose duty it was to see that the hanging wall of said stopes was safe and who had authority to give orders to plaintiff and other trammers at their work. Plaintiff, after protesting that the hanging wall of a certain stope in which he had been working was not safe, was ordered to go ahead with his work by said boss and was injured by falling rock. He was able to see the condition of said hanging wall and sometimes trammers called in the miners to scale said walls in order to render them safe. Held, the court properly refused to direct a verdict on the ground that plaintiff assumed the risk or was guilty of contributory negligence as a matter of law.—Minkkinen v. Quincy Min. Co., 169 Mich. 279.

¶ 1851. Plaintiff had worked for some time as a sweeper in defendant's factory, and a short time before the accident in question became an oiler. He was called upon by the foreman to adjust the screws in rollers used for crushing carbide, which work was unfamiliar to him and outside his usual duties. The place where the rollers were located was dark. The foreman held a light for him and directed him how to apply the wrench on the set screws. In doing this he reached in among the belts and pulleys, and, the wrench slipping, his arm was caught in the pulley attached to one of the rollers and injured. Plaintiff testified that, from the way the foreman was holding the light, he could not see the belts and pulleys and did not know that they were running. Held, it was error for the trial court to direct a verdict against plaintiff for being guilty of contributory negligence as a matter of law.—Johnson v. Union Carbide Co., 169 Mich. 651.

¶ 1852. Where a woodworker injured by a sliver flying from a machine which he alleges was not guarded as ordered by the state factory inspector and as required by Pub. Acts 1909, Act 285, § 15, How. St. 2nd Ed., § 4023, bases his right to recover on a violation of a promise to place a hood over the side knives, under evidence that plaintiff had a pair of large eye glasses used to protect eyes that he did not use, that he did not use a board that had been prepared to intercept shaving and that no complaint of injury had been made until after discharge, it is not improper to direct a verdict for defendant, particularly where plaintiff did not request a submission of the issue to the jury.—Gorrey v. W. F. Hurd Co., 177 Mich. 116.

¶ 1853. A brakeman while endeavoring to uncouple two cars found that the coupler would not work. He worked it from the other side and after the cars were separated went between the rails to adjust the defective coupler. Through some misunderstanding of signals the train was backed on him and he was hurt. Held that failure to report the defective car as required by the company's rules was such contributory negligence as would justify a directed verdict for defendant.—Coke v. Michigan Central R. Co., 177 Mich. 260.

¶ 1854. A verdict is properly directed for the defendant, where the cause of an employee's death by his clothing being caught on a revolving shaft it was his duty to repair, while leaning over it to make an adjustment of the gearing, is wholly conjectural, and he might easily have stopped it in order to make the necessary repairs, since he was guilty of contributory negligence.—Cressler v. King Paper Co., 181 Mich. 422.

§ 71. Instructions and requests.

In actions for wrongful discharge or wages, see ante §§ 24, 31.
Directing verdict, see ante § 70.
In actions for injury to third persons, see post § 81.
General law of instructions, see Instructions.
Applicability of instructions to cause of action and issues, see also Instructions § 43.
Instruction in action by servant erroneous as not supported by evidence, see also Instructions ¶ 320.

¶ 1855. In an action by a motorman for personal injuries sustained by his car running away on a slippery track, it was error for the court to instruct the jury that plaintiff was only a motorman without other training or experience or knowledge than what was merely sufficient to start and run a car, and he possessed no mechanical or scientific knowledge, but was an inexperienced young man from the country, where in fact he had been instructed and learned to control all the mechanism of the car, and there was nothing to show that he had not been instructed in the usual manner and for the usual time considered necessary for motormen to run a car alone, had been employed by the company for six months prior to the accident, and all of his instructors had considered him competent, and no complaint was made that the instructors were not themselves competent.—Mayer v. Detroit, Y., A. A. & J. Ry., 142 Mich. 459.

¶ 1856. In an action against an employer for wrongful death of the employee where the defendant claims that the deceased through his own negligence fell from a "bent" of a tramway under construction, and the evidence shows that another "bent" broke and the plaintiff claims it jarred deceased from his place, it is erroneous to instruct that one of the undisputed facts is that the deceased was jarred from his place by the breaking of the other "bent" and that the jury would have to accept the undisputed facts.—Jones v. McMillan, 129 Mich. 86.

¶ 1857. Plaintiff, by going outside his usual duties, and using a certain machine in the factory of defendant, his employer, was injured. Defendant's evidence was that plaintiff, upon starting to use such machine upon his own motion, was warned that it was dangerous. Held, that it was error to instruct the jury that defendant contended that he had forbidden plaintiff to use the machine.—Marklewitz v. Olds Motor Works, 152 Mich. 113.

¶ 1858. In an action wherein a person who had been injured by reason of a collision caused by defendant's teamster sought to charge defendant, there was evidence that at the time of the injury defendant's teamster and another were running their horses. At defendant's request the court charged the jury that if it should find the collision was caused by the wrongful and wanton act of defendant's teamster, which act was beyond the scope of defendant's business, plaintiff could not recover. Held, that as defendant did not request a fuller explanation of the law in regard to what would constitute an act within the scope of the teamster's employment, he could not complain of the court's failure to give such explanation.—Vernon v. Cornwell, 104 Mich. 62.

¶ 1859. In a suit for negligently killing plaintiff's decedent, where the plaintiff contends that the injury resulted from the negligence of the defendant railroad in leaving open a hole in its track scales, into which the decedent stepped, the defendant is entitled to have presented to the jury the theory that decedent did not step into the hole, but caught his foot between the main and the scale track, where there is evidence to support such theory.—Gilbert v. Ann Arbor R. Co., 161 Mich. 73.

¶ 1860. Requested instructions in an action for injuries sustained by a minor placed at work at dangerous machine, held sufficiently covered by and given proper prominence in the general charge.—Great Lakes Laundry Co. v. Aetna Life Ins. Co., 184 Mich. 294.

§ 71a. ——On duty and care of master; tools, machinery and appliances.

Nature and extent of master's duty as to tools and appliances, see ante § 46.
Jury questions as to sufficiency of tools and appliances, see ante § 67f.

¶ 1861. Where plaintiff's claim in an action for negligence against an electric light company is that defendant's cable had become rotten, and that defendant had notice thereof, there is no error in refusing defendant's requests to charge as to its liability in case its tower, elevator and cable were properly constructed.—Weiden v. Brush Electric Light Co., 73 Mich. 268.

¶ 1862. In an action for injuries caused to plaintiff by uncovered gear wheels in defendant's factory where plaintiff was employed, it appeared from the uncontradicted evidence that if the gears were uncovered they were dangerous; and the court charged that if the jury should find that plaintiff "understood the increased risk of the gears being uncovered, defendant cannot be held responsible if plaintiff continued his work for any considerable time, knowing the danger, without being induced by his master to believe that a change would be made and without making any complaint, or giving notice of such danger to the master." Held, that the question of defendant's negligence was fairly submitted.—Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607.

¶ 1863. In an action for personal injuries caused by a boiler explosion, an instruction charging that the defendant was liable unless it could clearly show due care and caution in the providing and keeping of the boiler, that it was the defendant's duty first to furnish a safe and suitable boiler and then to keep it in that condition, and that in the use of the boiler defendant was bound to keep within the limits of safety, was error, in that a greater degree of care was thus imposed than the reasonable care required by the law.—Beunk v. Valley City Desk Co., 133 Mich. 440.

¶ 1864. In an action by a motorman for injury due to the slipping of his car on a grade, the court, in instructing as to the duties of the company to make the track safe, mentioned the company's duty to the public and to passengers, along with its duty to the motorman. Held, this was not error, only implying that it owed the same duty to all.—Mayer v. Detroit, Y., A. A. & J. Ry., 152 Mich. 276.

¶ 1865. In an action for injury to a boy claimed to have been employed in hazardous employment in violation of Public Acts 1911, No. 230, an instruction limiting the jury to the negligence relied upon and eliminating questions relating to the sufficiency of safeguards except as to the consideration of existing conditions in determining whether plaintiff's employment was hazardous, is proper.—Radic v. Thomas Jackson & Co., Ltd., 178 Mich. 618.

¶ 1866. In an action by a railroad switchman for damages for personal injuries sustained as the result of being caught between the beam at the front of a switch engine and a post in a fence through which a sidetrack passed into a building, as he jumped off the footboard of the engine to avoid being caught between it and a car ahead, an instruction that the jury would be warranted in finding that it was the duty of the engineer to stop if steam was blowing in his face and obscured his vision for any considerable length of time; that it was defendant's claim that the engineer was exercising due care and was on the lookout for signals and did not see any; that the engine was not being run at a negligent rate of speed, and that if this was the case, it was for the jury to determine whether it was his duty to stop until his vision was cleared, held to be correct.—Sergeant v. Grand Rapids & I. Ry. Co., 198 Mich. 385.

¶ 1867. In an action for injuries to a servant caused by an insufficient tool, the action of the court in retracting a portion of his charge in which he had stated that defendant did not owe the duty of furnishing a reasonably safe tool, but only the duty to use reasonable care to furnish such a tool, was not prejudicial to the defendant where it appeared that it had manufactured the tool itself by one of its servants, so that any negligence of the servant was directly chargeable to it.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 1868. In an action for wrongful death of a trammer in a mine who was killed when a trolley wire fell from a defective clamp and struck him, it is error to instruct the jury that the defendant was required to use the "greatest possible care" in maintaining such wire, clamp, connection, etc., in a reasonably safe condition, since ordinary care only is required.—Meola v. Quincy Min. Co., 174 Mich. 305.

¶ 1869. Where plaintiff was injured because of the alleged defects in a saw it is not error to refuse a request to charge that the weight of the evidence was that the saw was in proper condition where the evidence on that question was conflicting.—Le Fleur v. Michigan Alkali Co., 175 Mich. 404.

¶ 1870. An instruction in an action by an employee for injuries sustained through the

explosion of a boiler, that his right to recover depended largely on whether the boiler in certain particulars had been permitted to become defective and out of repair, and whether the defendant had notice thereof, or in the exercise of reasonable care and prudence should have discovered and repaired such defect, held not improper in view of other portions of the instruction, and the finding of the jury that the boiler was defective.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

§ 71b. ——As to safe place to work.

Duty to furnish safe place to work, see ante § 46.

¶ 1871. A charge that the railroad company must furnish a reasonably safe place to work cannot be said to have cured error in another charge consisting in substantially telling the jury that if it allowed its track to get out of repair it would be liable and omitting to charge that it was under the duty of merely exercising reasonable watchfulness and inspection to keep it in safe condition.—Anderson v. Michigan Cent. R. Co., 107 Mich. 591.

¶ 1872. Where a mine servant was killed by a top fall while preparing to timber the hanging wall pursuant to orders, and it appeared that the duty of his work included assuring himself of the safety of the hanging wall, the court should have directed the attention of the jury to such facts, in connection with his charge as to the master's duty to furnish the servant with a safe place to work.—Andrews v. Tamarack Min. Co., 114 Mich. 375.

¶ 1873. An instruction that the company would be liable to plaintiff for his injuries if the platform in question was insufficient and unsafe for such general use as the company was putting it to, and was liable to be loosened by explosions in the shaft below, was not objectionable as withdrawing from the jury the question as to whether the accident to plaintiff was one which the company might reasonably have anticipated, when it was given in connection with instructions that the burden was upon plaintiff to show that the platform was not such a one as a reasonably prudent company would, under the circumstances, have erected, and that no presumption of want of reasonable care arose from the fact of the planking being disturbed by the firing of the blast, and that such care would not require the company to build a platform which could not be disturbed by blasts below, unless experience had shown that such blasts would probably disturb such platform.—Smizel v. Odanah Iron Co., 116 Mich. 149.

¶ 1874. The trial judge did not err in instructing the jury that the doctrine of safe place applied to a case in which a lineman was injured by the falling of a pole upon which he was working for defendant corporation, where the evidence would warrant the jury in finding that the pole in question was unsafe and dangerous for the linemen to work upon when it was furnished originally by the defendant and put in by the linemen in constructing the road as part of the permanent plant, that the plaintiff was not in the employ of defendant at the time the pole was put in and knew of no defects in it, and that the usual tests employed by linemen to determine the safe character of a pole would not have notified plaintiff that it was unsafe.—Livingway v. Houghton County St. Ry. Co., 145 Mich. 86.

¶ 1875. Where a mine employee was injured by a piece of rock falling from a hanging wall, instructions held properly to present the law as to recovery where the master fails to provide a safe place to work or gives assurance that it is safe.—Oiva v. Calumet & Hecla Mining Co., 178 Mich. 645.

§ 71c. ——As to tests and inspections.

Duty to make inspection, see ante § 53.

¶ 1876. The court instructed the jury that, if it should believe from the evidence that the engine was overhauled and inspected, and subjected to the hydrostatic test, by competent men, within two years from the time of the explosion, and also thoroughly and carefully tested by the hammer test, by competent testers, within thirty days of the explosion,—it appearing from the testimony that those ways of testing had been adopted by railway companies as the best tests they could give,—then defendant had done all that it could be asked to do, and was not guilty of the negligence charged. Held, that this instruction defined what would, as a matter of law, be a reasonable inspection, and what would constitute a reasonable time, and that it operated to remove all ground for an objection that earlier parts of the charge were not sufficiently definite in these particulars.—Woods v. Chicago & G. T. R. Co., 108 Mich. 396.

¶ 1877. An instruction requiring a master to inspect a machine as often as was reasonably necessary, in order to ascertain whether it was in proper repair and adjustment, or needed repairs, and imposing the duty to inspect a greater number of times where the circumstances showed much use of the machine, and placing the duty of inspection upon a consideration of the circumstances, held to properly submit the question to the jury.—Burnside v. Novelty Mfg. Co., 121 Mich. 115.

¶ 1878. In a suit to recover for the death of plaintiff's intestate, it is improper for the trial court to instruct as to the duty of defendant railway to inspect its cars, where the plaintiff in her declaration and according to her repeated statements at the trial

does not claim any negligence on account of want of inspection.—Groesbeck v. Grand Trunk Ry. Co. of Canada, 167 Mich. 259.

¶ 1879. In a suit for injuries to an employee in a drug store from the explosion of a soda fountain tank, there was evidence that the tank in question was an appliance of the simplest character; that it was old, badly rusted and scaled; and that it was in use in a place and under circumstances highly conducive to rust and deterioration, evidence of the existence of which was plainly visible. The trial judge charged that defendant was called upon, in making an inspection of this tank, to do what a reasonable man of ordinary prudence would do to keep it in a reasonably safe condition. There was no testimony showing what inspection was usual or customary as to such apparatus. Held, the charge was not erroneous as permitting the jury to establish a rule of inspection for themselves, where the negligence charged in the declaration was not the failure to inspect, but the failure to furnish sound and safe tanks, since the instruction was intended to bear on that duty.—McDonnell v. Central Drug Co., 170 Mich. 291.

¶ 1880. An instruction imposing a duty upon an electric railroad company to inspect the poles supporting its trolley wires is erroneous, in an action by a lineman to recover for injuries sustained by the breaking of such a pole, where there is evidence tending to show that he assumed the risk of such failure of inspection.—Lynch v. Saginaw Valley Traction Co., 153 Mich. 174.

¶ 1881. Where a miner was injured by a fall of rock and it appeared that blasts were made every day that had a tendency to dislodge rock, a request for a charge based upon the assumption that if an adequate inspection was made two weeks before the accident, defendant would be relieved from liability, is properly refused, the court charging the jury fully as to the degree of inspection which would relieve defendant from liability.—Moilanen v. Washington Iron Co., 176 Mich. 505.

§ 71d. ——As to methods of work, rules, warnings and instructions.

Methods of work, rules and orders, see ante § 52.

Duty of master to warn and instruct, see ante § 54.

¶ 1882. An instruction on the abrogation by common consent and practice of a rule requiring that couplings of cars without automatic couplers should be made with a stick to guide the link is erroneous if it ignores the requisite that the custom of the servants should have been so universal and notorious that the master is presumed to have known of it.—Nichols v. Chicago & W. M. Ry. Co., 125 Mich. 394.

¶ 1883. An instruction, in an action for the death of a brakeman, to the effect that recovery by the plaintiff would not be prevented if the cars were moving so slowly that it was not negligence to pass between them to uncouple them, and that such was the usual custom of brakemen under like circumstances, is erroneous as not submitting to the jury the theory that the railway company had sanctioned a violation of a rule prohibiting an employee from going between cars to uncouple them when in motion.—Fluhrer v. Lake Shore & M. S. Ry. Co., 121 Mich. 212.

¶ 1884. An instruction, in an action for injuries to a tunnel worker due to mismanaged air pressure in building a tunnel, on the Canadian side of a river, which instruction states that compressed air is a dangerous agency, with the dangers not apparent to ordinary men, and that the employer did not afford, either by the system which it adopted, or the valve which it used, or by adopting proper rules and giving proper warnings, any knowledge or warning of the danger which the employee was to encounter, is erroneous, as, under the law of England which applies, the master is not an insurer of the safety of its machinery and appliances and of the system adopted, but such master discharges his duty by appointing competent superintendents and workmen and authorizing them to procure all necessary machinery and appliances, where he does not personally superintend the work.—Turner v. St. Clair Tunnel Co., 121 Mich. 616.

¶ 1885. In an action for personal injuries sustained by an employee in a smelting factory through the explosion of molten matter which the employee was dumping, an instruction stating that it was not enough to tell the employee that the work was dangerous and that if the danger was one that was or should have been known to the defendant, it was its duty to warn the employee and explain to him "the nature, force and probable effect" of such an explosion, was not erroneous as imposing upon the defendant the duty of foretelling the precise result of any possible explosion.—Ribich v. Lake Superior Smelting Co., 123 Mich. 401.

¶ 1886. In an action for injuries caused by a chip flying from a hammer which plaintiff, a boy 17 years of age, was using, an instruction that if a boy of his age would not appreciate the danger of using such hammer it was the duty of the master to instruct, but if the danger was one which a boy of his class would naturally apprehend then it was a risk which was assumed, is sufficiently favorable to the plaintiff.—Dompier v. Lewis, 131 Mich. 144.

¶ 1887. Plaintiff was injured by going outside his usual duties, and operating a dangerous machine of the defendant, his

employer. Held, that it was proper for the court to charge that defendant owed the duty to instruct the plaintiff as to its dangers and mode of operation, and the degree of instruction due depended on the age and experience of plaintiff.—Marklewitz v. Olds Motor Works, 152 Mich. 113.

¶ 1888. Instructions to the effect that defendant would not be liable for an injury received by an employee operating a stamping press if the press was in good order, and had been properly inspected, are properly modified by including the element of necessity that the employee should have received sufficient instruction or warning.—Clemens v. Gem Fibre Package Co., 153 Mich. 496.

¶ 1889. On an issue as to whether appropriate instructions were given to a servant, evidence showing that such instructions were given with respect to one matter, does not preclude the court from charging that no instructions were given with respect to the duty in the discharge of which the servant was injured, where the instructions given did not relate to that duty, but solely to the ordinary duties of the servant.—Dalm v. Bryant Paper Co., 157 Mich. 550.

¶ 1890. It is error to instruct that a foreman having charge of a gang of men in the repairing of a line of wires used to transmit electric power, is a vice principal, and is bound in the absence of special agreement, to inform a lineman as to what wires are dangerous.—Argersinger v. Commonwealth Power Co., 164 Mich. 282.

¶ 1891. Where a servant was injured by flying molten metal, due to the presence of water in the ladle with which he dipped said metal, the trial court on the question of the master's duty to warn of said danger instructed that it was not essential to warn a man of danger which in the nature of things he "must appreciate." Held, the language "must appreciate" was not prejudicial to the defendant when taken with other instructions setting forth the true rule.—Borkowski v. American Radiator Co., 165 Mich. 266.

¶ 1892. In a case for personal injuries through falling rock, a charge that it was customary to examine the cliff in close proximity to the blast and to warn workmen of danger, approved.—Druck v. Antrim Lime Co., 177 Mich. 364.

§ 71e. Acts of fellow-servants and duty to employ competent servants.

Liability for acts of fellow-servants, see ante § 55.

Directing verdict on ground of fellow-servants' negligence, see ante § 70c.

¶ 1893. Where the proximate cause of the injury complained of was either the negligence of a superior servant of defendant in ordering plaintiff to continue his work upon a detached car while an engine was approaching, or the failure of the engineer or fireman (plaintiff's fellow-servants) to ring the engine bell, and thus give plaintiff sufficient warning to enable him to save himself from being thrown from the car by the shock of the collision, it is error to refuse to submit special questions to the jury calling for findings whether such warning would have been given, and whether the accident would have happened if the bell had been so rung, for defendant would not be liable for the negligence of the engineer or fireman.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409.

¶ 1894. Where a foundry employee, struck and injured by a car used to haul coal and iron up an incline, brought suit against his employer, alleging that the wire cable by which the car was hoisted and lowered had become weak and unsafe, so that, by reason of a slight jerk, it broke, allowing the car to run back, and where upon the trial the engineer, who was responsible for lowering the car, testified that the cable merely became detached, and that he did not discover the fact until too late, defendant was entitled to have the jury instructed that if they should find that the cable was in a reasonably safe and proper condition for use, and that the accident was occasioned by the engineer's negligence in not seeing that the cable was attached, verdict should be for defendant, and a general instruction that the engineer was a fellow-servant of plaintiff, for whose negligence there could be no recovery, was insufficient, especially in view of the fact that plaintiff's theory of the case was fully presented.—Hennig v. Globe Foundry Co., 112 Mich. 616.

¶ 1895. A requested instruction, in an action for the death of a brakeman, killed while going between cars to uncouple them, because of his foot catching in a defective crossing, which states that the railroad company had fulfilled its duty by furnishing the section foreman with material to repair the crossing, and that such foreman's failure to repair was the act of a fellow-servant, ignores the element of the existence of the defect for so long a time that the defendant must be presumed to have notice of it.—Fluhrer v. Lake Shore & M. S. Ry. Co., 121 Mich. 212.

¶ 1896. In an action by a section man for injuries sustained while unloading rails from a moving train which was in charge of an assistant roadmaster, where plaintiff claimed that such roadmaster was a vice principal and not a fellow-servant, and where there was testimony which made it possible for the jury to find that the accident was not due to the negligence of such assistant roadmaster but that it was ascribable to the engineer who was a fellow-servant, it was error

to exclude such possibility from the charge, although the jury were told that plaintiff could not recover if he or his fellow-servants were guilty of negligence contributing to the injury.—LaBarre v. Grand Trunk W. Ry. Co., 133 Mich. 192.

¶ 1897. Where a municipal laborer calking water pipes in a trench is injured by the bank caving in, defendant's instruction that if an employee instructed to watch did not give warning it is the negligence of a fellow-servant, may be refused where such phase of the case was fully covered in the charge given.—Keenan v. City of Mt. Pleasant, 176 Mich. 620.

¶ 1897a. In an action by a miner injured while at work in the bottom of a shaft by the fall of a piece of timber in the staging above him upon which timbermen were engaged in timbering the walls of the shaft, an instruction on the relation of plaintiff and the timbermen as fellow-servants held to be correct.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 1898. It was error to instruct the jury that it might fully consider the other claims of negligence in determining the question whether the defendant retained in its employ an incompetent motorman whose negligence caused the accident, in an action by a servant against an electric railway company for injuries for being struck by a car operated by an incompetent motorman, where the only ground upon which plaintiff could recover was the negligence of defendant in retaining such incompetent servant in its employ with knowledge of his incompetence.—Trend v. Detroit United Ry., 149 Mich. 338.

¶ 1899. Where in a suit for personal injury the plaintiff seeks to recover on the theory that defendant did not employ competent men in the construction of a platform, the case should not be submitted to the jury on that theory in the absence of sufficient evidence of such incompetency.—Risku v. Iron Cliffs Co., 163 Mich. 523.

¶ 1900. On action against a railway company by a brakeman injured when an engine backed into a car on which he was preparing the coupling, at a signal by the conductor without his knowledge, where the declaration charges that the accident was caused by the incompetency of the conductor because of the habitual use of intoxicants as a beverage, of which the company had knowledge, and the case goes to the jury on the theory that recovery depends on whether the conductor's judgment and alertness of mind was impaired by the use of intoxicants on that day, a requested instruction should have been given which states that unless it is found that the conductor was incompetent to perform his duties because of the use of intoxicating liquors, of which the company had knowledge, the company was not negligent in keeping the conductor in its employ.—Wallin v. Arcadia & B. River Ry. Co., 172 Mich. 466.

§ 71f. ——As to servant's knowledge of and assumption of risks.

Doctrine of assumption of risk, see ante § 56.
Directing verdict on ground that risk assumed, see ante § 70b.

¶ 1901. The jury should be charged as matter of law that the servant must have known the danger of wiping off the surface of rolls in a rolling mill on the in-drawing side, though not warned thereof by his foreman, where at the time he went to do such work at the foreman's direction he had worked about such machine for some months and had seen it at work rolling out brass bars into sheets, so that its dangerous character was obvious.—Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

¶ 1902. It is error to charge on assumption of risk, where the danger came from the breaking of a wire cable either because it was old and weak or because it was unduly strained, of neither of which the employee had any notice.—Piette v. Bavarian Brewing Co., 91 Mich. 605.

¶ 1903. An instruction is proper which states that it is not negligence for a railroad company to build or permit the erection and maintenance of coal bins in close proximity to sidings, and that one who enters the employment of such a company must expect to find coal bins and other structures and that he assumes the risk incident to railroading in such places, in the night as well as the day, and the first time over the road as well as on subsequent trips.—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 1904. Where a motorman was injured by the slipping of his car on a grade, due to the failure of the company to supply sand, it is proper to instruct the jury that if the plaintiff, after communicating his fears of danger, was assured by the superintendent that the track was safe, the risk was not assumed by the plaintiff.—Mayer v. Detroit, Y., A. A. & J. Ry., 152 Mich. 276.

¶ 1905. Plaintiff, a motorman, was injured by the sliding of his car, due to the failure of the company to supply sand for the tracks. The court instructed that if plaintiff communicated his fears, and the superintendent assured him the track was safe without sand, the plaintiff did not assume the risk. Held, that this instruction did not leave an inference that the negligence of the defendant was to be presumed from the mere fact of the car slipping.—Mayer v. Detroit, Y., A. A. & J. Ry., 152 Mich. 276.

¶ 1906. Plaintiff, a conductor on defendant's electric car, was injured by a collision with a car ahead, and sued to recover for defendant's negligence in having the car

brakes in an unsafe condition. Held, that an instruction by the court that plaintiff could not recover if he knew of the unsafe condition, or if he should, with reasonable care, have known of it, was sufficiently favorable to defendant on the question of assumed risk.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 1907. Combining the defenses of assumption of risk and contributory negligence in instructions is harmless, where the defenses rest upon the same facts.—Burgess v. Humphrey Bookcase Co., 156 Mich. 345.

¶ 1908. At the close of the charge a defendant complained to the court that the question of assumed risk had not been adequately covered. Defendant made no formal request for a further charge. The instruction of the court as given was correct as far as it went. Held, no error was committed.—MacDonald v. Freeman Mfg. Co., 160 Mich. 380.

¶ 1909. Where a requested instruction on the point of assumed risk is incorrect on that point, and properly refused by the trial court, no error arises from the fact that such instruction would have been proper had it been offered on the point of contributory negligence.—Molyneaux v. Bradley, Miller & Co., 167 Mich. 278.

¶ 1910. In an action for injuries under Act 104, Pub. Acts 1909, How. St. 2nd Ed., § 4110, relating to the liability of common carrier railroads to employees for their negligence or that of their officers, agents or employees, it is not error to charge upon the question of assumed risk as would have been proper before the act, where a later correct charge is given and taken together the charge is proper.—Quick v. Detroit & M. R. Co., 175 Mich. 676.

¶ 1911. Where a trammer in a mine was killed by a falling trolley wire, an instruction to the effect that if deceased knew or in the exercise of ordinary care should have known of the defect it was his duty under the rules to have pushed the cars past the defect by hand, and if being chargeable with such knowledge he used the electric power he assumed the risk of such use, should be given, where there is evidence on which to base it.—Meola v. Quincy Min. Co., 174 Mich. 305.

¶ 1912. In an action by a miner injured while at work in the bottom of a shaft by the fall of a piece of timber from a staging above him upon which timbermen were engaged in timbering the walls of a shaft, an instruction upon plaintiff's assumption of risk taken in connection with the entire charge held not erroneous.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 1913. An instruction that the master is liable where he exposes an inexperienced

ises, were bound to use the same ordinary care against accidents to themselves as was incumbent on the company, and that if the neglect of plaintiff or of H. in the course of their work under the contract contributed proximately to the accident, plaintiff could not recover, unless the conduct of the company's servants was wanton or wilful. 2. That if H., in the course of his work under the contract, placed the plank on the track, and thereby the cars were thrown off and ran against the woodshed, this was neglect on H.'s part which contributed proximately to the accident, and that plaintiff could not recover unless the conduct of the company's servants was wanton or wilful. There was no evidence that plaintiff knew of the plank, but it was proved to have been seen there by the station agent. Upon the question whether this charge should have been given, the court was equally divided.—Michigan Cent. R. Co. v. Leahey, 10 Mich. 193.

¶ 1919. A railroad company is liable for injuries received by a section hand on its railroad, while working on a flat car under the supervision of its assistant roadmaster, by being knocked off by an engine backing against the car, if, as the engine was backing down he was ordered by his superior, who knew of the approach of the engine, to continue work; hence in an action involving such facts, the jury should be instructed that if the approach of the engine was not known to the superior but was known to plaintiff when the order was given, the latter was guilty of contributory negligence in failing to notify his superior and to secure himself.—Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409.

¶ 1920. In an action for injury from negligence it is error to refuse an instruction that plaintiff cannot recover if his own negligence caused or contributed to the injury, where the evidence tended to show that plaintiff, working on a runway unloading coal, left his wheelbarrow so that machinery caught it and thereby lifted the runway, which fell when released and broke the supporting pieces.—Brown v. Gilchrist, 80 Mich. 56.

¶ 1921. In an action for personal injuries to an infant where the declaration alleges that he is a youth of ordinary intelligence and there was no claim to the contrary, it is not erroneous to instruct that the standard of care required of the plaintiff was that of a boy of ordinary intelligence.—Jahrmatter v. Kline, 129 Mich. 154.

¶ 1922. It is proper to instruct that it is a question for the jury as to whether, if the plaintiff was directed by the defendant to operate the machine by which he was injured, but was not instructed about its use, he knew enough about the machine to apprehend the danger, or whether the danger was obvious to a boy of his age and experience, and if it was, that his own negligence would be a bar to recovery.—Marklewitz v. Olds Motor Works, 152 Mich. 113.

¶ 1923. A plaintiff aged fourteen, sued to recover for injury to his hand in the planing mill of defendant, his employer. The court refused to charge that plaintiff could not recover if guilty of contributory negligence, "even though slight." Held, the refusal to use the words "even though slight" was not reversible error, where the court did charge that plaintiff could not recover if guilty of any contributory negligence.—Lund v. Sargent Mfg. Co., 158 Mich. 3.

¶ 1924. Where a plaintiff brakeman, while standing on the top of defendant's moving freight car in discharge of his duty, is injured through contact with telephone wires strung above defendant's track, the charge of the court that the plaintiff was not guilty of contributory negligence if he did not know at the time of the accident of the presence of the wires, is not erroneous where connected with other instructions to the effect that plaintiff was barred from recovery if he previously knew, or by reasonable care should have known, of the presence of the wires.—Meyers v. Detroit & C. R. Co., 166 Mich. 403.

¶ 1925. A railway company is not prejudiced by a charge in an action for injuries which allows the jury to consider that plaintiff, a brakeman, knew that a special freight train might be sent out after his train, and whether such brakeman should have protected the rear of his train at a station, though the rules do not vest any discretion in the trainmen, but require certain precautions under specified conditions.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 1926. In an action for injury to a boy claimed to have been employed in a hazardous employment in violation of Pub. Acts 1911, No. 230, an instruction, considered with other instructions given, was held not to be erroneous as requiring the jury to find that defendant had established that there was absolutely no chance for injury anywhere in the locality in which plaintiff was employed, and that his recovery was not barred unless he was grossly reckless and careless, as a condition to a finding for defendant.—Radic v. Thomas Jackson & Co., Ltd., 178 Mich. 618.

¶ 1927. A requested instruction that if a servant has been instructed as to the use of a saw, and fails to obey such instructions, he is guilty of contributory negligence, held erroneously refused where supported by evidence.—Welling v. Kalamazoo Lumber Co., 177 Mich. 340.

¶ 1928. Where a brakeman is injured while attempting to couple by hand cars the couplings of which are of different heights, it is error for the court on the question of

contributory negligence to instruct the jury that they are to consider only the care exercised by the plaintiff after he went between the cars, and not that exercised by him in deciding to attempt the coupling at all under the circumstances.—Betterly v. Boyne City, G. & A. R. Co., 158 Mich. 385.

¶ 1929. Plaintiff's intestate, a motorman on defendant's car, was killed in a collision at a railroad crossing. The negligence charged was defendant's failure to provide a brake as required by statute. The court charged that if the brake on the car was deficient and plaintiff did not know its condition, he had a right to assume that it was in its ordinary condition and that the car could be stopped within a reasonable time. Held, such instruction was proper.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 1930. In an action by a miner injured while working in the bottom of a shaft by the fall of a piece of timber, instructions relating to plaintiff's contributory negligence were held to be correct.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 1931. Under an allegation that a minor's hand was injured by the knives of a dangerous machine, at which he was placed without instructions, in violation of section 11, Act No. 285, Pub. Acts 1909 (How. St., 2nd Ed., § 4019), a charge that he could not recover if, under the circumstances, he failed to use the care and prudence of an ordinary man, and put his hand in the machine without calling the attention of anybody to the matter, or without instructions from any one to do so, unless he thought it necessary in the performance of his duties, was properly given.—Powell v. E. H. Stafford Mfg. Co., 183 Mich. 1.

¶ 1932. An instruction as to the contributory negligence of a child employed at a dangerous machine in violation of Act No. 285, Pub. Acts 1909, as amended by Act No. 220, Pub. Acts 1911, §§ 4009-4063, How. St., 2nd Ed., held not prejudicial to the defendant.—Schuetz v. Van Orman, 184 Mich. 478.

¶ 1933. Plaintiff, a miner, was injured by the falling of a rock from the roof of a drift of the mine. He introduced evidence that it was the custom, not always observed, for the mine boss, after exploding a charge of dynamite in the drift for blasting purposes, to go into the drift ahead of the miners to inspect the condition of the roof and walls. On the occasion in question plaintiff did not wait to be told by the boss that the place was safe, but went ahead and began his work. The court instructed the jury that if plaintiff knew it was the duty of the boss after blasting to go ahead of the men and inspect, to see if the drift was safe, and if plaintiff did not wait for him to do so, plaintiff was guilty of contributory negligence, and could not re-

Burden of proof under Federal Employers' Liability Act, see ante § 62.
Sufficiency of proofs under Federal Employers' Liability Act, see ante § 66.

¶ 1938. An instruction in an action under the Federal Employers' Liability Act, for the death of a switchman, held to properly submit to the jury the question of contributory negligence.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 1939. An instruction as to the reduction of damages in an action under the Federal Employers' Liability Act, because of the contributory negligence of the injured servant, approved.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 1940. An instruction as to the measure of damages and as to negligence and as to burden of proof as to contributory negligence in an action under the Federal Employers' Liability Act which ignored the fact that plaintiff was guilty of contributory negligence as a matter of law according to his own testimony, held erroneous.—Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605. (Brooke, C. J., and Ostrander, J., dissenting.)

¶ 1941. In an action by a railroad employee under the Federal Employers' Liability Act to recover damages for personal injuries, where the plaintiff claimed he was injured while he was attempting to get upon defendant's car after it had stopped by reason of it being suddenly started by defendant, and defendant claimed plaintiff attempted to board a moving car, and the court charged that under such claims and the evidence if defendant's claim was right plaintiff could recover nothing and if plaintiff's claim was right he could recover all the damages sustained, and in effect that no question of contributory negligence was involved, held that the question whether plaintiff attempted to board a moving car was submitted to the jury, and there was no reversible error in a verdict and judgment for plaintiff.—Cholerton v. Detroit, J. & C. Ry., 199 Mich. 647.

¶ 1942. In an action under the Federal Employers' Liability Act against a railroad company to recover damages for injuries sustained by a section foreman while operating a hand car from a collision with another hand car operated by another section foreman, by reason of alleged defective brakes on the latter car, an instruction that defendant was not bound to keep its car in such condition that an accident would never happen or absolutely safe but only in such condition that an accident would ordinarily not be apt to happen in the ordinary reasonable use of the car, in which case defendant would not be negligent if an accident did happen, held to state the proper rule as to plaintiff's assumption of risk.—Miller v. Ann Arbor R. Co., 196 Mich. 297.

Garage keeper's liability as bailee for negligence of his employee, see also Bailments § 13, ¶ 52.
Liability of master for act of servant in overloading building, see Buildings ¶ 25.
Injury from trapdoor, improperly guarded by employees, see Buildings ¶ 40.
Responsibility of county for acts of officers, see Counties § 36.
Liability of master for loss by fire due to incompetence of servants charged to prevent spread, see also Fires ¶ 10.
Liability for double damages for spread of fire set by servant, see Damages § 203.
Injuries to other users of highway caused by servant's negligence, see Highways § 375.
Liability for treble damages for injury to roads, see Damages § 209.
Responsibility of master civilly for liquor sales by servants, see Intoxicating Liquors, VII.
Liability of railroads for injuries to third persons, see also Railroads.
Liability of toll roads for injuries to third persons, see Toll Roads.
Statutory liability of owner of highway vehicle carrying passengers for hire, see Comp. L. 1915, § 4598.

¶ 1944. The rule of respondeat superior is not to receive a narrow or technical construction.—Palmer v. Michigan Cent. R. Co., 93 Mich. 363.

¶ 1945. A master is liable to third persons for the negligence of a servant while acting as such and within the scope of his employment.—Cook v. Michigan Cent. R. Co., 189 Mich. 456.

¶ 1946. A master is responsible for the trespasses of his servants, done under the directions of an overseer, or in the regular course of their employment, and not by wilful wrong. He must keep them within their proper bounds. For wilful misconduct he is sometimes liable and sometimes not.—Smith v. Webster, 23 Mich. 298.

¶ 1947. The proprietor of a newspaper is liable for reckless libels by his employees. —Scripps v. Reilly, 38 Mich. 10.

¶ 1948. The hirer of a horse is liable for its death caused by the acts of his servants in maltreating and punishing the animal to hasten its movements while using it directly in the line of their work.—Pesola v. Forsten, 182 Mich. 94.

¶ 1949. An employer does not necessarily escape liability for injuries resulting from the substitution by his employee of gasoline for kerosene sold to a customer by reason of the fact that the employee believed the gasoline was kerosene after personally inspecting same.—McLawson v. Paragon Refining Co., 198 Mich. 222.

¶ 1953. The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arises.—Riley v. Roach, 168 Mich. 294.

¶ 1954. Where a trespass is committed by the subordinate employees of a corporation, the doctrine respondeat superior applies to the corporation rather than to its agent in charge.—Bath v. Caton, 37 Mich. 199.

¶ 1955. A master is liable for the negligent driving of a servant, even while the latter is acting temporarily for a third person who has hired the team and its driver from the master; and it is immaterial that the person hiring expressly asked for the services of this particular driver.—Joslin v. Grand Rapids Ice Co., 50 Mich. 516.

¶ 1956. A special deputy sheriff, whose duty it was to preserve order at a resort of a street railway company, and upon the cars going to and from such resort, at the expense of such company, represented not the public, but the company, and the company was liable, in an action for personal injuries, where it appeared that such officer assaulted the plaintiff, at the request of the conductor, for the nonpayment of his fare.—Foster v. Grand Rapids Ry. Co., 140 Mich. 689.

¶ 1956a. The defendant gave one Crawford and one Smith a license to go in upon and clear certain wild land at so much per acre. They had full liberty to decide with reference to the manner, place and amount of clearing. Fires set by Crawford spread onto the plaintiff's land. Held, that as Crawford was an independent contractor, defendant was not liable.—Rogers v. Parker, 159 Mich. 278.

¶ 1957. A servant of one person when loaned another for some special service, with respect to such services becomes the latter's servant, and the borrower is answerable as master for the acts of the servant while so engaged, without any actual contract of employment between them or the servant receiving payment for his services.—Janik v. Ford Motor Co., 180 Mich. 557.

¶ 1958. Where the servant of one person is loaned another, an important consideration, although not controlling, in determining who is answerable for the acts of the servant while engaged in the special service is the ownership of the equipment, appliances or instrumentality with or in relation to which the temporary service, out of which an alleged injury arose, is performed.—Janik v. Ford Motor Co., 180 Mich. 557.

¶ 1959. A servant of an automobile dealer who was, at the request of an out of town purchaser of a car, made after the completion of the sale, loaned to the latter in order to take the car to the limits of a populous city, while so engaged is to be regarded as the servant of the purchaser.—Janik v. Ford Motor Co., 180 Mich. 557.

¶ 1960. A chauffeur, who, at the time of a collision with a pedestrian, is taking an automobile from the residence of the owner to his employer's garage, in pursuance to a contract between the owner and the employer whereby the employer agreed for a specified sum to take care of the car at his garage and call for and deliver it to the owner at any point requested in the city, is the servant of the garage proprietor and not of the owner of the car.—Sweetnam v. Snow, 187 Mich. 414.

¶ 1961. An automobile dealer is not answerable for the negligence of his servant while driving a car to the limits of a populous city at the request of a purchaser, where, after the completion of the sale, the servant was loaned to the buyer, an out of town purchaser, at request, notwithstanding that the car bore the dealer's license tag at the time of an accident.—Janik v. Ford Motor Co., 180 Mich. 557.

¶ 1962. A towerman in charge of an interlocker for two railroads is the employee of both roads, and his negligence is attributable to each.—Van Orman v. Lake Shore & M. S. Ry. Co., 152 Mich. 185.

¶ 1963. A materialman furnishing plans and specifications and reinforcing steel for a reinforced concrete building is an independent contractor.—Bayne v. Everham, 197 Mich. 181.

¶ 1964. Where plaintiff let a team of horses to a person having an independent contract with defendant company to cut and deliver logs, the fact that the overseer of the defendant company gave the driver some suggestions and directions on the question of depositing logs for the purpose of building a road across a frozen lake, does not create the relation of master and servant between such driver and the defendant company so as to make the company liable for the loss of the horses by drowning, when it appears that the independent contractor was managing and controlling the building of the road at the time of the accident.—McBride v. Jerry-Madden Shingle Co., 173 Mich. 248.

¶ 1965. Plaintiff was on the street on his way to defendant's depot for the purpose of taking a train. A police officer of the city attempted to arrest plaintiff, and the undisputed evidence showed that he called to his aid the depot watchman in the employ of defendant. In a suit for personal injuries against defendant, held, said depot watchman was acting in his capacity as a peace officer of the state, and defendant was not

liable for his part in the arrest.—Buman v. Michigan Cent. R. Co., 168 Mich. 651.

Liability of master for acts of independent contractor in violation of law, see note 7 N. C. C. A. 724-736.
Liability of master for the negligence of his servant temporarily in the service of another, see note 6 N. C. C. A. 357-371.

§ 75. Course or scope of employment of wrongdoing servant.

Scope of employment in actions by servant against master, see ante § 34.
Burden of proof as to scope of employment, see post § 78.
Jury questions as to scope of relation, see ante § 67a; post § 80.
Instructions as to scope of employment, see post § 81.
Responsibility of corporation for acts of agents beyond authority, see Corporations, XVII, D.
Engineer running train contrary to orders as in line of employment, see also Carriers ¶ 463.
Authority of conductor or trainman to invite person to ride on freight train, see also Carriers ¶ 323.

¶ 1966. To render an employer liable for the fault or negligence of his employee, the injury complained of must arise in the course of the execution of some service lawful in itself, but negligently or unskilfully performed.—Moore v. Sanborne, 2 Mich. 519.

¶ 1967. Acts not fairly or reasonably incident to the nature, character or purpose of the business in which the servant is employed, or not in the discharge of the duties intrusted to him, do not render the master liable.—Wiltse v. State Road Bridge Co., 63 Mich. 639.

¶ 1968. The phrase "in the course of his employment or authority" when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business; it is not synonymous with "during the period covered by his employment."—Riley v. Roach, 168 Mich. 294.

¶ 1969. The phrase "in the course or scope of his employment or authority," when used relative to the tortious acts of a servant, means while engaged in the master's service, or while about the master's business.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1970. When the wrong done by the servant merely arises from an excess of authority committed in furthering the master's interests, and the master receives the benefit of the act, the master's liability does not depend upon any question of the exact limits of the servant's authority.—Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205.

¶ 1971. When the keeper of a boat laid up in winter quarters has positive orders from

Liability of master for torts of insane servant, see note 2 N. C. C. A. 636-640.

§ 76. ——Wanton, wilful and malicious acts.

See also ante ¶ 1946.

Nonliability of carrier for wanton acts in ejection from trains, see also Carriers ¶¶ 395, 396.

Liability of master to exemplary damages because of servant's malice or wilfulness, see Damages § 194.

¶ 1978. For the wanton violation of law by a servant, although when occupied about the business of his employer, the servant alone is liable.—Moore v. Sanborne, 2 Mich. 519.

¶ 1979. For those aggravations that arise out of his servant's wantonness and malice the employer is not on the same footing with his servant.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

¶ 1980. A master is not responsible for a positive wrong intentionally or recklessly done by his servant, beyond the scope of his business.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 1981. A master is liable for an injury done by his servant in the course of his employment, where the latter acted carelessly and recklessly and in negligent disregard of his master's instructions, but not if the injury was wanton, wilful and intentional. Recklessness is only a high degree of negligence; the master's responsibility is not affected by the degree.—Cleveland v. Newsom, 45 Mich. 62.

¶ 1982. One who innocently and for a lawful purpose employs another is responsible only for what is fairly within the authority that he gives him, and not for his trespasses; nor is he liable for the latter's aggravated and wanton wrongdoing in such damages as would be proper if he did it himself or sanctioned it.—Sutherland v. Ingalls, 63 Mich. 620.

¶ 1983. In determining the question of liability of a master for the torts of his servant, the line is drawn between those acts negligently or unskilfully performed and those done by the servant in a wanton violation of law.—Ducre v. Sparrow-Kroll Lumber Co., 168 Mich. 49.

¶ 1984. Defendant's store was in charge of one Kroll, as manager, and one Struthers was a clerk therein. Plaintiff came into the store intoxicated and was guilty of improper conduct toward women in the store. He was not there as a customer or by invitation. Struthers ordered him out, put his hand on plaintiff's arm and plaintiff, having become quiet, was standing by a stove when Struthers suddenly attacked him with a hammer, knocking him down. Plaintiff was then put out a side door. Held, Struthers' act was wanton and wilful and defendant was not liable therefor.—Ducre v. Sparrow-Kroll Lumber Co., 168 Mich. 49.

§ 77. ——Acts of chauffeurs and drivers.

See also ante ¶ 1955.

Liability for death of hired horse, see ante ¶ 1948.

Liability for negligence of loaned chauffeurs and drivers, see also ante § 74.

Due process in statute imposing liability for another in respect to motor vehicles intrusted to him, see Constitutional Law § 158.

Liability of motor vehicle owner for negligence of driver, see Comp. L. 1915. § 4825.

¶ 1985. Where defendant's chauffeur takes out his automobile without any order from defendant or his wife, his housekeeper, or any member of defendant's family, and without defendant's knowledge or consent, and contrary to his express directions, said chauffeur is acting outside the scope of his authority, and defendant is not liable to third persons for injuries occurring through said chauffeur's negligence, the automobile at the time of the accident being under the direction of guests of defendant.—Riley v. Roach, 168 Mich. 294.

¶ 1986. The owner of an automobile is not liable for damages caused by his chauffeur while driving the machine on a trip of 2½ miles to the home of a relative of such chauffeur and during an interval when the owner did not require the use of his machine, and such trip cannot be said to have any relation to the owner's business.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1987. In an action for damages against the owner of an automobile for damage caused to plaintiff's store, where it appeared that, towards the close of the interval when the owner did not require the car, his chauffeur, while returning to the point where he had left the owner, deviated from his route and collided with plaintiff's store, held that the rule making the owner liable for acts of the chauffeur within the scope of his employment, notwithstanding any disobedience of the owner's orders, could not be applied to hold the owner liable.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1988. A chauffeur who has borrowed his employer's car for a trip is still using the car for his own purposes where he is on the return trip to the point where the master has designated that he meet him, and the master is not liable for a tort committed by the chauffeur while so returning.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1989. Express consent of an automobile owner that a chauffeur may use the owner's car for matters pertaining to the chauffeur's own pleasure amounts to no more than

a loan of the car, and does not make the use of the car any part of the owner's business so as to charge him with liability for damage caused by the chauffeur.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1990. A driver employed by an automobile manufacturing company who is required to spend his time inspecting, examining and testing machines for his employer at the plant of a manufacturing company where the machines are manufactured for his employer, and who, after working hours, volunteers to take a salesman working for his employer in a machine of such manufacturing company, which had not been delivered to the employer, to one of his employer's plants, is not acting within the course or scope of his employment or authority.—Eberle Brewing Co. v. Briscoe Motor Co., 194 Mich. 140.

¶ 1991. If a chauffeur, or any other servant, commits an injury while doing something relative to his own affairs exclusively and in no wise connected with his master's service, there is no rule of common law holding the master liable, and it ordinarily makes no difference that the injury is inflicted by the use of an instrumentality belonging to the master.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1992. An employee of a garage, in acceding to the request of the son of the owner of a car left for repairs for a demonstration of the thoroughness and value of the repairs to a clutch by running the car up and down a hill, is acting within the scope of his employment, although he is not specifically directed to perform such act by his masters. —Slattery v. Tillman, 197 Mich. 349.

¶ 1993. An employer is not liable for personal injuries to a boy riding on a lumber wagon with the consent of the driver who has been expressly forbidden to permit children to ride with him.—Schulwitz v. Delta Lumber Co., 126 Mich. 559.

¶ 1994. The owner of a truck is not liable for personal injuries sustained by a boy who was riding on it by express permission of the driver where the owner has repeatedly warned the driver not to permit boys to ride on the truck and there is no evidence that he knew that his instructions were disobeyed.—Mahler v. Stott, 129 Mich. 614.

¶ 1995. An employer who employs boys to drive his delivery wagons for certain hours each day, and who places the horses in care of a stable keeper, is not liable for an injury caused to a person riding a bicycle through a collision with one of the employer's horses while it was being driven by one of such boys, after hours, at the request of the stable keeper, and for the purpose of exercising the horse; the act of the boy being outside the scope of his authority. —Reaume v. Newcomb, 124 Mich. 137.

¶ 2001. In a suit for damages for injuries claimed to have been received by reason of the careless and reckless driving of defendant's servant, his condition as drunk or sober at or about the time of the accident is a proper subject of inquiry.—Williams v. Edmunds, 75 Mich. 92.

¶ 2002. In an action for damages caused by the recklessness of defendant's servant in leaving his horse unhitched, it is proper for the identification of the turn-out to show that the name of defendant's firm appeared on the vehicle.—Schulte v. Holliday, 54 Mich. 73.

¶ 2003. A servant's long-continued and notorious habit of leaving his master's horse unhitched may be shown in an action against the master for damage caused thereby.—Schulte v. Holliday, 54 Mich. 73.

¶ 2004. Where a person sued for damages caused by the recklessness of a driver in his service defends on the ground that the team belonged to a third person and that the driver was in his employment, it is proper to show that defendant and the third person had been in partnership until shortly before the injury.—Schulte v. Holliday, 54 Mich. 73.

¶ 2005. In an action for injury caused by the conduct of a servant the burden of proof is not on plaintiff, after he has shown that at the time the injury was done the servant was in the employment of defendant in his regular business, to show further that he was acting in the course of his employment.—Schulte v. Holliday, 54 Mich. 73.

¶ 2006. In an action for personal injuries received from the derailing of a roller-coaster owned and operated by a third person in defendant's park, evidence that the car ran over a chip, that carpenters in defendant's employ were at work in buildings near by, and that some chips made by them were found at the place of the injury, would not warrant a jury in finding that the accident was caused by the negligence of defendant's servants in allowing the track to be obstructed.—Knottnerus v. North Park St. R. Co., 93 Mich. 348.

¶ 2007. Where, in an action for an injury from a collision caused by the negligence of defendant's teamster, the latter has testified that he had one or two drinks of whisky on the day of, and prior to, the accident, it cannot be said that the teamster's sobriety at the time of the injury was so beyond dispute as to render immaterial evidence concerning defendant's knowledge of the teamster's habits of intemperance.—Vernon v. Cornwell, 104 Mich. 62.

¶ 2008. The fact that at the time of an accident an automobile bore the license tag of a dealer, does not raise an inference against the ownership and control of the car by a purchaser who was riding therein, although driven by the dealer's servant, who was, at the request of the purchaser, made after the completion of the sale, loaned the purchaser to drive the car to the limits of a populous city, where it appears that dealers' license tags are frequently left on cars after sale, and when being driven away, until the purchaser can obtain a license for himself.—Janik v. Ford Motor Co., 180 Mich. 557.

¶ 2009. Authorization by a corporation of the utterance of a slander by an office manager, or a ratification thereof, held not shown by the evidence.—Flaherty v. Maxwell Motor Co., 187 Mich. 62.

¶ 2010. In an action for personal injuries, where plaintiff had driven an unmanageable horse within five feet of a backing engine from which steam was escaping, he is precluded from recovering although he testifies that he did not see the engine but saw the rest of the train, for he must have known it was being moved by an engine, and it was his duty to have seen both the engine and the cars.—Mahan v. Clee, 87 Mich. 161.

§ 80. ——Questions of law and fact.

In actions for wrongful discharge or wages, see ante §§ 23, 30.

In actions for injuries to servant, see ante § 67.

General law as to jury questions, see Trial, VI.

¶ 2011. Whether the relation of principal and agent or of master and servant exists in any given case is under proper instructions a question of fact for the jury.—Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405.

¶ 2012. Where there is conflicting evidence as to whether a person in charge of a traction engine at the time a fire complained of was caused was the servant of defendants or of the persons from whom the engine was purchased, the question is for the jury.—Rogers v. Fowler, 151 Mich. 485.

¶ 2013. Defendant's son, while driving a milk wagon, injured plaintiff. While being served with process, defendant was asked whether he owned the milk business. He replied that he did not own it, but had an interest in it. Other testimony showed the father had set the son up in business. Held, it was an open question whether there was evidence of defendant's responsibility as owner, to go to the jury.—May v. Hill, 152 Mich. 158.

¶ 2014. Defendant contracted with Hook and Still to clear certain lands for him. Plaintiff sued defendant for negligently per-

mitting fire to escape from his premises during the course of said work and invade those of the plaintiff. There was evidence that defendant oversaw and directed the work of said Hook and Still; that he told plaintiff he could not depend on said men; and that he requested plaintiff to assist in said work and paid plaintiff for such assistance. Held, the court properly submitted to the jury the question whether said Hook and Still were independent contractors for the purpose of determining defendant's liability.—Ripley v. Priest, 169 Mich. 383.

¶ 2015. Defendant paint company entered into an arrangement with one Boyseau to deliver paint for it. Boyseau was to furnish the horse and wagon, and he was at liberty to drive himself or have his agents do it, and was free to work for other persons besides defendant. While delivering for defendant, he put the defendant's sign on his wagon. In a suit for personal injuries inflicted by Boyseau's wagon, held, he was not defendant's servant, and defendant was entitled to a directed verdict.—Burns v. Michigan Paint Co., 152 Mich. 613.

¶ 2016. In an action for damages caused by defendant's automobile to plaintiff's store where it appeared that towards the close of the interval when the owner of the automobile did not require his car, his chauffeur, who had been driving the car about for his own pleasure, deviated from the direct route while returning to the point where he had left his employer, and collided with the front of plaintiff's store, held a verdict was properly directed for defendant.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 2017. In an action by a passenger on defendant's launch on account of personal injuries received as a result of the alleged incompetency of the master of such launch, where there was no evidence that defendant had knowledge or notice of the master's incompetency, or of matters sufficient to put him on inquiry, or of any conduct that would have disqualified such master for the work he was doing, held not error to take the question of incompetency from the jury.—Gordon v. Drake, 193 Mich. 64.

¶ 2018. In an action against the owner of an automobile and his son for damages on account of the death of one who was struck by such automobile when driven by the son, held, that a verdict could properly be directed for the owner of the car at the close of plaintiff's case.—Johnston v. Cornelius, 193 Mich. 115.

¶ 2019. In trespass against an employer for an injury caused by the act of his servant, it is for the jury to decide whether the act was wilful or careless; if wilful, the employer would not be answerable.—Wood v. Detroit City St. Ry. Co., 52 Mich. 402.

Instructions erroneous as inapplicable to cause of action and issues, see also Instructions § 43.
Instructions misleading as singling out facts, see also Instructions § 76.
Instructions as to credibility of servants of a party called as witnesses, see Instructions § 89.

¶ 2025. In an action of trespass vi et armis for damages caused by defendant's truckmen in removing a piano, an instruction that the defendant employer is liable only for such acts as were committed by the truckmen in doing those things necessary in getting the piano, is sufficiently protective of the defendant's rights.—Canton v. Grinnell, 138 Mich. 590.

¶ 2026. In an action against the owner of a reinforced concrete building, the contractor and a materialman furnishing plans and specifications and reinforcing steel, to recover for the death of a carpenter due to the fall of a portion of the second floor, an instruction that the materialman was an independent contractor held inconsistent with an instruction that it was the duty of the owner to furnish plans and specifications.—Bayne v. Everham, 197 Mich. 181.

V. INTERFERENCE WITH RELATION OR SERVICE BY THIRD PERSONS.

§ 82. In general.

Assault in expelling servant from premises without due notice, see Assault § 18.
Illegality of contract of employment made to induce breach of contract of employment with another, see also Contracts ¶ 565.
Injunction to prevent boycotts and strikes, see Injunctions § 90.
Malicious interference with contract or service as a tort, see Torts.
Provisions as to corrupt influencing of employees, see Comp. L. 1915, § 15590.

¶ 2027. Neither employers nor employees may use force, violence, threats, intimidation or coercion, when disputes arise as to employment of laborers.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

¶ 2028. The law will protect employers in the right to employ whom they please, at prices which they and their employees can agree upon, and to discharge them at the expiration of their term of service, or for violation of their contract, as against interference by a trade union. Laborers have the right to fix a price upon their labor and to refuse to work unless that price is obtained. Laborers also have the right to organize in order to improve their condition and secure better wages, and they may use persuasion to induce men to join their organization or refuse to work except for an established wage.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

¶ 2029. Laborers may present their cause against the master to the public in newspapers or circulars, using no coercion, and if the effect is ruin to the employer, it is damnum absque injuria.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

MASTERS to MATURITY.

Cross-References.

Masters in Chancery—
See Courts § 3.
General law of references, see Reference.
Conduct of judicial sales, see Foreclosure, III, E; Judicial Sales; Partition, IV.
Materiality of Evidence—
The general rules for determining the relevancy and materiality as distinguished from the competency of evidence are treated in Evidence, III, and specific rules and applications in those portions of the various specific topics which treat of evidence. Criminal evidence is treated in Indictment, VIII, B, and in the specific criminal topics there referred to.
As factor in allowing continuance or change of venue for convenience of witnesses, see Continuances § 8 et seq.; Venue, II; Indictment §§ 98, 121.
Materiality of Issues and Variances—
For the general rules, see Pleading, IX, X.
Of the specific issues, see specific topics treating of the action or issue in question.
In criminal cases, see Indictment, I, E.
Materiality of Misrepresentations—
As element in fraud, see Fraud § 4.
As breach of condition or warranty, see Sales, VI; Insurance § 106; Fraternal Associations § 49; Contracts, VII.
Materialmen's Liens—
See Mechanics' Liens; and see Public Contracts, VII.
Materials—
Sales of, see Sales.
For building as fixtures, see Fixtures § 5.
Doctrine of accession of materials to other materials or to land, see Accession.
Matters in Abatement or Bar—
Mode of pleading, see Pleading, III; Equity, VII, C; Indictment, V.
Maturity—
Of debt or obligation, see specific topic treating of the debt or obligation, e. g., Negotiable Instruments; Mortgages; Foreclosure, I; Chattel Mortgages.
Application of payments or securities in order of maturity, see Payment, III; Marshalling Assets.
Accrual and maturity of right of action to put limitations in motion, see Limitations, IV.